IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED, *Plaintiff*,	:	3:15-CV-00608-CSH
v.	:	
ROBERT KLEE ARTHUR HOUSE JOHN W. BETKOSKI, III MICHAEL CARON *Defendants*.	:	August 7, 2015

DEFENDANT'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's Motion. Nothing in the Opposition changes the fact that Plaintiff's Complaint is premature and not ripe for judicial review. The Commissioner of the Department of Energy and Environmental Protection ("Commissioner") has yet to take any action affecting Plaintiff and it is clear that the Commissioner has not intruded on the jurisdiction of the Federal Energy Regulatory Commission ("FERC"). Further, Plaintiff's action is brought under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. Section 824a-3, but Plaintiff has failed to meet the jurisdictional prerequisites required for filing an appeal under that statute. Finally, Allco has failed to state a claim that the state's renewable portfolio standard is unconstitutional. Thus, this action should be dismissed.

I. Ripeness

Allco's first claim is that the draft request for proposals ("RFP") released in February 2015, violates its rights as an alleged qualifying facility ("QF") under PURPA. Allco asserts the draft RFP indicates that the Commissioner will conduct a renewable energy procurement that includes both QFs and non-QFs in violation of the Federal Power Act ("FPA"). Defendants have noted that the document in question is a draft RFP for a procurement that has not yet occurred and thus no claim is ripe. Defendant's Motion, p. 11. The Opposition now states that "[Allco] will suffer an injury-in-fact when it is forced to compete in the Commissioner's procurement with" non-QFs. Opposition, p.1. Plaintiff's use of the terms "will" and "when" show that they are looking to the future regarding actions that clearly have not yet occurred and may never occur.

The Opposition claims that Plaintiff's challenge to the draft RFP is ripe because certainty is not required to establish ripeness. Opposition, p. 11. There is no question of certainty in this case. The Commissioner has, certainly and unequivocally, not taken any action that causes any injury to Allco. The draft RFP has not been finalized or issued and no bids have been submitted, reviewed, accepted, or declined. There is no process for this Court to review.

II. Exhaustion

If Allco has any right to challenge the draft RFP under PURPA, it has failed to exhaust its remedies under Section 210(h)(2)(B) of PURPA, codified at 16 U.S.C. § 824a-3(h)(2)(B). Presumably because on June 24, 2015, the Court of Appeals for the

Second Circuit requested supplemental briefing on this issue in the appeal of *Allco I*,[1] Allco includes nine pages in its Opposition to explain why it has not failed to exhaust its remedies under Section 210(h)(2)(B). Of course, a "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); *Makarova v. United States,* 201 F.3d 110, 113 (2d Cir. 2000).

Allco's Opposition asserts standing based on its alleged (future) injuries. Opposition, p.1. As the Court of Appeals for the Second Circuit has held: "The only private right of action under PURPA arises from § 210(h)(2)(B) of that statute," codified at 16 U.S.C. § 824a-3(h)(2)(B). *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269 (2d Cir. 2002). Section 824a-3(h)(2)(B) states:

> (B) Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate. The Commission may intervene as a matter of right in any such action.

Thus, under § 824a-3(h)(2)(B), a QF has a right of action to petition FERC to enforce the requirements of PURPA against a State agency or utility. Only if FERC declines to

[1] *Allco v. Klee*, No. 15-20 (2d Cir. Filed January 2, 2015).

bring such an enforcement action, can a QF bring an action to enforce in district court. *Id*. Congress has therefore identified a specific statutory provision for private redress of alleged violations of PURPA, which right of action Plaintiff has not yet pursued.

The Second Circuit has been quite clear that the statutory right of action is exclusive and failure to follow it bars jurisdiction. In *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1268 (2d Cir. 2002), a utility sued FERC and the New York Public Service Commission ("NYPSC") alleging various claims under PURPA. With respect to the claim against FERC, the Court noted that 16 U.S.C. § 824a-3(h)(2)(B) does not permit suit against FERC under any circumstances and thus there was no private cause of action under PURPA against FERC. *Id*. With respect to the NYPSC, the Court found that "in the absence of proof that Niagara complied with the jurisdictional pre-requisites" of 16 U.S.C. § 824a-3(h)(2)(B) the Court had no jurisdiction against the state regulators and therefore dismissed the case. *Id*. at 1269-70.

