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	:	June 19, 2015

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

On April 30, 2015, plaintiff Allco Finance Ltd, a developer of various solar projects, filed a complaint ("Complaint") against Robert Klee ("Commissioner"), Commissioner of the Connecticut Department of Energy and Environmental Protection ("Department" or "DEEP"), and Arthur House, John W. Betkoski, III, and Michael Caron, Utility Commissioners of the Public Utilities Regulatory Authority ("PURA Commissioners"), in their official capacity for alleged violations of federal law. Plaintiff has sued both DEEP and PURA in three counts, requesting this Court to strike down the State of Connecticut's renewable energy portfolio compliance program administered by PURA, and seeking to halt a renewable energy procurement to be conducted by DEEP. The proposed procurement would be conducted by DEEP in Connecticut, and by electric companies in Massachusetts and Rhode Island.

Count I asserts that proposed renewable energy procurements yet to be conducted under state law will violate the Federal Power Act ("FPA") and are federally preempted. The proposed procurements would be conducted under Sections 6 and 7 of Public Act 13-303, *An Act Concerning Connecticut's Clean Energy Goals* ("Public Act 13-303"), as amended by Public Act 14-94, *An Act Concerning Connecticut's Recycling and Materials Management Strategy, the Underground Damage Prevention Program and Revisions to Energy and Environmental Statutes*.[1] DEEP issued a draft request for proposals ("Draft RFP") under Sections 6 and 7 on February 25, 2015. Consistent with Sections 6 and 7, the Draft RFP states that DEEP may direct Connecticut electric distribution companies to enter power purchase contracts with bidders whose projects are found to be in the interests of ratepayers. Exhibit A to Plaintiff's Complaint, Appendix H-1. Plaintiff objects to this feature of the RFP. Plaintiff claims that compelling Connecticut electric distribution companies to enter power purchase contracts as contemplated by the Draft RFP, and by Sections 6 and 7 will violate the Supremacy Clause. Complaint, ¶43.

Count II asserts a violation of the dormant Commerce Clause. Plaintiff claims to own renewable energy certificates ("RECs") that Connecticut statutes do not deem acceptable for purposes of state renewable portfolio standards ("RPS") compliance. Instead, Connecticut statutes deem RECs issued by the New England Power Pool Generation Information System ("NEPOOL GIS") as acceptable for RPS compliance purposes. Plaintiff asserts that Connecticut's reliance upon NEPOOL GIS RECs for RPS compliance discriminates against out-of-state sellers of RECs and violates the dormant Commerce Clause. Complaint, ¶71.

Count III alleges that rights under the FPA and the dormant Commerce Clause have been violated under color of state law, providing plaintiff remedies under 42 U.S.C. § 1983.

[1] http://www.cga.ct.gov/2014/ACT/PA/2014PA-00094-R00SB-00357-PA.htm

Plaintiff asks the Court to declare that the State's actions have violated the FPA and the Commerce Clause and further asks the Court to enjoin the defendants from violating federal law and specifically asks the Court to bar issuance of the Draft RFP in final form.

As set forth fully below, this Court should dismiss the Complaint. Plaintiff's Count I preemption claim: 1) is unripe; 2) is beyond this Court's subject matter jurisdiction because plaintiff failed to exhaust remedies; and 3) fails to state a plausible claim. Plaintiff's Count II dormant Commerce Clause claim: 1) is not redressable by this court; and 2) fails to state a plausible claim. Finally, plaintiff's Count III 42 U.S.C. § 1983 claim must be dismissed because it is barred by the Eleventh Amendment and fails as a matter of law.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The Parties

PURA is a state agency that regulates investor-owned public utilities in Connecticut. It has three commissioners which are appointed by the Governor and which serve terms as specified in Conn. Gen. Stat. § 16-2.

Plaintiff alleges it owns, operates and develops solar projects that are Qualifying Facilities ("QF") under the Public Utility Regulatory Practices Act of 1978 ("PURPA"). Complaint, ¶13. A QF is a generating facility that meets certain standards set by the Federal Energy Regulatory Commission ("FERC") regarding matters such as size, fuel use, and efficiency. Plaintiff alleges it owns projects located in Georgia and New York. Complaint, ¶13.

