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*	:	MAY 26, 2016

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Introduction

This complaint marks Plaintiff's latest effort in a series of actions taken against Connecticut's energy and environmental policies.[1] Plaintiff Allco Finance Limited ("Allco") is a developer of solar generation projects which allegedly are qualifying facilities ("QFs") under the Public Utility Regulatory Policies Act of 1978, codified in part at 16 U.S.C. § 824a-3 ("PURPA"). On March 30, 2016, Allco filed the present complaint alleging one Count against Robert Klee, Commissioner ("Commissioner") of the Connecticut Department of Energy and Environmental Protection ("DEEP"), and Arthur House, John Betkoski, III, and Michael Caron, Utility Commissioners ("PURA Commissioners") of the Public Utilities Regulatory Authority ("PURA"), in their official capacities. Complaint, *Allco v. Klee et al*., No. 3:16-CV-508-CSH (filed Mar. 30, 2016)

[1] *See Allco Fin. Ltd. v. Klee*, No. 3:13-CV-1874-JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014), *aff'd on alt. grounds*, 805 F.3d 89 (2d Cir. 2015) (*Allco I*), and *Allco Fin. Ltd. v. Klee et al*, No. 3:15-CV-608-CSH (filed Apr. 26, 2015) (*Allco II*).

(*Allco III*). In the case *sub judice*, Plaintiff argues that Defendants' actions in connection with two state directed renewable energy procurements in which the state directed regulated utilities to enter into contracts for renewable energy are preempted by federal law and therefore void. *Compl.*, ¶¶ 2-9. Plaintiff seeks a declaratory ruling that the two state energy procurement efforts are preempted by the Federal Power Act; a ruling that "the Number Nine [power purchase agreement] from the 2013 [procurement]" is void; and an order enjoining the defendants from further renewable energy solicitations "inconsistent with the Federal Power Act . . . ." *Compl*., Prayer for Relief.

This basis of Plaintiff's instant complaint is that states are preempted from requiring domestic utility companies to enter into long-term contracts for renewable generation. *Compl.*, ¶ 25. To the contrary, federal courts and the Federal Energy Regulatory Commission ("FERC") have consistently held that state regulators have full authority to require utilities to enter into bilateral renewable energy contracts.[2] Plaintiff has also argued "many of the actions complained of herein" before and asked for similar relief, which, 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.[3] In this case, Plaintiff has not and cannot state a cause of action and further lacks standing to bring this action.

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[2] *See* discussion *infra* Part II.

[3] Albeit 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).

Factual Background

On February 19, 2013, DEEP, as directed by Conn. Gen. Stat. Section 16a-3d, released Connecticut's first Comprehensive Energy Strategy ("2013 CES") which sets forth the key findings and policy goals that will direct the state's energy and environmental planning for the near and long-term.[4] The 2013 CES found that Connecticut and other New England states need to encourage new renewable energy generation in order to meet the needs of important environmental regulatory programs outlined in the state's Renewable Portfolio Standard and the Regional Greenhouse Gases Initiative programs.[5]

In order to implement that policy goal, the legislature passed two public acts. The first was Public Act 13-303 "An Act Concerning Connecticut's Clean Energy Goals." 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 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

[4] *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.
[5] *See* Conn. Gen. Stat. § 22a-200a (setting forth requirements to reduce greenhouse gas emissions).

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 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. Moreover, any such contracts entered into under these public acts must seek regulatory approval from PURA. P.A. 13-303 § 6; P.A. 15-107 § 1(h).

Renewable Energy Procurements

The Commissioner has issued several RFPs based on the authority given by Public Acts 13-303 and 15-107.[7] 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"). *Compl*., ¶ 2. On July 22, 2013, Plaintiff submitted five solar power bid proposals with the DEEP, along with forty-seven other bidders. *Compl*., ¶ 27; Plaintiff's Exhibit B at 1. After an extensive review and consideration of the forty-seven bids, the Commissioner, in a letter dated September 18, 2013 (the "Directive"), directed the electric distribution companies ("EDCs") to enter into purchase power agreements ("PPAs") with two selected projects, one of which was the Fusion Solar Center, a 20 megawatt ("MW")

