IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED,	:	3:15-CV-00608-CSH
Plaintiff	:	
	:	
v.	:	
	:	
ROBERT KLEE	:	
ARTHUR HOUSE	:	
JOHN W. BETKOSKI, III	:	
MICHAEL CARON	:	
Defendants	:	JUNE 19, 2015

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Introduction

This complaint marks Plaintiff's latest action taken against Connecticut's energy and environmental policies.[1] Plaintiff, Allco Finance Limited, is a developer of solar generation projects. On April 30, 2015, Allco filed the present complaint alleging three counts 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, arguing that their actions violate federal law. Plaintiff's Complaint ("Compl.") ¶¶ 5-6, 13-15.

This case has its genesis in the highly complex task States are now facing as they endeavor to meet two critical obligations: (1) their duty under federal law to coordinate with regional Independent System Operator/Regional Transmission

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

Organization grid operators; and (2) their duty under both federal and state law to increase renewable energy generation. In 2013, in an effort to meet these obligations, the Connecticut General Assembly enacted statutes authorizing DEEP and PURA to implement the State's energy policy directives. Relevant to this complaint are the legislative directives to draft a request for proposals from renewable generators and implement a statutory construct for determining whether renewable energy certificates are eligible to qualify for compliance with the State's renewable standards.

In Count I Allco claims that Connecticut's February 2015 draft renewable energy procurement plan is preempted by the Federal Power Act, and violates the Supremacy Clause. Compl. ¶¶ 40-62. In Count II Allco argues that the state's renewable portfolio standard ("RPS") violates the dormant Commerce Clause because it does not permit Allco to sell renewable energy certificates generated in Georgia to Connecticut utilities. Compl. ¶¶ 33, 34, 62-71. In Count III Allco asserts a 42 U.S.C. § 1983 claim, arguing that its rights under the Federal Power Act, the Public Utility Regulatory Policies Act, and the dormant Commerce Clause have been violated under color of state law. Compl. ¶¶ 72-80.

Plaintiff seeks to challenge: (1) Connecticut's preliminary draft for a request for proposals ("RFP") from renewable energy generators, prepared pursuant to the state General Assembly's statutory policy directives; and (2) the State's statutory construct for determining whether renewable energy certificates are eligible to qualify for compliance with renewable standards that utilities are required to meet. Allco asks this Court to declare that these state actions violate the Supremacy Clause and the Commerce

Clause, respectively, and additionally to enjoin the defendants from proceeding with the draft renewable energy procurement plan. Compl. 19-20 ("Prayer for Relief").

For the reasons described below, this Court should dismiss Plaintiff's complaint pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(1) for lack of subject matter jurisdiction and Rule 12(b)(6) for its failure to state a claim. Allco's Count I preemption claim is based on conjecture, is thus unripe for judicial review, and should be dismissed pursuant to Rule 12(b)(1). Its Count II Commerce Clause challenge and Count III § 1983 claim both fail to state a cause of action for which relief can be granted and therefore should be dismissed pursuant to Rule 12(b)(6).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

As Allco notes in its Complaint, this current action is related to an earlier case, *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) (*Allco I*), brought by the same Plaintiff against the DEEP Commissioner as here; Plaintiff's present complaint is based in part upon the same legal theory advanced in *Allco I*. Compl. ¶ 4 & n.1.

A. Plaintiff Allco's Related Case

Allco's first complaint, filed February 19, 2013, focused on the DEEP Commissioner's actions taken pursuant to state energy policies.[2] As proscribed by statute, DEEP released Connecticut's first Comprehensive Energy Strategy in 2013,

[2] Connecticut state energy policies include, but are not limited to, its 2013 Comprehensive Energy Strategy, Conn. Gen. Stat. § 16a-3d and its 2014 Integrated Resources Plan, § 16a-3a, 3b.

which sets forth key findings and policy goals allowing for organized and efficient state energy and environmental planning for the near and long-term.

One such key finding was that Connecticut and other New England states need to encourage new renewable energy development in order to meet the requirements of critical environmental and energy regulatory mechanisms (e.g., the state's Renewable Portfolio Standard, the Regional Greenhouse Gas Initiative, and the Global Warming Solutions Act).[3] In order to achieve that policy goal, the legislature passed An Act Concerning Connecticut's Clean Energy Goals, Public Act 13-303 (2013).[4] Section 6 of P.A. 13-303 authorized the Commissioner to solicit proposals from generators of renewable energy. Compl. ¶¶ 28-31. On July 8, 2013, DEEP released a Notice of Request for Proposals ("RFP") clearly identifying the RFP as issued pursuant to Public Act 13-303. Compl. ¶ 31; *Allco I*, 2014 WL 7004024, at *1.