2. Connecticut's Electric Restructuring Act

Connecticut restructured its electric industry in 1998. Public Act 98-28, *An Act Concerning Electric Restructuring* ("Public Act 98-28").[2] Based upon the premise that a competitive generation market would allow customers to choose among alternative electric generation services, the state adopted an electric industry structure in which electric utilities would no longer be responsible for constructing and operating electric generating facilities to meet customer needs. Public Act 98-28, Section 2(5). Instead, competitive (non-utility) companies would construct and operate electric generating facilities, and compete to serve Connecticut's customers at the lowest cost.

Public Act 98-28 intended for generation of electricity to be achieved in a manner that minimizes negative environmental impacts. Public Act 98-28, Section 2(9). Prior to electric restructuring, the state had direct regulatory authority over the portfolio of generating resources that would be constructed by electric utilities to serve customers. However, in a restructured electric industry, Connecticut would achieve environmental benefits by regulating the retail electricity transaction. Through its jurisdiction over retail transactions, Connecticut would require that retail providers of electricity include supply from environmentally friendly renewable energy sources in the retail electric generation service sold to customers. Conn. Gen. Stat. § 16-245a(a).

This requirement is known as the renewable energy portfolio standard or RPS. The RPS requires that retail electricity sold to Connecticut customers[3] must include an increasing percentage of energy from renewable sources. Conn. Gen. Stat. § 16-245a(a). Compliance with

[2] http://www.cga.ct.gov/ps98/Act/pa/1998PA-00028-R00HB-05005-PA.htm

[3] The RPS applies to retail electric generation services sold to customers of investor-owned electric distribution companies, whether by competitive electric suppliers or the electric distribution companies themselves.

the RPS is demonstrated by acquiring one REC for every megawatt-hour of renewable energy sold. Conn. Gen. Stat. § 16-245a(b). RECs satisfy the RPS because they represent the renewable energy attribute of generated electricity that is unbundled from the underlying energy, and can be sold separately.

The retail requirement and the REC system work in tandem to provide an additional payment stream to generators of renewable energy. Connecticut statutes create demand for NEPOOL GIS RECs by imposing the RPS obligation upon retailers (and the retail electric generation services transaction). Generators that possess NEPOOL GIS RECS can receive the payment stream by selling the RECs to retailers needing them for compliance. Therefore, generators can receive both electricity revenues and REC revenues.

Even after creating the additional payment stream, Connecticut continues to influence REC values in three ways. One method is adjusting demand over time through the RPS obligation percentage. A second method of influencing REC values is by defining the categories of renewable energy to either include or exclude various forms of renewable energy. The third method is statutorily capping the value of a REC.

For example, the Class I obligation was introduced in 1998, delayed in 2003, and then extended and increased in 2007.[4] Specifically, the RPS obligation percentages were introduced in Section 25 of Public Act 98-28. The legislature subsequently deferred implementing those percentages in 2003. Public Act 03-135, *An Act Concerning Revisions to the Electric Restructuring Legislation* ("Public Act 03-135"),[5] Section 7. Then, in 2007, the legislature acted

[4] Connecticut created two classes of renewable energy, Class I and Class II, which are defined at Conn. Gen. Stat. §§ 16-1(a)(20) and (21), respectively. Generally, Class I RECs are designed to have a greater monetary value than Class II RECs.

[5] http://www.cga.ct.gov/2003/act/Pa/2003PA-00135-R00SB-00733-PA.htm

to increase the overall RPS goal to 20% by 2020. Public Act 07-242, *An Act Concerning Electricity and Energy Efficiency*,[6] Section 40. All else equal, when the state acts to increase the demand for RECs, the price obtained by renewable energy generators increases. When the state acts to decrease the demand for RECs, the price decreases.

Connecticut has also influenced REC values by amending the definitions of qualifying resources, which also affects demand. For example, in 2003, the legislature added run-of-river hydropower to the definition of Class I resources, but also introduced an emissions limitation on eligible biomass generating sources. Public Act 03-135, Section 1. Later, in 2013, the legislature required the DEEP Commissioner to adopt a schedule under which biomass and landfill gas RECs will be given a gradually reduced value. Public Act 13-303, Section 5.