Not only does Allco's failure to exhaust its remedies under § 824a-3(h)(2)(B) preclude Count 1 of its Complaint, it also prevents Allco from seeking relief under 42 U.S.C. § 1983. As described above, PURPA contains its own comprehensive enforcement scheme. "When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under § 1983." *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121, 125 S.Ct. 1453 (2005); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 20, 101 S. Ct. 2615 (1981)("[W]hen the remedial devices provided in a particular Act are sufficiently

comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under Section 1983."). *See also, Municipal Electric Utilities Ass'n. v. Conable*, 577 F. Supp. 158, 163-64 (D.D.C. 1983) (FPA has a detailed remedial scheme precluding a Section 1983 claim).

PURPA includes specific and detailed remedies in 16 U.S.C. § 824a–3(h) (see *Niagara Mohawk*, 306 F.3d at 1268), and this demonstrates congressional intent to preclude suits under § 1983 for violations of PURPA. *See also*, *North Am. Natural Resources v. Michigan PSC*, 73 F. Supp. 2d 804, 809 (W.D. Mich. 1999)("[S]pecific and detailed remedies provided by [PURPA] demonstrate congressional intent to preclude suits under § 1983 for violations of PURPA.") Allco therefore may not maintain a claim under § 1983 based upon alleged violation of its PURPA rights.

III. Preemption

The Federal Power Act does not prohibit regulated entities from entering into contracts for renewable energy to further state policies. The Opposition, however, argues the same position that failed to persuade this court in *Allco I*, specifically, that the Commissioner's renewable energy procurement violates the FPA.[2] Opposition, pp. 29-39. The Opposition correctly notes the entirely unexceptional proposition that the FPA grants FERC jurisdiction over wholesale energy rates. Opposition, pp. 29-30. 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.

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

In fact, federal law is clear that states have the authority to direct the procurement of renewable energy. FERC 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). FERC "respect[s] the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways." *Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000 (1995).

Recent cases have only emphasized this point. For example, in *Midwest Power Systems, Inc*., 78 FERC P 61,067 at p. 61,248, 1997 WL 34082 (1997), FERC held that "states have numerous ways outside of PURPA to encourage renewable resources." FERC expressly found the relevant Iowa statute was not preempted "to the extent that [it] require[s] [EDCs] to purchase from certain types of generating facilities." Nothing in the Opposition provides an answer to FERC's clear position in *Midwest Power*. *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*, 78 FERC P 61,282 (2013) (FERC did not strike down an optional program for certain QFs even though rates differed from PURPA rates.)

The Commissioner's authority under state law to conduct procurements directing utilities to purchase renewable energy is wholly within his jurisdiction and does not violate the FPA.

IV. The RPS Does Not Violate the Dormant Commerce Clause

The Opposition insists that Connecticut's renewable portfolio standard ("RPS") statute facially discriminates against out-of-state owners of renewable energy certificates ("RECs"). Opposition, pp. 40-48. Allco claims that Connecticut law is a flat ban on out-of-region RECs and, therefore, is per se unconstitutional. Opposition, p.41.

As an initial matter, Connecticut General Statutes § 16-245a does not expressly ban out-of-state RECs and does not discriminate in favor of in-state resources and in fact most Connecticut RECs come from out-of-state. Further, the statute is not a price control statute and does not link in-state prices to out-of-state prices; all of which have drawn adverse judicial scrutiny in the past. Finally, § 16-245a is not the only state program that permits purchase of the environmental attributes of clean energy generation. As the Opposition acknowledges, Allco could sell its clean energy through Connecticut's Clean Energy Options program. Opposition, p. 48.