Plaintiff offered five solar power bid proposals to with the Department, which were ultimately unsuccessful. Thereafter, Plaintiff Allco sued in the District Court of Connecticut alleging, as here, that the Commissioner's actions intrude on the Federal Energy Regulatory Commission's ("FERC's") exclusive jurisdiction to regulate wholesale transactions for capacity and energy and therefore are preempted by the Federal Power Act ("FPA").[5] Compl. ¶¶ 5, 43-48. In that case, the Commissioner filed a Motion to Dismiss on the grounds that Allco lacked standing as a disappointed bidder.

[3] Conn. Gen. Stat. § 22a-200a; Public Acts No. 08-98 (2008).
[4] Codified at Conn. Gen. Stat. § 16a-3f.
[5] Federal Power Act (FPA), 16 U.S.C. §§ 791-828c (2010 & Supp. 2014).

Judge Janet Bond Arterton dismissed that action on December 10, 2014. Allco appealed the dismissal to the Court of Appeals.[6] All briefing is complete and the matter has been scheduled for decision on September 2, 2015.

B. Allco's Current Complaint

In the present action, Allco focuses on the February 25, 2015 draft RFP released by Connecticut, along with the Commonwealth of Massachusetts and Rhode Island, which explores a potential three state clean energy procurement that would be conducted under the same statutory authority, and in much the same manner as the last renewable energy effort. Compl. ¶¶ 29-30. In Allco's view, this potential three-state RFP would be substantially similar to the RFP issued in 2013, and the Commissioner, this time along with the PURA Commissioners, would be acting in violation of the constitution, if the draft RFP becomes final. Compl. ¶¶ 30, 36, 43, 44, 47. Thusly, Allco filed this complaint on April 30, 2015.

Count I alleges that the FPA places exclusive jurisdiction over interstate sales of wholesale power in the Federal Energy Regulatory Commission ("FERC") and that Commissioner's likely decision to issue a final RFP will likely be field and conflicted preempted by the FPA. Compl. ¶¶ 43-44. This is nearly identical to its claim that was dismissed for lack of standing in *Allco I*. *Compare* Compl. ¶¶ 40-62, *with Allco I*, 2014 WL 7004024, at *1-2. As in *Allco I, the* instant Complaint alleges that through the draft RFP, the Commissioner may compel utilities to enter into renewable energy contracts in violation of the FPA and also in violation of the Public Utility Regulatory Policies Act of

[6] *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014), *appeal docketed*, No. 15-20 (Jan. 5, 2015).

1978, Pub. L. No. 95-617, 92 Stat. 3117 (codified as amended in scattered sections of 15, 16, 42, and 43 U.S.C.) ("PURPA"), which Allco argues is the only exemption to the FPA. Compl. ¶¶ 36, 43, 44, 47.

Count II claims that the Commissioner has violated the dormant Commerce Clause based on Allco's assertion that Connecticut's implementation of its renewable portfolio standard ("RPS") statute "discriminates against out-of-state businesses" and is "not closely tailored to achieve any legitimate local purpose." Compl. ¶¶ 22, 64-65. Connecticut's RPS requires in-state utilities to maintain a certain percentage of renewable energy in their retail portfolios, largely to encourage new sources of renewable energy within New England. Compl. ¶ 22. A renewable energy generator is assigned one renewable energy certificate ("REC") for every megawatt of clean energy generated. Compl. ¶ 1. A utility can satisfy its RPS obligation either by purchasing clean energy and the associated RECs, or simply buying the RECs on the open market maintained for that purpose. Compl. ¶¶ 22-26. Connecticut's RPS only qualifies RECs generated in the New England region (within the Independent System Operator–New England, or "ISO-NE") or RECs from generators that can transmit their energy into the regional grid. Conn. Gen. Stat. § 16-245a(b). Allco argues that it has a solar facility in Georgia that generates RECs, and that Connecticut is facially discriminating against it in violation of the dormant Commerce Clause by not allowing "those RECs [to qualify] in the State of Connecticut." Compl. ¶ 33, 68.

Finally, Count III sets forth a § 1983 claim alleging that the actions described in Counts I and II deprived Plaintiff of constitutional and federal rights; it further alleges

that the actions in Counts I and II were conducted under color of state law, thereby violating § 1983.