[7] Now codified at Conn. Gen. Stat. §§ 16a-3h and 16a-3j, respectively.

solar project; and the other was the Number Nine Wind Farm, a 250 MW wind power project. *Compl.*, ¶ 28. None of Plaintiff's projects were selected. PURA, after a full hearing and review, approved the two PPAs. Final Decision, PURA Docket No. 13-09-19 (October 23, 2013).[8]

More recently, a new, larger-scale renewable energy procurement RFP was issued on November 12, 2015 ("2015 Procurement"), and more than fifty bids were received from renewable energy developers, including solar developers. Plaintiff Allco chose not to submit a bid in the 2015 procurement. *Compl.*, ¶ 35. As of the date of this motion to dismiss, bids are under active consideration by the DEEP as well as by the relevant soliciting parties in Massachusetts and Rhode Island. Simultaneously, DEEP is also conducting a smaller scale 2-20 MW renewable energy procurement.[9]

Allco asks the Court to declare that these state actions are preempted by the Federal Power Act and that one of the contracts from the 2013 Procurement is void. In addition, Allco seeks an order enjoining defendants from further procurements unless bid fees are removed, only QFs are permitted to bid, and any other action "inconsistent with the Federal Power Act . . . ." *Compl.*, Prayer for Relief.

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[8] *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.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/8b29b17e17254cd285257c0d006af56e?OpenDocument.

[9] 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.

For the reasons described below, this Court should dismiss Plaintiff's complaint pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for its failure to state a claim. Allco's preemption claim is based on a complete misunderstanding of federal law and, further, Allco lacks standing to bring this action.

PROCEDURAL HISTORY

As Allco notes in its Complaint, this current action is related to two earlier cases, *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) (*Allco I*), brought by the same Plaintiff, Allco, against the DEEP official Defendant and *Allco Fin. Ltd. v. Klee et al*, No. 3:15CV608 CSH, (*Allco II*), 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. *Compl.*, ¶ 1.

A. Allco I

In *Allco I*, the complaint contained three Counts, one of which was that the Federal Power Act ("FPA") preempts any state effort to set wholesale power rates with the narrow exception of PURPA. Amended Complaint at ¶¶ 84-86, *Allco I*, No. 3:13-CV-1874-JBA (filed Feb. 26, 2014). Allco claimed that the Commissioner erred in giving a contract to a wind power project that was larger than PURPA allows and that contract was therefore void. *Id*. at ¶ 87. The District Court dismissed Allco's complaint finding both a lack of standing and further that the Commissioner did not misappropriate power to 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). The Second Circuit affirmed on alternative grounds, *Allco I*, 805 F.3d 89, 93 (2d Cir. 2015).

Specifically, the Second Circuit 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 the Federal Energy Regulatory Commission. *Id.* (citing *Niagara Mohawk Power Corp.* v. *FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002)); *see* § 824a-3(h). Allco responded to the Court's ruling by filing a PURPA administration implementation challenge under 16 U.S.C. §824a-3(h) with the FERC. *Allco Renewable Energy Ltd*. v. Klee 805 F.3d 89, 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 (Jan. 8, 2016), 2016 WL 126022.

B. Allco II

On April 30, 2015, Allco filed a second complaint, *Allco II*, alleging three Counts against the Commissioner and the PURA Commissioners, in their official capacities, arguing that their actions associated with the second state renewable energy procurement efforts violated federal law.

In Count One, Allco claimed that Connecticut's 2015 Procurement, then only available as a February 2015 draft RFP, was preempted by the FPA as violative of the Supremacy Clause. Since then, a finalized renewable RFP was released on November 12, 2015 (“2015 Procurement”). To reiterate, Allco chose not to submit a bid. On March 30, 2016, Allco moved for a temporary restraining order and preliminary injunction seeking an order from this Court that the 2015 Procurement 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.