Finally, state law essentially caps the value of RECs at 5.5 cents per kWh by offering an alternate means of RPS compliance in lieu of providing RECs. Conn. Gen. Stat. § 16-245(k). The alternate form of compliance is a cash payment of 5.5 cents per kWh. *Id*. Because no provider of retail electric generation services in Connecticut will rationally pay more than 5.5 cents per kWh, Conn. Gen. Stat. § 16-245(k) acts as a statutory cap on REC values.

3. NEPOOL Generation Information System

If a retail provider complies with the RPS using RECs, it must use RECs issued by NEPOOL GIS. Conn. Gen. Stat. § 16-245a(b). NEPOOL GIS was created by the New England Power Pool, or "NEPOOL". NEPOOL 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: a generation sector; a transmission sector; a supplier sector; a publicly-owned entity sector; and an end user sector. *New England Power Pool*, 88 FERC ¶ 61079, 61181 (July 16, 1999).

[6] http://www.cga.ct.gov/2007/ACT/PA/2007PA-00242-R00HB-07432-PA.htm

NEPOOL does not have a state regulator sector. NEPOOL is governed through a committee structure expressly approved by FERC. *New England Power Pool*, 88 FERC at ¶ 61079.

NEPOOL GIS issues RECs in accordance with a set of operating rules drafted and approved by NEPOOL under this federally approved governance structure. Specifically, NEPOOL's committee structure drafted and adopted the NEPOOL GIS Operating Rules to govern the process of REC creation, transfer and retirement.[7]

To create RECs, NEPOOL GIS obtains information from ISO New England, Inc. ("ISO-NE"), the regional transmission organization regulated by FERC. NEPOOL GIS Operating Rule 2.1(a)(i). ISO-NE reports the generating sources actually used to serve load throughout the geographic area managed by ISO-NE (its control area), which may include electricity imported into New England from neighboring power pools. However, NEPOOL GIS will only create RECs for imported power if certain requirements are met. NEPOOL GIS Operating Rule 2.7(c). RECs will be issued for imported power if, *inter alia*, the power is generated in an adjacent control area;[8] the power is recognized by a state or states as a renewable energy source; the generator schedules transmission rights into the NEPOOL control area; and the power is settled in the ISO-NE settlement system. NEPOOL GIS Operating Rule 2.7(c).

Rule 2.7(c) is known as the "deliverability requirement". It was written by NEPOOL to ensure that "…GIS certificates are only awarded for renewable energy that is consumed in the NEPOOL control area and displaces fossil fuel generation in New England." PURA Decision

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[7] http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=0CC0QFjACahUKEwjJ_Pz87JHGAhXQw4AKHc45AFo&url=http%3A%2F%2Fwww.nepoolgis.com%2Fwp-content%2Fuploads%2Fsites%2F3%2F2014%2F07%2FGIS-Operating-Rules-to-be-effective-7_1_14.doc&ei=U9l-VYmHEtCHgwTO84DQBQ&usg=AFQjCNGACefyvDqcd8x-w4AgQMQmlbqBWg&bvm=bv.95515949,d.eXY

[8] Adjacent control areas to NEPOOL include ISO-New York, Northern Maine Independent System Administrator, Inc., Quebec and New Brunswick. Complaint, ¶26.

dated November 9, 2005 in Docket No. 04-01-13, *DPUC Review of RPS Standards and Trading Programs in New York, Pennsylvania, New Jersey, Delaware and Maryland*, p. 5,[9] citing comments submitted by APX, a company that serves as the GIS Administrator.[10] The deliverability requirement was created by NEPOOL because: 1) "it reflects the realities of how power moves," 2) "[t]he purpose of the GIS is to reflect accurately the emission characteristics of energy that is actually consumed in the NEPOOL Control Area"; and 3) "[a]llowing non-adjacent imported energy would diminish the accuracy of the emission characteristics." Decision in Docket No. 04-01-13, p. 5, citing comments submitted by APX.

Connecticut law expressly incorporates NEPOOL GIS. It recognizes RECs for electricity generated within the ISO-NE control area (Conn. Gen. Stat. § 16-245a(b)(1)(A)), or imported into the ISO-NE control area pursuant to NEPOOL GIS Operating Rule 2.7(c) (Conn. Gen. Stat. § 16-245a(b)(1)(B)). Other New England states also rely upon NEPOOL GIS for RPS compliance, including Maine,[11] Massachusetts,[12] New Hampshire,[13] Rhode Island[14] and Vermont.[15]

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9 http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/9ab396426cd4b833852570ba0074f0b1?OpenDocument&Highlight=0,04-01-13

10 In adjudicating a Rule 12(b)(6) motion, a district court a court may consider materials in addition to the complaint if such materials are public records, which can include letter decisions of government agencies and records of administrative agencies. *Bebry v. ALJAC LLC*, 954 F. Supp. 2d 173, 176 (E.D.N.Y. 2013).