Summary of Argument

For Allco to prevail, this Court would need to sanction unprecedented expansions of the following three legal principles: (1) that Article III does not grant jurisdiction to review actions that are not ripe; (2) that the dormant Commerce Clause is not implicated by state actions that do not discriminate in favor of in-state interests and at most represent de minimis impacts on commerce that are necessary to meet valid state policies; and (3) that a § 1983 action may not be maintained in the absence of a violation of a constitutional or federal statutory right.

Plaintiff's Count I Federal Power Act preemption claim is conjectural and unripe for judicial review and Plaintiff has not suffered any injury in fact to establish it has Article III standing to bring this action. Additionally, Plaintiff's Count II Commerce Clause challenge fails to state a claim as there is no indication of state protectionism and its Count III § 1983 claim fails because there has been no violation of federal law or right.

Argument

I. PLAINTIFF'S FEDERAL POWER ACT PREEMPTION CLAIM IS UNRIPE FOR REVIEW BECAUSE ITS ALLEGED INJURY IS MERELY CONJECTURAL

Standard of Review: Rule 12(b)(1) Motion to Dismiss

A case is properly dismissed pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction "when the district court lacks the statutory or constitutional power to adjudicate it." *Morrison v. Nat'l Australia Bank Ltd*., 547 F.3d 167, 170 (2d Cir. 2008) *aff'd,* 561 U.S. 247 (2010). "[T]he court must take all facts alleged in the complaint as

true and draw all reasonable inferences in favor of plaintiff." *Natural Res. Def. Council v. Johnson*, 461 F.3d 164, 171 (2d Cir. 2006).

A plaintiff asserting subject matter jurisdiction over its claims bears the "burden of proving by a preponderance of the evidence that it exists." *Makarova v. U.S.*, 201 F.3d 110, 113 (2d Cir. 2000) (holding that the plaintiff had failed to meet that burden, and affirming the district court's grant of the defendant's motion to dismiss for lack of jurisdiction). When deciding a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), a district court "may refer to evidence outside the pleadings." *Id*.

A. Plaintiff's claim is premature and not ripe for judicial review

Standard of Review: Ripeness

Courts are obligated to first consider whether a cause of action is ripe—*i.e*., it presents "a real, substantial controversy—not a mere hypothetical question." *AMSAT Cable Ltd. v. Cablevision of Conn.,* 6 F.3d 867, 872 (2d Cir.1993); *see, e.g*., *Komondy v. Gioco*, 59 F.Supp.3d 469, 475 (D.Conn. 2014) (citing *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013)). A claim is not ripe if it depends upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." *E.g*., *Nat'l Org. for Marriage, Inc. v. Walsh*, 714 F.3d 682, 687 (2d Cir. 2013). The Supreme Court states that the doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)). Ripeness, therefore, is "peculiarly a

question of timing." *E.g*., *id*.; *Thomas v. Union Carbide Agric. Prods. Co*., 473 U.S. 568, 580 (1985).

The ripeness doctrine is drawn both from Article III limitations on judicial power and from "prudential reasons for refusing to exercise jurisdiction . . . ." *Nat'l Park Hospitality Ass'n v. Dep't of Interio*r, 538 U.S. 803, 808, 123 S. Ct. 2026, 2030 (2003) (citation omitted). Thus, the doctrine implicates two overlapping threshold jurisdictional criteria. *Simmonds v. I.N.S.*, 326 F.3d 351, 356-57 (2d Cir. 2003) (citing *Reno v. Catholic Soc. Servs., Inc*., 509 U.S. 43, 57, n.18 (1993)). "Both are concerned with whether a case has been brought prematurely," however, each protects against premature adjudication "in different ways and for different reasons." *Id*. at 357.

> *Constitutional ripeness* is a doctrine that, like standing, is a limitation on the power of the judiciary. It prevents courts from declaring the meaning of the law in a vacuum and from constructing generalized legal rules unless the resolution of an actual dispute requires it. . . . . *Prudential ripeness* is, then, a tool that courts may use to enhance the accuracy of their decisions and to avoid becoming embroiled in adjudications that may later turn out to be unnecessary or may require premature examination of . . . constitutional issues that time may make easier or less controversial.

Id. (alteration to original; citations omitted) (emphasis added); *see also Entergy Nuclear Vermont Yankee LLC v. Shumlin*, 733 F.3d 393, 429 (2d. Cir. 2013).