C. Allco III

Finally, on March 30, 2016, Allco filed the instant complaint, *Allco III*, No. 3:16-CV-508 CSH, which is the subject of this motion to dismiss. This complaint contains one count that restates the essential allegations of *Allco I* and *Allco II*, in that the 2013 Procurement was in violation of "the Federal Power Act's prohibition on state regulation of wholesale electricity sales – subject only to the limited exception for sales by QFs under PURPA" and that the 2015 Procurement would also be preempted. *Compl.*, ¶¶ 4-7. Allco seeks a ruling that the 2013 and 2015 Procurements are preempted except for participation by QFs and voiding any contracts awarded contrary to the alleged requirements of PURPA. *Compl.*, Prayer for Relief.

STANDARD OF REVIEW FOR A MOTION TO DISMISS

A "case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 94 (2d Cir. 2011), *aff'd*, 133 S. Ct. 721 (2013). The "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002). "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Arbaugh v. Y & H Corp*., 546 U.S. 500, 506 (2006).

In ruling on a motion to dismiss under Rule 12(b)(6) for failure to state a claim, the court may consider only "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The court must deem all of the material facts alleged in the complaint to be true and draw all reasonable inferences in favor of the plaintiff. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999). However, the facts alleged "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO PURSUE ITS CLAIMS

The gravamen of Plaintiff's claim is that the state's actions in selecting contracts for regulated utilities is preempted by the Federal Energy Regulatory Commission's ("FERC") authority to regulate wholesale power markets. *Compl*., Count I, ¶¶ 7, 16, 19,

24-26, 73-80. Plaintiff is wrong on the facts and the law and its claim lacks any merit for reasons that are discussed elsewhere in this memorandum. But this Court need not each the merits of Plaintiff's claims because Plaintiff lacks standing to bring them.

A. Standard of Review – Dismissal for Lack of Standing

"[S]tanding 'is perhaps the most important of the jurisdictional' doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Plaintiff bears the "burden to prove [its] standing by pointing to specific facts" that allow it to invoke this Court's Article III jurisdiction. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154 n.4 (2013). Plaintiff has not satisfied that burden. The Supreme Court has consistently held that:

> [A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). The Court's "refusal to serve as a forum for generalized grievances has a lengthy pedigree," including decisions refusing to question the procedures by which constitutional provisions were ratified and by which Supreme Court justices were appointed. *Lance v. Coffman*, 549 U.S. 437, 439-40 (2007) (discussing cases).

Standing is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752 (1984). Standing is an essential part of the case-or-controversy requirement of Article III of the Constitution. *See* U.S. Const. Art. III, § 2; Lujan, 504 U.S. 555 at 560. As such, the standing inquiry addresses whether a

plaintiff's claims are appropriately resolved by the court. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). Standing implicates the court's jurisdiction and must be addressed before determining whether the plaintiff has adequately stated claims against defendants. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 93–102 (1998); *Ramming v. U.S.,* 281 F.3d 158, 161 (5th Cir. 2001) ("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."). At the pleading stage of proceedings, the plaintiff need only make general factual allegations of injury caused by defendants. *Lujan,* 504 U.S. 555 at 561. The court must assess the plaintiff's standing to bring each of its claims against each defendant. *See James v. Dallas,* 254 F.3d 551, 563 (5th Cir. 2001).

The "irreducible constitutional minimum of standing" first requires that the plaintiff have suffered an injury in fact, that is, an actual or imminent invasion of a concrete and particularized legally protected interest. *Lujan,* 504 U.S. 555 at 560. Second, there must be a causal connection between the plaintiff's complained-of injury and the defendant's actions. *Id.* Third, it must be likely that the plaintiff's injury will be redressed by a favorable decision from the court. *Id.* at 561. To seek injunctive relief, a plaintiff must also allege defendants will cause it future injury and that the relief sought will redress such injury. *James,* 254 F.3d 551 at 563.

B. Allco Failed to Establish Injury and Redressability of Injury

Plaintiff does not have a "concrete and particularized legally protected" property interest that has been injured by the Commissioner's action in this matter. Specifically,

with respect to the 2013 Procurement, the United States Court of Appeals for the Second Circuit has already ruled that Allco lacks standing to void the Number Nine PPA. *Allco I*, 805 F.3d 89, 98 ("Because merely voiding its competitors' contracts would not redress Allco's injury, Allco also lacks standing to seek such equitable relief."). With regard to the 2015 Procurement, this was a Connecticut renewable energy procurement directed solely by state law and Allco choose not to bid. Allco, therefore, has suffered no legally cognizable injury.