11 "ISO-NE Control Area. For service in the ISO-NE control area, verification of compliance with the portfolio requirements must be through eligible GIS certificates." Code Me. R. 65-407, Ch. 311, §6(B)(1).

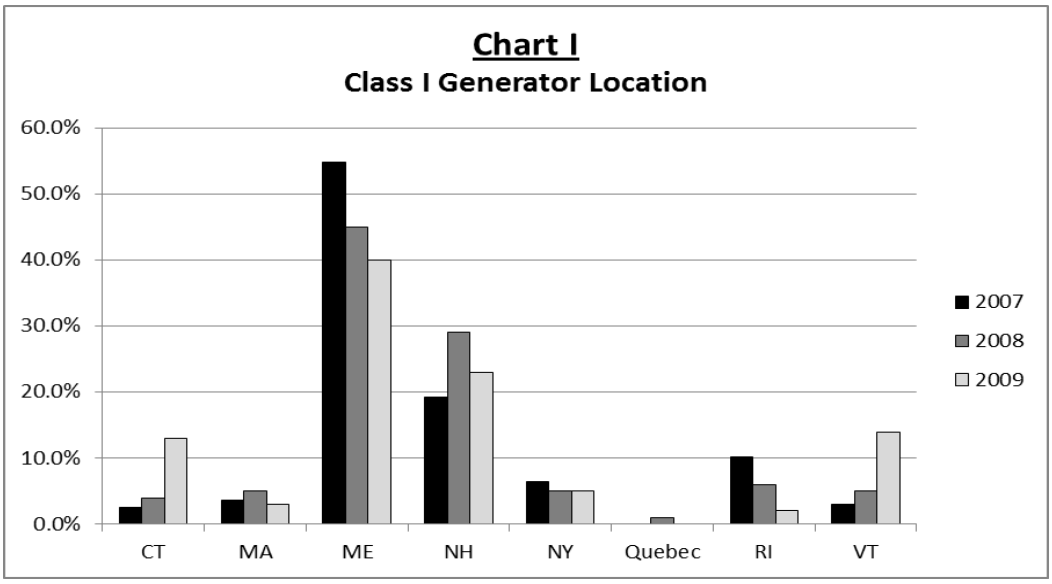
12 "…For electrical energy transactions included in the ISO-NE Settlement Market System, the Compliance Filings shall include documentation from the NEPOOL GIS administrator of the Retail Electricity Supplier's ownership of GIS Certificates…." 225 Mass. Code Regs. 14.09(c)(1).

13 "The electric renewable portfolio standard program established in this chapter shall utilize the regional generation information system (GIS) of energy certificates administered by ISO-New England and the New England Power Pool (NEPOOL) or their successors." N.H. Rev. Stat. Ann. §362-F:6(I).

14 "…compliance with the renewable energy standard may be demonstrated through procurement of NE-GIS certificates relating to generating units certified by the commission as using eligible renewable energy sources, as evidenced by reports issued by the NE-GIS administrator." R.I. Gen. Laws Ann. §39-26-4(d) (West).

15 On June 11, 2015, the Governor of Vermont signed a bill incorporating NEPOOL GIS, but the final public act was not available as of the date this brief was filed.