Additionally, the ripeness doctrine "ensur[es] that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III . . . ." *Thompson v. Am. Bar Ass'n*, 2007 WL 987807, at *6 (D. Conn. Mar. 30, 2007) (quoting *United States v. Fell*, 360 F.3d 135, 139 (2d Cir. 2004)). Determining whether a case is ripe, generally, is a two-prong inquiry regarding: (1) "the fitness of the issues for judicial

decision," and (2) "the hardship to the parties of withholding court consideration." *Id*. (quoting *Abbott*, 389 U.S. at 149 (1967)).

Standing[7] and ripeness are closely related doctrines that overlap "most notably in the shared requirement that the [plaintiff's] injury be imminent rather than conjectural or hypothetical." *N.Y. Civil Liberties Union v. Grandeau*, 528 F.3d 122, 130 n.8 (2d Cir. 2008); *see, e.g.*, *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 225 (2d Cir. 2006); *U.S. v. Fell*, 360 F.3d 135, 139 (2d Cir. 2004) ("At the core of the ripeness doctrine is the necessity of ensur[ing] that a dispute has generated injury significant enough to satisfy the case or controversy requirement of Article III of the U.S. Constitution.") (quotation marks omitted; alteration in original). Constitutional ripeness, in other words, is really just about the first prong of the standing test established by the Supreme Court in *Lujan*[8]—to say a plaintiff's claim is constitutionally unripe is to say the plaintiff's claimed injury is not "actual or imminent," but instead "conjectural or hypothetical." *See id*.; *Ross v. Bank of Am., N.A. (USA),* 524 F.3d 217, 226 (2d Cir. 2008).

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[7] To establish standing, the "irreducible constitutional minimum" requires the plaintiff to show that it meets a three-prong test: (1) "the plaintiff must have suffered an injury in fact," i.e., "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical;" (2) "there must be a causal connection between the injury and the conduct complained of;" and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quotation marks, citations, alterations, and footnotes omitted).

[8] *Id*. (stating that to meet the first-prong under Lujan "the plaintiff must have suffered an injury in fact" which is not conjectural or hypothetical but actual or imminent).

B. Plaintiff's claim is not constitutionally ripe

Allco's claims are simply not constitutionally ripe. The *draft* RFP in question is precisely that, a draft. Compl. ¶ 29. No final RFP has been issued and it is not possible to determine what such final RFP, if any, would look like. Moreover, the state utility commissions in Massachusetts and Rhode Island must still review and approve any such RFP. In fact, it is entirely possible the three state RFP will not be pursued. Beyond this, it is speculative at best to assume that the Commissioner, or either of the other states, may conduct the RFP process in a manner that might violate any federal law.[9] There are too many levels of speculation involved for this Court to have jurisdiction. The terms of the draft may change. The RFP may be cancelled and no one knows how the actual selection process will play out. At each stage, this Court will be called upon to guess what numerous state officials and private parties will do.

As previously noted there is a second, prudential standard of ripeness. The doctrine of prudential ripeness is particularly relevant in this case and will enable this Court "to avoid becoming embroiled in adjudications that may later turn out to be unnecessary."[10] Allco's preemption claim has already been reviewed by a federal court of competent jurisdiction and decided in favor of the Commissioner. The holding in that

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[9] "Administrative agencies, being creatures of State legislatures, are . . . presumed to act within their constitutional power." *Olson v. Bd. of Ed. of Union Free Sch. Dist. No. 12, Malverne, New York*, 250 F. Supp. 1000, 1010 (E.D.N.Y. 1966); *United States v. Chemical Found., Inc*., 272 U.S. 1, 14–15 (1926); *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001) ("In the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties.").

[10] *Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 347 (2d Cir. 2005) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds*, *Califano v. Sanders*, 430 U.S. 99 (1977)).

case is now before the Court of Appeals for the Second Circuit. This Court should decline to entertain Plaintiff's preemption claim unless and until this claim moves beyond conjecture and becomes actual and imminent.

C. Even if Plaintiff's claim is deemed to be ripe, Allco lacks Article III case-or-controversy standing to assert its preemption claim

Specifically, constitutional ripeness overlaps with the Article III "Cases" and "Controversies" requirement, U.S. Const. art. III, § 2, cl. 1, that limits the jurisdiction of federal courts. Likewise, the "reason for a case-or-controversy limitation is to restrain the federal courts from enmeshing themselves in deciding abstract and advisory questions of law." *Hull v. Burwell*, No. 3:14-CV-00801 JAM, 2014 WL 6911357, at *2 (D. Conn. Dec. 8, 2014). Hence, unless a federal plaintiff brings its claim pursuant to a statute providing for the lawsuit, it must establish case-or-controversy "standing" to assert its claim by showing: "(1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Id*. (quoting *Susan B. Anthony List v. Driehaus*, —— U.S. ——, 134 S.Ct. 2334, 2341 (2014) (citing *Lujan,* 504 U.S. 560–61 (some internal quotation marks omitted)); *see also E.M. v. New York City Dep't of Educ*., 758 F.3d 442, 449–50 (2d Cir. 2014).