2013 Procurement

Allco again seeks a ruling declaring the 2013 Procurement was preempted and voiding the Number Nine PPA. Allco specifically alleges that it bid into the 2013 Procurement and that "[b]ut for the Defendants' selection and approval of the Number Nine wind project, one or more of Allco's projects would have been selected[] and received contracts." *Compl.*, ¶ 29.

As an initial matter, Allco is, factually, a disappointed bidder having failed to obtain a contract under the 2013 Procurement. *See Allco I*, 805 F.3d 89 at 93. As the District Court in *Allco I* noted, "Allco cites no cases in which a court has found that a disappointed bidder has standing to raise a preemption challenge to a state program." *Allco I*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *9. The District Court further noted that, in other cases, *existing generators* claimed that a state program would lower overall prices but "[b]y contrast, here Allco has suffered no such injury and despite not being awarded this particular contract remains free to sell whatever energy it wishes in the open market. . . ." *Id*.

Of course, it is entirely speculative whether any of Allco's projects would have been selected in different circumstances. More importantly, Allco's allegations are insufficient to establish the injury required for standing. In fact the Second Circuit has already ruled that:

> 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 89 at 98.

Not only is it irresponsible to assume that Allco would have been awarded a contract, the 2013 Procurement process ended more than a year ago and, under the terms of the RFP, none of the bids are currently valid and there are no valid bids from Allco or anyone else from which to select a contract. Thus, under any scenario, voiding of any of the 2013 Procurement contracts at this point would not result in Allco winning a contract. Thus, not only does Allco lack an injury in fact, there is no order this Court can give that would redress Allco's claimed injuries under the 2013 Procurement and Allco therefore has failed to establish two key elements of standing.

Beyond this, Allco argues that some of its other, potential projects will suffer injury because the Number Nine project, if and when it gets built, will lower regional power prices thus suppressing the price Allco believes it should get paid. Compl., ¶ 30. The response to this is that the Second Circuit has already noted, is:

> For an injury to be cognizable as an injury-in-fact, the plaintiff must have suffered the injury at the time of the complaint's filing, *Lujan*, 504 U.S. 555 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 I, 805 F.3d 89 at 94, fn. 3. At the time of this complaint was filed Allco has no operational QF's in Connecticut at all; Number Nine has not been built and cannot suppressing any price in New England; and thus Allco's theoretical injuries are both future and speculative as the Second Circuit has ruled.

2015 Procurement

As for the 2015 Procurement, Allco chose not to participate. Without having filed a bid, Allco cannot creditably claim that it has suffered an injury. Of course, even if Allco had bid, at the time of the filing of this complaint there is no reason to assume Allco would prevail. As noted by the Second Circuit above, any possible suppression in regional prices by future sales by any selected projects, when they are built, is purely speculative and insufficient to support standing now.

Finally, Allco's Complaint states that it did not participate in the 2015 Procurement "because of the unlawful terms" of the RFP. *Compl*., ¶ 35. The only two

allegedly unlawful conditions identified are 1) bid fees and 2) allowing bids from projects larger than QFs. State law, however, expressly permits developers to submit projects larger than QFs. Moreover, Allco does not cite to any statutory or other prohibition on bid fees for RFPs to cover the costly analysis of complicated major energy projects. Finally, it should be noted that the Defendant Commissioner did not request, or accept, any bid fees from any developer and that the bid fees were imposed by out-of-state parties for their project evaluation costs. None of these latter parties has been made part of this action.

Neither Procurement Infringed On Any Rights Plaintiff Has Under PURPA

Allco seems to argue that, in the absence of the legislative directives in Public Acts 13-303 and 15-107, it would have had a right to sell its power to the utilities under PURPA, 16 U.S.C. Section 824a-3(h). *Compl.*, ¶ 48. Neither the 2013 Procurement nor the 2015 Procurement were conducted under PURPA. These procurements are conducted pursuant to state law. Moreover, any rights Allco may have under PURPA may be pursued before PURA, as Plaintiff has acknowledged. *Compl.*, ¶ 30; *see also Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000 (1995).