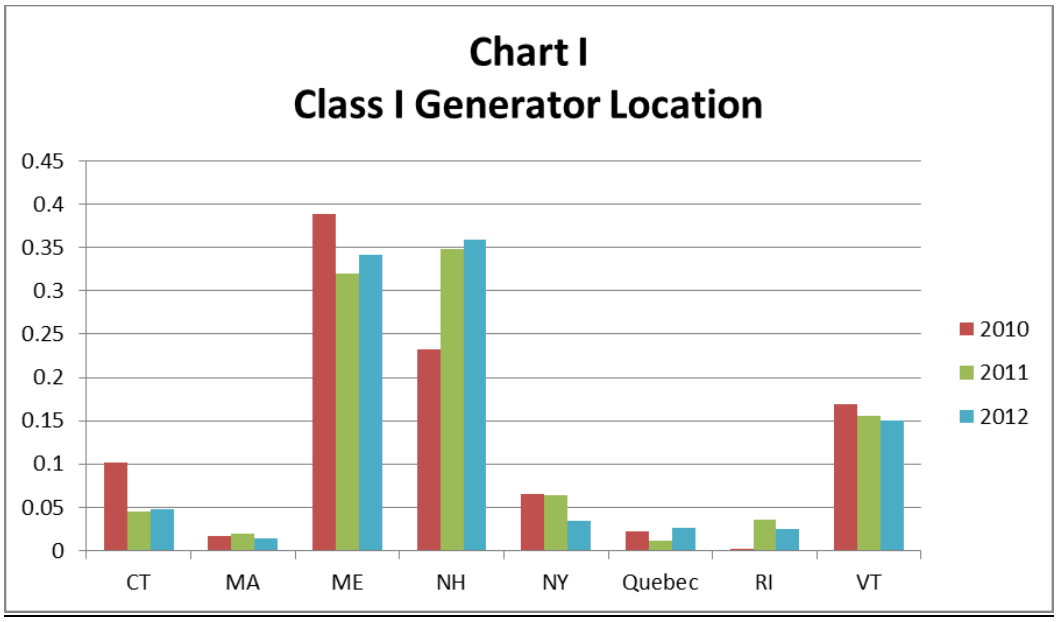
Two charts demonstrate the geographic source of all Class I RECs used for Connecticut RPS compliance each year since 2007. The charts were included in two of PURA's annual RPS compliance proceeding decisions.[16]



October 31, 2012 Decision in PURA Docket No. 10-09-06, *Annual Review of Connecticut Electric Suppliers' and Electric Distribution Companies' Compliance with Connecticut's Renewable Energy Portfolio Standards in the Year 2009*, p. 5 ("PURA Docket No. 10-09-06").[17]

[16] Class I is defined at Conn. Gen. Stat. § 16-1(a)(20), and includes electricity derived from solar power. Because plaintiff claims to be the owner, operator and developer or various solar projects in Connecticut, Georgia and New York as well as other places (Complaint, ¶13), this Memorandum will focus on Connecticut Class I renewable energy.

[17] http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/16a9c428b7c8e3f885257aaa005f02a9?OpenDocument&Highlight=0,10-09-06



February 11, 2015 Decision in PURA Docket No. 13-06-11, *Annual Review of Connecticut Electric Suppliers' and Electric Distribution Companies' Compliance with Connecticut's Renewable Energy Portfolio Standards in the Year 2012*, p. 11 ("PURA Docket No. 13-06-11").[18]

These charts show that Connecticut's in-state renewable generation only once accounted for more than ten percent of Connecticut Class I RPS compliance. The vast majority of Connecticut's Class I REC supply has come from Maine and New Hampshire.

4. DEEP's Draft RFP Under Sections 6 and 7

As set forth above, after creating the demand for RECs, Connecticut has influenced REC values in various ways. In recent years, Connecticut has employed an additional tool to influence REC values. It has acted to increase the supply of RECs. Reacting to a projected shortfall in Class I RECs, the Connecticut General Assembly created a process under which

18 http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/1ab7c2af210c771b85257def00667d01?OpenDocument&Highlight=0,13-06-11

DEEP can effectuate an increase in the supply of Class I RECs by issuing an RFP for Class I renewable energy sources, and selecting proposals from such resources of up to four percent of the load distributed by Connecticut's electric distribution companies. Section 6 of Public Act 13-303. If a proposal is selected by the DEEP Commissioner and a power purchase agreement is successfully negotiated between the electric distribution company and the selected generating facility, the agreement is submitted to PURA, which shall review and approve the agreement within thirty days. *Id*. Section 7 of Public Act 13-303 sets up a similar process under which the DEEP Commissioner can effectuate an increase in the supply of either Class I RECs or large-scale hydropower, of up to five percent of electric distribution company load. If a proposal is selected by the DEEP Commissioner and a power purchase agreement is successfully negotiated between the electric distribution company and the selected generating facility, the agreement is submitted to PURA, which shall review and approve the agreement within sixty days.