An injury in fact must be: "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. (citing *Susan B. Anthony List*, 134 S.Ct. at 2341 (some internal quotation marks and citations omitted)). The Supreme Court has clearly stated that a "theory of standing" that "relies on a highly attenuated chain of possibilities does not satisfy the requirement that threatened injury must be certainly impending,"

and is reluctant "to endorse standing theories that rest on speculation about the decisions of independent actors." *Id*. at *4 (citing *Clapper v. Amnesty Int'l USA*, —— U.S. ——, 133 S.Ct. 1138, 1148 (2013)).

Plaintiff's alleged injury to support its Count I Federal Power Act preemption claim rests on speculation about "the decisions of independent actors." *Id*. The fact of the matter is that Defendants have merely drafted a preliminary *draft* for a request for proposals. It may or may not result in the issuance of a final RFP. Even if it does, Plaintiff plans on submitting a bid, which could possibly be accepted. Plaintiff's theory of standing relies on an attenuated string of possibilities and speculation about the decisions of several independent actors. *Id*.

Finally, the District Court held in Plaintiff's prior related case Allco I that it lacked Article III standing to assert a preemption claim where the final RFP had been issued, based on essentially the same legal theory. Allco I, 2014 WL 7004024, at *1-2 (D. Conn. Dec. 10, 2014) ("Allco alleges that in his implementation of Section 6, Defendant has 'fixed' wholesale energy prices, which would only be permissible under the FPA if the proposals were in compliance with PURPA."). In the instant case, Plaintiff lacks standing even more so as the *draft* RFP at issue still must undergo multiple tiers of review, and the outcome of Plaintiff's potential bid(s) are unknown at this time. All in all, Plaintiff cannot prove that subject matter jurisdiction exists and Count I should be dismissed pursuant to Rule 12(b)(1).

II. CONNECTICUT'S RPS STATUTE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Standard of Review: Rule 12(b)(6) Motion to Dismiss

Count II of Plaintiff's complaint 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) (citation, and internal quotation marks omitted). Rather, the Supreme Court has emphasized that "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id*. "[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. Overview of Connecticut's RPS and Regional Energy Markets

Allco claims that Conn. Gen. Stat. § 16-245a violates the dormant Commerce Clause because it limits qualifying RECs to those generated within the ISO-NE or adjacent control areas. In order to evaluate this claim it is necessary to briefly review how regional energy markets operate.

1. Renewable Portfolio Standards and Renewable Energy Certificates

Under established federal law states retain full authority to set portfolio standards over their in-state utilities. *See New York v. FERC*, 535 U.S. 1, 24 (2002).[11] 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 acceptable sources of renewable energy and establishing a mechanism to track the environmental attribute to the energy generated. An RPS typically requires that a certain percentage of electricity supplied to end-users is derived from renewable sources, and is the most popular mechanism used by states to spur renewable development in order to displace non-renewable and generally older and more polluting fossil fuel generation.[12]

In Connecticut, for the year 2015, retail electric suppliers and electric distribution companies[13] must meet the RPS by obtaining at least 15% of its retail load from Class I

[11] *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).

[12] Steven Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 WAKE FOREST L. REV. 121, 135-36 (2014). Thirty states have adopted some form of a renewable portfolio standard (RPS) mechanism, *id.*

[13] "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. § 16-1(a)(29).

renewable energy sources.[14] Compl. ¶ 22. These standards may be met by generating electricity from renewables or purchasing RECs.[15] Compl. ¶¶ 23-27

Connecticut law requires that, to qualify as Connecticut RECs, they must come from a generator located within the ISO-NE control area or be able to transmit power into the ISO-NE grid. Compl. ¶¶ 23-27; Conn. Gen. Stat. § 16-245a(b).

The statute provides:

> [A retail utility] may satisfy the requirements of this section (1) by purchasing certificates issued 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) . . . ; (2) for those renewable energy certificates under contract to serve end-use customers in the state . . . by participating in a renewable energy trading program within said jurisdictions as approved by the Public Utilities Regulatory Authority; or (3) by purchasing eligible renewable electricity and associated attributes from residential customers who are net producers.

Conn. Gen. Stat. § 16-245a(b).