II. FAILURE TO STATE A CLAIM

A. Standard of Review – Failure to State a Cause of Action

Beyond the lack of standing, the Complaint also fails to state a cause of action for which relief can be granted. "On a Rule 12(b)(6) motion to dismiss a complaint, the [C]ourt must accept a plaintiff's factual allegations as true and draw all reasonable inferences in [the plaintiff's] favor." *Gonzalez v. Caballero,* 572 F.Supp.2d 463, 466

(S.D.N.Y. 2008). The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (alteration in original) (alteration, citation, and internal quotation marks omitted). Instead, the Court has emphasized that "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.,* and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, 127. "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal,* 556 U.S. 662, (2009) 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (alteration in original) (citation omitted) (quoting Fed.R.Civ.P. 8(a)(2). When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 5 Wright & Miller § 1216, at 233–234 (quoting *Daves v. Hawaiian Dredging Co.,* 114 F.Supp. 643, 645 (D.Hawaii 1953*)).*

B. Plaintiff's Allegations Could not Raise a Claim of Entitlement to Relief

Allco's principle argument is that the FPA vests FERC with exclusive jurisdiction over the wholesale sale of electric energy and that any action by the states in that field is preempted. Allco claims that in PURPA "Congress carved out a role for the States to regulate wholesale sale by Qualifying Facilities," but that the "Defendants actions compelling the Number Nine PPA violated PURPA and the Federal Power Act, and are preempted." *Compl.*, ¶¶ 42, 43.

To the contrary, the Commissioner has not and is not regulating wholesale sales of electricity; his actions are not preempted by the FPA and, in fact, are fully supported by the decisions of the United States Supreme Court, the Court of Appeals for the Second Circuit and FERC itself.

FPA and State Regulatory Authority

Section 201(b) of the FPA grants FERC jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). "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)) (alterations in original). For example, § 205 of the FPA prohibits, among other things, unreasonable rates and undue discrimination "with respect to any transmission or sale subject to the jurisdiction of the Commission," 16 U.S.C. §§ 824d(a)–(b), and § 206

authorizes FERC to correct unlawful practices and gives it jurisdiction over "any rule, regulation, practice, or contract affecting" such rates and charges, *Id.* § 824e(a).

Relatedly, the Supreme Court has explained that under the FPA, states retain "authority over local service issues, including reliability of local service; administration of integrated resource planning . . . including DSM [demand-side management]; authority over utility generation and resource portfolios; and authority to impose nonbypassable distribution or retail stranded cost charges." *New York v. FERC*, 535 U.S. 1, 24 (2002) (citing Order No. 888, at 31,782, n.544. (1996)).

Thus, Plaintiff's assertion that a state can only require utilities to contract for energy under the requirements of PURPA directly contravenes not only the FPA but also relevant precedent, including the holding 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 example, order utilities to build renewable generators themselves, or . . . order utilities to purchase renewable generation." *S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC P 61269 at *8 (June 2, 1995). . . . [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. *New York v. FERC*, 535 U.S. 1 at 8.

Shumlin, 733 F.3d 393, 417. Thus, it is without cavil that Connecticut "may, for example, order utilities to purchase renewable generation" which is exactly what the Commissioner did here.

Hughes Does Not Limit Bilateral Contracts

The United States Supreme Court recently addressed 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 in deregulated markets such as New England:

> Interstate wholesale transactions in deregulated markets typically occur through two mechanisms. The first is bilateral contracting: LSEs 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, RTOs and ISOs administer a number of competitive wholesale auctions: for example, a "sameday auction" for immediate delivery of electricity to LSEs facing a sudden spike in demand: a "next-day auction" to satisfy LSEs' anticipated near-term demand; and a "capacity auction" to ensure the availability of an adequate supply of power at some point far in the future.

Hughes, 136 S. Ct. 1288 at 1292. *Hughes* itself "involve[d] the capacity auction administered" by an ISO. The Court noted that the State of Maryland had, in that case, "require[d] CPV to participate in the PJM auction, but guarantee[d] CPV a rate distinct from the clearing price for its interstate wholesale 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; it mandates that LSEs and CPV exchange money based on the cost of CPV's capacity sales to PJM." *Id*. at 1299.

