IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED,	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
v.	:	3:15-CV-00608(CSH)
	:	
ROBERT KLEE, in his official Capacity as Commissioner of the CONNECTICUT DEPARTMENT OF ENERGY AND ENVIRONMENTAL PROTECTION, and ARTHUR HOUSE, JOHN W. BETKOSKI III, and MICHAEL CARON, in their Official Capacity as Commissioners of the CONNECTICUT PUBLIC UTILITIES REGULATORY AUTHORITY	:	
Defendants	:	September 8, 2015

JOINT REPLY OF COMMISSIONERS KLEE, HOUSE, BETKOSKI AND CARON TO PLAINTIFF'S SUR-REPLY

I. INTRODUCTION

On August 24, 2015, the Court granted plaintiff Allco Finance Limited's motion to submit a sur-reply brief, and authorized defendants Klee, House, Betkoski and Caron to file a Reply to plaintiff's sur-reply. This Reply addresses plaintiff's arguments from the sur-reply.

II. THE DORMANT COMMERCE CLAUSE DOES NOT REQUIRE CONNECTICUT TO LEGISLATE DEMAND FOR PLAINTIFF'S RECs.

Plaintiff Allco Finance Limited asserts that a factual dispute exists as to what renewable energy certificates ("RECs") are. Sur-reply, p. 2. No such factual dispute exists. Defendants Klee, House, Betkoski and Caron accept all facts alleged in the Complaint as true for purposes of this motion to dismiss. Plaintiff asserts that RECs are renewable energy attributes that can be traded separately from the underlying energy. Complaint, ¶1. No dispute exists here. Plaintiff

claims to own RECs from its Georgia facility. Complaint, ¶33. Defendants accept this allegation as true for purposes of their motions to dismiss. Significantly, defendants also accept the pleaded fact that RECs are a subsidy to generators of renewable power. Complaint, ¶66.

The parties only disagree on how the law applies to these facts. Plaintiff asserts that the Dormant Commerce Clause requires Connecticut to rewrite its Renewable Portfolio Standard ("RPS") law to subsidize plaintiff's RECs. Defendants respond that subsidies do not offend the Dormant Commerce Clause, and that Connecticut is not required to subsidize plaintiff's renewable generation in Georgia and New York (or other renewable generators in California or Oregon, for example).

Plaintiff wrongly contends that even if a REC is a subsidy, that does not cure *per se* invalid facial discrimination. Sur-reply, p. 3. Plaintiff misses the point of *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S.Ct. 2488 (1976) and its progeny[1] entirely. *Hughes* stands for the proposition that a subsidy scheme created by the state for legitimate state purposes does not require justification under the Commerce Clause. *Hughes*, 426 U.S. at 809. *Hughes* created an **exclusion from** Dormant Commerce Clause analysis. To be sure, defendants are not trying to cure facial discrimination. Connecticut's RPS statute does not facially discriminate under any Dormant Commerce Clause analysis or theory. However, the Dormant Commerce Clause is simply inapplicable as a matter of law to the RPS subsidy program created by Connecticut to increase the use of renewable energy generation and displace fossil fuel resources that pollute the environment.

[1] See *Reeves, Inc. v. Stake*, 447 U.S. 429, 442, 100 S.Ct. 2271 (1980); *Dept. of Rev. of Ky. v. Davis*, 553 U.S. 328, 341, 128 S.Ct. 1801 (2008); *McBurney v. Young*, 133 S.Ct. 1709, 1720 (2013).

Defendants House, Betkoski and Caron ("PURA defendants") did not claim that Connecticut created all RECs, as argued by plaintiff. Sur-reply, p. 2. PURA defendants asserted that RECs are wholly a state creation and that Connecticut Class I RECs are a creature of Connecticut law. PURA memo at pp. 27, 29. Though Connecticut Class I RECs were created by Connecticut, PURA defendants do not dispute the existence of other non-NEPOOL GIS RECs from other parts of the country, whether those RECs were created by REC platforms sanctioned by other states or regions, or by entrepreneurial private entities.

Connecticut places no constraints upon the sale of RECs plaintiff claims to possess. Plaintiff may sell its RECs to any buyer in Connecticut at whatever price the market will bear. Connecticut has done nothing to burden the sale of these RECs in the state. Indeed, plaintiff does not plead or point to any such burden. Plaintiff acknowledges that any national market for RECs exists independently from Connecticut's RPS. Sur-reply, p. 2. Connecticut has not interfered with any national market for RECs that exists independently from its RPS.