What is not clear from the statute is that it is the grid operator acting through the New England Power Pool Generation Information System (NEPOOL GIS) that identifies

[14] "Class I renewable energy source" generally means solar, wind, or fuel cells. § 16-1(a)(26).

[15] Conn. Gen. Stat. § 16-245a(a)-(b), amended by Public Acts of 2013, No. 13-303, § 1; § 16-1, amended by P.A. 13-303.

and tracks RECs for all energy "produced in the control area."[16] Thus, the only means to determine if the energy being produced is in fact renewable is through a system owned and operated by an entity other than the State.

2. Regional Energy Markets Administered By Federal Authorities

FERC has long insisted on the independence of its grid operators (in this case ISO-NE).[17] For New England, FERC ultimately approved the establishment of ISO New England (ISO-NE) as the regional grid operator. Associated with ISO-NE is the The New England Power Pool (NEPOOL) which is a voluntary association of 430 members. ISO New England Inc., 145 FERC ¶ 61227, n.17 (Dec. 19, 2013). Its membership consists of five sectors: (1) a generation sector; (2) a transmission sector' (3) a supplier sector; (4) a publicly-owned entity sector; and (5) an end user sector. New

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[16] *Home*, NEW ENGLAND POWER POOL GENERATION INFORMATION SYSTEM, http://www.nepoolgis.com (last visited Jan. 6, 2015).

[17] FERC has ordered:

> [W]e [have] repeated our earlier statement that `the principle of independence is the bedrock upon which the ISO must be built' and emphasized that this principle must apply to all RTOs, whether they are ISOs, transcos or variants of the two. We also stated that `[a]n RTO needs to be independent in both reality and perception.' We reaffirm both principles in the Final Rule. In applying these principles in the context of ISOs, we have stressed the importance of a decisionmaking process that is independent of control by any market participant or class of participants.

Regional Transmissions Organizations, Order 2000, 80 FERC ¶ 61,285 (Dec. 20, 1999).

England Power Pool, 88 FERC ¶ 61079, 61181 (Jul. 16, 1999). NEPOOL, in turn, is governed through a committee structure expressly approved by FERC. *Id.*

NEPOOL rules include Rule 2.7(c) which permits tracking RECs through the New England Power Pool Generation Information System (GIS).[18] Rule 2.7(c) tracks RECs produced in the region or, in certain cases, adjacent control areas if generators have obtained defined transmission rights.

As noted in written comments filed by NEPOOL and ISO-NE in response to PURA's docket on RPS review:

> Imported Energy must come from an adjacent control area so that it reflects the realities of how power moves. The NEPOOL groups considering the Rules (which include representatives of New England utility and environmental regulatory agencies) determined that the *central purpose* of the GIS is to reflect accurately the emission characteristics of the energy that is actually consumed in the NEPOOL Control Area. Without a relatively high level of accuracy, the GIS would be less useful as a tool for environmental regulators to monitor the actual energy-related emissions in New England or to facilitate accurate consumer disclosure of the energy actually used to serve New England load.[19]

Of importance, a State Regulators Caucus Memorandum that was signed by representatives of a number of New England utility and environmental regulatory agencies, including the Connecticut Department of Environmental Protection, specifically noted that the "State Regulators Caucus's support for and commitment to the NEPOOL-GIS is contingent on the fundamental design principle that each

[18] *Home*, NEW ENGLAND POWER POOL GENERATION INFORMATION SYSTEM, http://www.nepoolgis.com (last visited Jan. 6, 2015).
[19] Responses of New England Power Pool and ISO-NE, [PURA] Review of RPS Standards and Trading Programs Docket No. 04-01-13, PURA ("RPS Review") (Jul. 12, 2004), *available at* http://www.ct.gov/pura/docketsearch (emphasis added).

[C]ertificate represents a complete and comprehensive picture of the environmental, social and economic impacts of one particular generation unit."[20]

The Memorandum went on to recognize "the reality that the environmental, social and economic impact of each generation unit is unique."[21] Unless the energy comes from an adjacent control area, the RECs tracked by the GIS would not provide a "complete and comprehensive" picture of the energy actually consumed in the New England region. *Id.* 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."[22] Displacing fossil with renewable generation is necessary to meet federal environmental protection requirements, and this displacement is unlikely, if not impossible, without limiting the recognition of RECs to renewable energy generated in areas adjacent to the NEPOOL Control Area.[23]

> 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.[24]

"The *final requirement*—that the seller of the imported Energy certify that the attributes associated with the Certificates not have been sold or used elsewhere—is

[20] RPS Review, *supra* note 19.
[21] *Id*. (citing NEPOOL-GIS State Regulators Caucus Position Memorandum #2) .
[22] *Id*.
[23] *Id*.
[24] RPS Review, *supra* note 19 (emphasis added).

intended to ensure that the attributes are not inappropriately 'double-counted.'"[25] Thus, Rule 2.7(c) is the only means for Connecticut to further its compelling interests of ensuring that renewable energy can be verified and tracked in a responsible manner that prevents double-counting, and displaces fossil fueled generators by clean energy generators. It is against this background that Plaintiff alleges that the state's RPS statute violates the dormant Commerce Clause because it follows this regionally administered, federally approved tracking system.