The Court concluded:

> Our holding is limited: We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. We therefore need not and do not address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies . . . . Nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures "untethered to a generator's wholesale market participation." . . . . 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* is not new law as Plaintiff asserts. As noted in that case, FERC has chosen to employ its authority in two ways. FERC can either operate a market-based auction system where they will unilaterally approve the resulting rates or parties can contract bilaterally outside of the auctions and the Commission will review the final contracts for reasonableness. *Hughes*, of course, involved only the auction-based system, finding that "So long as a State does not condition payment of funds on capacity clearing the auction, . . ." it was not preempted. *Id*. In fact, the Court emphasized that Maryland's contracts for differences directly impacted FERC's auction prices and were not bilateral contracts and did not involve the sale of capacity between parties. In the case of Connecticut's 2013 and 2015 Procurements, the approved contracts were classic bilateral contracts, merely transferring ownership of the energy purchased and were wholly outside of the ISO-NE auctions. Consequently, *Hughes'* holding does not apply

to the instant case and is noteworthy only for the fact that it upholds FERC's approach to review bilateral contracts for reasonableness after the contracts are signed.

Connecticut has decided that supporting renewable power is a chief policy goal, as evidenced in the passage of legislation including Public Acts 13-303 and 15-107. Neither law mentions PURPA nor gives the Commissioner authority to set rates or determine avoided costs. Rather, the laws as passed give the Commissioner the authority only to review and approve bilateral contracts which would then be submitted to FERC. For example, Section 6 of P.A. 13-303 states, in pertinent part:

> On or after January 1, 2013, the commissioner of [DEEP] . . . may . . . solicit proposals . . . from providers of Class I renewable energy sources . . . if the commissioner finds such proposals to be in the interest of ratepayers . . . [he or she] may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity and environmental attributes, or any combination thereof, for periods of not more than twenty years. . . .

P.A. 13-303, § 6 (codified at § 16a-3h). Public Act 15-107 similarly states that the Commissioner may conduct procurements for energy resources if they are in the public interest but, as with P.A. 13-303 does not give the Commissioner any authority to change, modify or regulate wholesale energy rates. All Connecticut procurements, including the 2015 Procurement, were conducted under state law, not PURPA, and the Commissioner faithfully followed the terms of Public Acts 13-303 and 15-107.

In fact, in the *Hughes* case, FERC specifically argued to the U.S. Supreme Court that the *Connecticut* state contracts at issue here are expressly not preempted by the

FPA.[10] *See* Solicitor General's Brief, Attachment A.[11] In the Solicitor General's brief, distinguished the types of contracts held to be preempted by the courts below from "permissible" state contracts, arguing that:

> Permissible state programs might also involve contracts between generators and utilities that are not directly tied to participation in and clearing the [regional system administrator's] auction, a requirement that local utilities purchase a percentage of electricity from a particular generator or renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements.

SG Brief, Attachment A, p. 22. Connecticut's program at issue in this case falls squarely within the "permissible" state programs set forth by the Solicitor General and FERC. Indeed, the Solicitor General cited the District Court's holding in *Allco I, noting* that the Connecticut program was not "preempted by FERC's authority over wholesale rates for electricity." *Id*. (citing *Allco I* District Court's decision at *6-*10). FERC noted that the "Connecticut law did not directly distort the wholesale market," and thus was not preempted by the FPA. SG Brief, p.23.

FERC itself has recognized the authority of states to direct the procurement of renewable energy noting that: "We respect the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify

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[10] The General Counsel for FERC and the Solicitor General submitted the brief for the United States in No. 14-623 *CPV Maryland, LLC v. Talen Energy Mktg., LLC,* 136 S. Ct. 356 (2015), consolidated with No. 14-614, *Hughes v. Talen Energy Mktg., LLC* 136 S. Ct. 382 (2015), *cert. granted sub nom. Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 993 (Jan. 25, 2016) (Nos 14-614 and 14-623). On October 9, 2015, the Court granted certiorari, over the Solicitor General's objection. The Court heard argument on February 24, 2016.