Connecticut does not have to subsidize plaintiff's RECs merely because they exist. It does not have to legislate demand for plaintiff's RECs in the Connecticut RPS program merely because they exist. No Dormant Commerce Clause theory and no Dormant Commerce Clause precedent requires such a result, and plaintiff cites to none.

Plaintiff recognizes that Connecticut's RPS program is independent from any national market for RECs. Sur-reply, p. 2. The fact that Connecticut's RPS program relies upon market forces of supply and demand simply does not place it within the ambit of the Dormant Commerce Clause. Just as Maryland offered a bounty in combination with elemental laws of economics to speed up the scrap cycle for automobile hulks (*Hughes*, 426 U.S. at 797),

Connecticut offers a subsidy in combination with elemental laws of economics to encourage the development of renewable power (PURA defendants Memo at 27).

In its sur-reply, plaintiff contends that the Tenth Circuit's recent decision in *Energy and Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015) is inapplicable because the facts are different and *Epel* did not address a facially discriminatory state law. Sur-reply, pp. 1-2. Plaintiff errs, as the *Epel* analysis remains instructive to the case at bar. In *Epel*, Colorado's statute required 20% of energy sold within the state to come from renewable energy sources, and out-of-state coal generators sought to have the statute vacated. In an extensive discussion of dormant commerce clause jurisprudence, the Tenth Circuit upheld the statute, finding that Colorado's statute failed to satisfy the "three essential characteristics" of dormant commerce clause cases. *Epel*, 793 F.3d at 1173. First, the Colorado statute was not "a price control statute," did not "link prices paid in Colorado with those paid out of state," and did not "discriminate against out-of-staters." *Id*. In a similar fashion, Connecticut's RPS statute does not control prices, does not link in-state prices to out-of-state prices, and does not discriminate against out-of-staters. As stated in PURA's motion, the vast majority of RECs come from out-of-state, and nothing in the RPS statute discriminates against out-of-state suppliers, either facially or indirectly. Rather, similar to Colorado, Connecticut's statutory scheme provides a subsidy to renewable energy paid for by Connecticut residents in the form of higher prices. Similar to Colorado, Connecticut's statutory scheme is constitutional.

Throughout plaintiff's sur-reply, it presumes the existence of a theory of regional discrimination that is actionable under the Dormant Commerce Clause. No legal authority supports plaintiff's regional discrimination theory. Plaintiff's theory of regional discrimination

cannot be proven merely by citing *NE Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174, 105 S.Ct. 2545 (1985). As stated in PURA defendants' Reply at pp. 8-9, the U.S. Supreme Court only forewarned in *dicta* that a group of states should not establish a system of regional banking by excluding bank holding companies from outside the region. *NE Bancorp*, 472 U.S. at 174. In the actual facts of that case, Congress authorized actions taken by Connecticut and Massachusetts, and their actions could not be attacked under the Dormant Commerce Clause. *NE Bancorp*, 472 U.S. at 174. There is no relevant holding from *NE Bancorp*, and no court has adopted its *dicta* as a holding. In sum, plaintiff's claimed Dormant Commerce Clause discrimination is based on an unsupported theory of regional protectionism.

On page two of its sur-reply, plaintiff argues that *Wyoming v. Oklahoma*, 502 U.S. 437 (1992) governs this dispute, premised upon its unsupported regional protectionism theory. This argument fails for numerous reasons. First, *Wyoming* did not relate to a state-created subsidy. In *Wyoming*, the State of Oklahoma legislated a fuel source set-aside so that in-state utilities would always burn a percentage of in-state coal for electric generation. See *Wyoming*, 502 U.S. at 440. The instant case relates to unbundled attributes of electric generation, not fuel. See Complaint, ¶1. Unlike Oklahoma, Connecticut is not economically advantaging a domestic fuel source and protecting that fuel source from interstate markets. *Wyoming*, 502 U.S. at 440.

The deliverability requirement to which plaintiff vehemently objects also distinguishes *Wyoming* from the instant case. Deliverability was not an issue in *Wyoming*, as coal was actually shipped to Oklahoma to be combusted into electricity. Nor does the deliverability requirement have any set-aside or quota; any and all generation that meets the GIS Operating Rule 2.7(c) criteria can be recognized in the NEPOOL GIS.

Finally, Oklahoma's set-aside was the exact opposite of a renewable energy portfolio standard. Oklahoma's set-aside guaranteed that higher polluting, high sulfur content coal would be burned. *Wyoming*, 502 U.S. at 455, 457. The set-aside was created notwithstanding its negative effect on Oklahoma's environment, and was viewed as a sheer protectionist preference for in-state coal. *Wyoming*, 502 U.S. at 455.