B. Plaintiff fails to state a Commerce Clause claim because the state renewable portfolio standard law does not discriminate in favor of in-state commerce

Standard of Review: 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 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. The first question when analyzing a dormant Commerce Clause claim is whether the challenged law: (1) "discriminates on its face against interstate commerce," *United Haulers Ass'n v. Oneida-Herkimer*, 550 U.S. 330, 338 (2007), or (2) only incidentally burdens interstate commerce. *Id*. at 338-39; *see also Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217-18 (2d Cir. 2004). This threshold

[25] RPS Review, *supra* note 19.

determination determines the proper level of scrutiny; a discriminatory law is virtually invalid *per se*, whereas a law that only incidentally burdens interstate commerce is subject to the more deferential balancing test under *Pike v. Bruce Church*, 377 U.S. 137 (1970).

"Discrimination" simply means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Id*. (citing *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)). A state law that clearly discriminates on its face in this sense amounts to "economic protectionism," and is virtually invalid per se unless "the state has no other means to advance a legitimate local purpose." *Id*. at 338-39 (citing *Maine v. Taylor*, 477 U.S. 131, 138 (1986)). Otherwise, a law that only incidentally burdens interstate commerce is subject to the more deferential balancing test under *Pike v. Bruce Church*, 377 U.S. 137 (1970), and upheld "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Id*. at 142.

Ultimately, the minimum showing required to prevail in a Commerce Clause challenge is that the challenged law has a disparate impact on interstate commerce, *i.e*., imposes "a burden on interstate commerce that is qualitatively or quantitatively different from that imposed on intrastate commerce." *Freedom Holdings*, 357 F.3d at 217 (quoting *Nat'l Elec. Mfrs. Ass'n v. Sorrel*, 272 F.3d 104, 108 (2d Cir. 2001); *see, e.g*., *Automated Salvage Transport, Inc. v. Wheelabrator*, 155 F.3d 59, 75 (2d Cir. 1998) ("The fact that it may otherwise affect commerce is not sufficient.").

1. ***Connecticut's Statute Does Not Implicate 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 qualifying renewable energy certificates (used towards satisfying the renewable portfolio standard) to those generated within the ISO-NE control area or from adjacent control areas. Compl. ¶¶ 23-27; Conn. Gen. Stat. § 16-245a(b). Plaintiff has not stated a valid cause of action under the Commerce Clause because the Connecticut statute does not facially discriminate in favor of in-state interests. In fact, Conn. Gen. Stat. § 16-245a does not even mention in-state energy resources at all. As Judge Easterbrook aptly stated: "No disparate treatment, no disparate impact, no problem under the dormant commerce clause." *Automated Salvage*, 155 F.3d at 75 (citing *Nat'l Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1132 (7th Cir. 1995)).

2. Even if the Commerce Clause is implicated, any burden on interstate commerce is only incidental and not excessive

Even if General Statutes § 16-245a is deemed to discriminate against out-of-state resources, it is clear that the statute would pass the balancing test described in *Pike v. Bruce Church*, 377 U.S. 137 (1970). Specifically, the statute represents not only an incidental burden on interstate commerce—it represents, in fact, the only means to accomplish the State's legitimate goals of grid reliability and renewable energy generation.

Connecticut's RPS program was enacted to address important environmental issues. Specifically, under the Clean Air Act Connecticut is considered a non-attainment state for two important air pollutants; nitrogen oxide ("NOx") and particulate matter

emissions ("PM") which are major emissions from fossil fuel generation plants.[26] As a consequence, the State has exercised its authority over retail suppliers by requiring the utilities to purchase a certain percentage of clean energy as proscribed by the RPS.[27] There is a finite amount of energy consumed in New England. Each megawatt of clean energy generated in New England will therefore displace a megawatt of older, dirtier energy generated in New England. Thus, requiring state utilities to buy RECs associated with the generation of clean energy in New England will compel the displacement of dirtier, fossil fuel generation in the region. Out-of-region RECs (*e.g.*, from Georgia) will have no impact on air emissions in New England because the energy generated by the clean energy resource is consumed in Georgia and will not displace fossil fuel generation in New England.