[11] *Rothstein v. Balboa Ins. Co*., No. 14-1112, 2014 WL 4179879, at *1 (2d Cir. June 25, 2014) (citing *Rothman v. Gregor*, 220 F.3d 81, 92 (2d Cir.2000) (taking judicial notice of another complaint "as a public record") (citation omitted).

their generation mix to meet environmental goals in a variety of ways." *Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000. "[N]othing in this Final Rule affects any electric utility's resource adequacy obligations . . . or resource portfolio obligations under state law including obligations to purchase renewable energy." 18 CFR Part 292 New PURPA Section 210 Regulations Applicable, 117 F.E.R.C. P 61,078, 61411, 2006 FERC LEXIS 2367, *8, 2006 FERC LEXIS 2367 (F.E.R.C. 2006)*; see also*, *Midwest Power Systems, Inc*., 78 FERC P 61,067, 1997 WL 34082 (FERC held that "states have numerous ways outside of PURPA to encourage renewable resources.")*; see also Conn. Dep't of Pub. Util. Control v. Fed. Energy Regulatory Comm'n*, 569 F.3d 477, 481 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010) ("State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]"); *Otter Creek Solar LLC*, 143 FERC P 61, 282 (2013) (FERC did not strike down an optional program for certain QFs even though rates differed from PURPA rates.)

The state's authority to direct the procurement of renewable energy has been expressly identified by FERC when it 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." *Southern California Edison Company*, 71 FERC P 61269, 1995 WL 327268 (emphasis added).

This is especially true in New England. Addressing the participation of Connecticut power plants holding long-term contracts in the regional New England market, FERC recognized that "states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals . . . . " *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011) at P 20*; see also Id.* at P 170 ("The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction").[12]

As the Supreme Court noted in *Hughes*, bilateral contracting outside of regional auction markets is perfectly permissible under the FPA. FERC agrees, and has consistently approved of state sponsored competitive power-supply solicitations. *E.g.*, *Commonwealth Atl. Ltd. P'ship*, *supra*; *see also* 18 C.F.R. § 35.27(b)(1) (providing that nothing in FERC's rate-filing regulations "[l]imits the authority of a State commission in accordance with State and Federal law to establish . . . [c]ompetitive procedures for the

[12] *See also ISO New England, Inc.*, 126 FERC ¶ 61,080 (2009) at P 38 ("The Commission has accepted the use of long-term bilateral contracts, such as the Connecticut state-sponsored requests for proposals . . . to meet installed capacity and local sourcing requirements"); *New England, Inc.*, 122 FERC ¶ 61,016 (2008) at P 26 ("The Commission's long-standing policy, consistent with a substantial body of judicial precedent, has been to protect the stability of long-term contracts. Contracts, especially long-term contracts like the ones at issue here, provide certainty and stability in energy markets").

acquisition of electric energy . . . purchased at wholesale."). And far from disapproving of state involvement, FERC has encouraged and even relied on it. *E.g.*, *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, PP 18, 36-39 (2004) (emphasizing that a utility's solicitation was based on an RFP developed in a PSC proceeding and subject to PSC and PSC-selected consultant supervision).

FERC has acknowledged on multiple occasions that states have the authority to promote the development of new renewable generation resources through long-term contracts. Significantly, in a rulemaking clarifying the requirements for sellers of wholesale electricity to obtain market-based rate authorization — *i.e.*, blanket approval from FERC to enter into freely negotiated contracts with purchasers for energy, capacity, and ancillary services — FERC expressly recognized the continuing authority of state commissions to "establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale . . . . " Order 697, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities, 119 FERC ¶ 61,295 (2007) at PP 1078-79. The entire provision states that nothing in this part:

> (a) Shall be construed as preempting or affecting any jurisdiction a State commission or other State authority may have under applicable State and Federal law, or
>
> (b) Limits the authority of a State commission in accordance with State and Federal law to establish (1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale . . . .

18 C.F.R. § 35.27 ("Authority of State Commissions").

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 FPA 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 J. KLEE

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