Ultimately, § 16-245a only requires utilities to purchase RECs from within the jurisdiction of the FERC-established regional transmission system or from resources

that have the rights to transmit into the same system. Any limitations on transmission are contained in the NEPOOL System Rule 2.7(c), a rule implemented by the New England Power Pool ("NEPOOL") Markets Committee which, in turn, is overseen by the regional transmission operator under authority from FERC and thus wholly outside the jurisdiction of the state. By its terms, therefore, the Commerce Clause is not offended by § 16-245a and, to the extent that there is a regional, not state, preference this is the result of a regional system approved and regulated at the federal level.

Significantly, the Opposition misses the intent of the RPS statute. Connecticut, like many other states, requires its regulated utilities to purchase a percentage of their power from renewable energy sources in order to reduce important pollutants from fossil fuels. Opposition, pp. 5-6. RECs are the certificates granted for each unit of clean energy generated. Defendant's Motion, p.6. If the power associated with the clean generation cannot be used by consumers in the state, it will not displace the fossil fuel generation and will not accomplish the state's legitimate environmental goals. An analogy would be a state program to clean up Connecticut's rivers and harbors expending Connecticut funds to clean up a harbor in Georgia.

The Opposition interestingly cites a decision of the NEPOOL Board of Review to an appeal from a Canadian power company to change Rule 2.7c to permit importation from outside the region. *In the matter of the Appeal Case Brookfield Energy Marketing, Inc.*, No. 02-NE-BD-2008 (NEPOOL Board of Review, 2009).[3] Contrary to Plaintiff's assertion, this case is inapposite. Brookfield's appeal failed and Rule 2.7 was not

[3] www.nepool.com/uploads/RB_Decisions_2008_02.pdf.

changed. *Id.* The Board's decision emphasizes that the Rule is not Connecticut's to change and if Allco wishes to change Rule 2.7 it should seek redress at NEPOOL.

Allco cites *W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994) and Illinois Commerce Commission v. FERC*, 721 F.3d 764 (7th Cir. 2013) *cert. den.* 134 S. Ct. 1277 (2014), for the claim that environmental goals are not sufficient to limit RECs to energy that flows into the region. Opposition, pp. 41-42. These cases stand for no such proposition. *W. Lynn Creamery, Inc.* states that if environmental preservation is the central purpose of the regulation; that is not sufficient to uphold a facially discriminatory regulation. *W. Lynn Creamery, Inc., 512 U.S. at 204.* Connecticut's RPS is not facially discriminatory. *Illinois Commerce Commission* stated, as quoted by Allco, that Michigan's RPS statute cannot discriminate against out-of-state renewables without running afoul of the dormant commerce clause. Connecticut's RPS statute, however, does not discriminate against out-of-state renewables. Rather, it recognizes renewable generation that is delivered into the ISO-NE regional market. Interestingly, the court in *Illinois Commerce Commission* cited to a law review article that noted that linking the RPS to the NEPOOL GIS tracking system likely avoids any constitutional challenge under the dormant commerce clause. "Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power," 7 Texas J. Oil, Gas & Energy Law 59, 101-03 (2012).

V. The Procurement Could Not Violate 42 U.S.C. § 1983.

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.") Allco claims to be a Qualifying Facility under PURPA. PURPA includes specific and detailed remedies in 16 U.S.C. § 824a–3(h) (see *Niagara Mohawk*, 306 F.3d at 1268), and this demonstrates congressional intent to preclude suits under § 1983. *North Am. Natural Resources v. Michigan PSC*, 73 F. Supp. 2d 804, 809 (W.D. Mich. 1999)("[S]pecific and detailed remedies provided by [PURPA] demonstrate congressional intent to preclude suits under § 1983 for violations of PURPA."). Further, there is no violation of a federal right because the Commissioner did not intrude on FERC's exclusive jurisdiction and § 16-245a does not violate the Commerce Clause.

Finally, Allco's claims for attorney's fees are barred by sovereign immunity. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984)(Eleventh Amendment bars claims against state officials based upon 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,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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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