Plaintiff's pollution control equipment hypothetical is also unavailing. Sur-reply, p. 3. It merely replaces the in-state coal set-aside in *Wyoming v. Oklahoma* with pollution control equipment. However, there is still no set-aside for in-state renewable energy, and plaintiff's theory of regional protectionism is unsupported. Plaintiff's pollution control equipment hypothetical, and indeed its entire Count II claim, is premised upon the incorrect belief that if Connecticut legislates demand for renewable energy from other states through RECs, it must legislate demand for renewable energy from **all** states through RECs, regardless of location, and regardless of whether the underlying renewable energy reaches New England. No case stands for this proposition.

Plaintiff chastises Connecticut for incorporating the NEPOOL GIS deliverability requirement in the state's RPS statute. Sur-reply, pp. 4-5. It is irrelevant whether the legislature was required to incorporate the NEPOOL GIS rule. The deliverability requirement was not written by NEPOOL specifically to protect Connecticut in-state resources at the expense of out-of-state resources. Therefore, Connecticut's incorporation of that rule cannot be protectionist legislation. Further, given the purpose of the RPS, incorporating the deliverability requirement makes perfect sense. The RPS mandates that a portion of electric suppliers' load used to serve customers will include a percentage of renewable energy power, and the NEPOOL GIS

deliverability requirement is consistent with this statutory goal because it ensures that renewable energy electrons either be generated in New England, or enter New England as an import.

Notably, plaintiff's assertion that Connecticut's RPS law "de-values" plaintiff's RECs is a clear shift in its argument, has no support in its Complaint, and is incorrect. Sur-reply, p. 1. Plaintiff pled that Connecticut bans its RECs. Complaint, ¶¶3, 33, 34, 68. Defendants refuted this argument, noting that plaintiff's RECs are not banned at all, but can be sold to any party that wishes to pay for the RECs, including those needing to "green up" standard service supply. PURA defendants' memo, p. 33; Klee memo at 24. Having abandoned its "ban" argument, plaintiff now adopts a "de-value" theory. Plaintiffs did not and cannot plead facts showing that its RECs once had a higher value and have been devalued as a result of Connecticut legislative action. It has not connected Connecticut's actions to the value of its RECs. Plaintiff's shifting argument demonstrates that it has no claim at all.

Plaintiff may sell its RECs to any purchaser at whatever price the market will bear. However, Connecticut is under no Dormant Commerce Clause obligation to legislate demand for plaintiff's RECs. Plaintiff's Dormant Commerce Clause Claim (Claim II) entirely fails to state a claim, and should be dismissed pursuant to Rule 12b(6).

III. PLAINTIFF FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

The FERC decisions cited by defendants are entirely relevant to the question of whether plaintiff must exhaust its administrative remedies. Plaintiff asserts that the FERC decisions, *Winding Creek Solar LLC*, 151 FERC ¶ 61103 (May 8, 2015) and *Otter Creek Solar LLC*, 143 FERC ¶ 61282 (June 27, 2013), have no substantive implications for the merits of this case. Sur-reply, pp. 5-9. These cases have undeniable procedural and substantive implications for this case. Both cases demonstrate that Qualifying Facilities must first raise PURPA preemption

claims to FERC before pursuing any such claims in federal district court. 16 U.S.C. § 824a-3(h)(2)(B); *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269 (2d Cir. 2002). It does not matter whether FERC "issued a brief declaratory statement" in response, whether those orders "command *Chevron*-style deference," or whether plaintiff finds them persuasive. Sur-reply, pp. 6-7. As a matter of law, FERC must first be given the opportunity to address the claim, and because plaintiff has failed to pursue a remedy at FERC, its Count I claim must be dismissed.

Even where plaintiff implores the Court not to defer to FERC's declaratory orders in *Winding Creek* and *Otter Creek*, plaintiff reinforces its own failure to exhaust. Sur-reply, pp. 6-7. Plaintiff cites *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 1231 (5th Cir. 2014) for the proposition that the *Winding Creek* and *Otter Creek* orders should not be given deference. However, the issue presented to FERC in that case was whether the dispute belonged in state or federal court, and the Fifth Circuit Court of Appeals did not defer to FERC. *Exelon Wind 1*, 766 F.3d at 392. In contrast, *Winding Creek* and *Otter Creek* addressed the substantive question of whether PURPA preempts state action.

Defendants believe *Winding Creek* and *Otter Creek* should be given deference because they are on-point declarations of law issued by the federal agency responsible for implementing PURPA. The only basis upon which to accord less deference is if they are viewed as positions FERC would take in federal district court once FERC declines to take an enforcement action under PURPA Section 210. *N.Y. State Electric & Gas Corp. v. FERC*, 117 F.3d, 1473, 1474 (D.C. Cir. 1997). However, this only highlights plaintiff's failure in the instant case to follow

the PURPA enforcement scheme, and plaintiff's failure to exhaust administrative remedies as required by that scheme.