Connecticut is not alone in enforcing eligibility requirements. The Maine RPS exemplifies REC-eligibility requirements based on delivery of benefits rather than location because it requires producers to deliver electricity into the New England Power as does Rhode Island and the five states that comprise the New England Power Pool (NEPOOL) share electricity with each other and allow other states to buy from the pool as a spot market. *Bangor Hydro-Electric Co*., 96 Fed. Energy Reg. Comm'n Rep. ¶ 61,063 (2001). The Maine RPS, for example, limits eligibility to those renewable sources that "[g]enerate[] power that can physically be delivered to the control region

[26] *See* Conn. Agencies Regs. §§ 22a-174-1, -9, -22, -18 (2013), *available at* http://www.sots.ct.gov/sots/lib/sots/regulations/title_22a/174.pdf

[27] Conn. Gen. Stat. § 16-245a.

. . . [of] the New England Power Pool, or its successor." Me. Rev. Stat. tit. 35-A, § 3210.2(B)(1) (Supp. 2003). This method ensures that the renewable benefits will accrue in-state because if NEPOOL benefits, Maine will benefit. In sum, Connecticut's RPS statute does not discriminate in favor of in-state resources and only limits certain out-of-region resources that cannot meet the legitimate generation portfolio goals reserved to the States.

Finally, there is an inherent contradiction in Allco's argument. Allco claims that Connecticut's RPS statute is unconstitutional because it wishes to sell Class I RECs from its out-of-region generation. Other than General Statutes § 16-245a, Connecticut has no other authority by which it can require its domestic utilities to purchase Class I RECs from anywhere. This Court does not have the authority to re-write Connecticut state law. If § 16-245a is struck down, there is no remaining State statute that permits the sale of Class I RECs. Allco will, of course, be able to market the environmental attributes of its out-of-region solar resources, but only through the Connecticut Clean Energy Options ("CCEO") program—a right it has always had.[28]

III. PLAINTIFF FAILS TO STATE ITS SECTION 1983 CLAIM BECAUSE IT DOES NOT PLAUSIBLY ALLEGE THAT THE DEFENDANTS ARE LIABLE UNDER THE STATUTE

Count III of the Complaint alleges a § 1983 claim against the Commissioner arguing that the violations set forth in Counts I and II were carried out under color of state law. Compl. ¶¶ 72-80. "Section 1983 is not itself a source of substantive rights,

[28] Allco is free to offer the environmental attributes of its energy under other state programs such as the CCEO program, which has received national recognition. *See* DPUC Review of the Connecticut Clean Energy Options Program, Docket No. 10-05-07 (March 30, 2011), *available at* http://www.ct.gov/pura/docketsearch.

but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal citations omitted.) Thus, a 1983 action can be based only on a constitutional claim or a claim of a violation of a federal right. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997) ("In order to seek redress through section 1983 . . . a plaintiff must assert the violation of a federal right, not merely a violation of a federal law."). The FPA does not create a federal right enforceable by an action under Section 1983. Interestingly, Allco claims to be a Qualifying Facility under PURPA. However, as FERC has established:

> [Plaintiff] cannot maintain a claim against FERC under PURPA for the simple reason that no such claim exists. The only private right of action under PURPA arises from § 210(h)(2)(B) of that statute. See 16 U.S.C. § 824a-3(h)(2)(B). That subsection permits "[a]ny electric utility, qualifying cogenerator, or qualifying small power producer" to petition FERC to enforce PURPA "against a State regulatory authority or nonregulated electric utility" and, if FERC does not initiate an enforcement action, to bring an action in district court "to require such State regulatory authority or nonregulated electric utility" to comply with PURPA.

Niagara Mohawk Power Corp. v. FERC, 306 F.3d 1264, 1268 (2d. Cir. 2002).

The Commissioner is not a state utility regulator and Allco has not brought an action against FERC. There is, therefore, no private right of action for Allco to pursue here. There is also no violation of a federal right because the Commissioner has not intruded on FERC's area of exclusive jurisdiction and the RPS statutes do not violate the dormant Commerce Clause.

Finally, Allco's claims for attorney's fees and damages are barred by sovereign immunity. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984)

(Eleventh Amendment bars all federal claims against state officials if based upon allegations of violations of state law.).

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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CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2015, 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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