Substantively, the *Otter Creek* and *Winding Creek* are fully on-point. In both cases, states acted outside of PURPA to develop renewable resources. In both cases, FERC rejected challenges that states are limited to acting solely within PURPA. No case stands for the proposition plaintiff puts forth here, that states may order regulated utilities to conduct procurements, can monitor the procurement, and can review the utility's choice in hindsight, but can only conduct the procurement and choose the winning bidder under PURPA.

Plaintiff argues that states must operate within PURPA and then avers that *Midwest Power Systems, Inc.*, 78 FERC ¶¶ 61,067, 1997 WL 34082 (January 29, 1997), is not relevant. Sur-reply, p. 8. In *Midwest*, FERC held that "states have numerous ways outside of PURPA to encourage renewable resources." *Midwest*, 78 FERC 61,248; PURA Memo, p. 21. *Midwest* is entirely relevant, as it rejects plaintiff's theory that states are limited to acting under PURPA. Further, *Conn. Dep't of Public Utility Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) and *PJM Interconnection, L.L.C.* 135 FERC ¶ 61,022 at P 142 (2011) are not relevant, and do not constrain states in the way plaintiff suggests. *Conn. DPUC v. FERC* related to whether FERC overstepped its authority in implementing the forward capacity market, not geographical constraints to reserved state authority under the Federal Power Act. *Conn. DPUC v. FERC*, 569 F.3d 749. Similarly, *PJM Interconnection* related to the scope of FERC's authority under the FPA, not whether states are geographically constrained under the FPA. *PJM Interconnection* at P 142. Regulated utilities routinely both purchased electricity from out-of-state, and frequently invested in out-of-state generation (nuclear plants were frequently built on this basis). States had

full regulatory authority over regulated utilities in both circumstances. Nor was integrated resource planning ever limited to consideration of in-state resources only.

Plaintiff's legal theories are inconsistent and contradictory. Certainly, if Connecticut sought to implement Sections 6 and 7 by limiting respondents to only those generators willing to build within the geographic borders of Connecticut it would be attacked and potentially struck down under the Dormant Commerce Clause. Generators outside of Connecticut can deliver power over the interstate electric grid, would meet Connecticut's renewable energy policy goals, and would have a colorable claim of discrimination.

IV. DEEP ISSUED ON AUGUST 31, 2015, A NOTICE OF PROCEEDINGS AND OPPORTUNITY FOR PUBLIC COMMENT THAT WOULD IMPLEMENT SECTIONS 6 AND 7.

Though not strictly responsive to plaintiff's sur-reply, defendants provide the following brief factual update to the Court. In their memoranda in support of their motions to dismiss, defendants argued that plaintiff's Count I is premature because the RFP has not yet been issued in final form. Klee memo, pp. 11-12; PURA memo, p. 14-15. On August 31, 2015, DEEP issued a Notice of Proceedings and Opportunity for Public Comment that would permit comment on its remaining authority under Section 6 of Public Act 13-303, and Section 7 of that Act.[2]

V. CONCLUSION

For the reasons set forth in their motions to dismiss, defendants Robert Klee, Arthur House, John W. Betkoski III and Michael Caron respectfully request that this Court dismiss plaintiff's Complaint against them in its entirety.

[2] Notion of Proceedings and Opportunity for Comment, DEEP (August 31, 2015) http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/67b2877d014a6f2a85257eb200467127/$FILE/Notice%20of%20proceedings%20and%20opportunity%20to%20comment%2008.31.15.pdf

Respectfully submitted,

COMMISSIONERS ROBERT KLEE, ARTHUR HOUSE, JOHN W. BETKOSKI, III AND MICHAEL CARON

GEORGE JEPSEN
ATTORNEY GENERAL

BY: /s/ *Seth A. Hollander*
Seth A. Hollander
Assistant Attorney General
Federal Bar No. CT28857
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2681
Fax: (860) 827-2893

/s/ Robert D. Snook
Robert D. Snook (ct24956)
Assistant Attorney General
Attorney General's Office
55 Elm Street
P.O. Box 120
Hartford, CT 06141-0120
860-808-5250 (phone)
860-808-5387 (fax)
Robert.Snook@ct.gov
Attorney for
DEEP Commissioner Klee

e-mail seth.hollander@ct.gov
Attorney for Defendants PURA Commissioners House, Betkoski and Caron.

CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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/ Seth A. Hollander
Seth A. Hollander
Assistant Attorney General