5. Prior Related Litigation

In 2013, DEEP successfully conducted an RFP under Section 6. The RFP sought power purchase agreements for energy and RECs, and DEEP selected two such contracts. The electric distribution companies successfully negotiated power purchase agreements, which were submitted to PURA for approval pursuant to Section 6. PURA performed its limited role, and approved the contracts in a PURA Decision dated October 23, 2013 in Docket No. 13-09-19, *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.[19] PURA found that the selected projects did not exceed four percent of electric distribution company load. *Id*., p. 6.

Plaintiff sued Commissioner Klee in U.S. District Court claiming the DEEP Commissioner's actions under Section 6 were federally preempted. Plaintiff asserted that the DEEP Commissioner's actions intruded on FERC's exclusive jurisdiction to regulate wholesale transactions for energy and capacity under the FPA. On December 10, 2014, plaintiff's case was dismissed because plaintiff lacked standing to challenge the completed procurement and because plaintiff failed to state a claim upon which relief could be granted. *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *1 (D. Conn. 2014) *appeal docketed*, No. 15-20 (2nd Cir. January 2, 2015) ("*Allco I*").

On February 25, 2015, DEEP issued a Draft RFP under which it would conduct an RFP pursuant to remaining authority under Section 6 (in terms of percent of electric distribution company load) and Section 7. The Draft RFP would solicit power purchase agreements and transmission alternatives. Transmission alternatives may be selected without a power purchase agreement. Exhibit A to plaintiff's Complaint, p. 6.

The Draft RFP includes only two references to PURA. In Section 2.5.1, the Draft RFP indicates that agreements entered into under Sections 6 and 7 are subject to PURA review and approval. The second reference is in Appendix F-1, where a bidder would consent to release of the bidder's entire unredacted proposal by DEEP to PURA for its statutory review and approval.

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19 http://www.dpuc.state.ct.us/FINALDEC.NSF/0d1e102026cb64d98525644800691cfe/5b77ec07a58f0bf885257c0d005de16d?OpenDocument&Highlight=0,number,nine,wind,farm

Plaintiff sued DEEP Commissioner Klee and PURA Commissioners House, Betkoski and Caron regarding DEEP's proposed actions under Sections 6 and 7 announced in the February 25, 2015 Draft RFP.

III. ARGUMENT

A. STANDARD OF REVIEW FOR A MOTION TO DISMISS

When considering a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, the Court "must accept as true all material factual allegations in the Amended Complaint and refrain from drawing inferences in favor of the party contesting jurisdiction." *Sicignano v. United States*, 127 F. Supp. 2d 325, 328 (D. Conn. 2001) (quoting *Atlantic Mut. Ins. Co. v. Balfour Maclaine Int'l. Ltd.*, 968 F.2d 196, 198 (2d Cir. 1992)). However, "[i]n resolving the question of jurisdiction, the district court can refer to evidence outside the pleadings and 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, 496-97 (2d Cir. 2002) (quoting *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000)).

When considering a Rule 12(b)(6) motion to dismiss, the Court accepts as true all factual allegations in the Amended Complaint and draws inferences from those allegations in the light favorable to the plaintiff. See *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683 (1974); *Easton v. Sundram*, 947 F.2d 1011, 1014-15 (2d Cir. 1991), *cert. denied*, 504 U.S. 911, 112 S.Ct. 1943 (1992). In addition, a court may consider "facts stated … in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991). Dismissal is warranted when, under any set of facts that the plaintiff can prove consistent with the allegations, it is clear that no relief can be granted. See *Hishon v. King & Spaulding*, 467 U.S. 69, 73, 104

S.Ct. 2229 (1984); *Frasier v. General Elec. Co.*, 930 F.2d 1004, 1007 (2d Cir. 1991). Moreover, "'[a] complaint which consists of conclusory allegations unsupported by factual assertions fails even the liberal standard of Rule 12(b)(6).'" *De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (quoting *Palda v. Gen. Dynamics Corp.*, 47 F.3d 872, 875 (7th Cir. 1995)).

B. PLAINTIFF'S COUNT I PREEMPTION CLAIM IS NOT RIPE AS TO PURA COMMISSIONERS AND SHOULD BE DISMISSED.

Plaintiff's preemption claim challenges the anticipated implementation of Sections 6 and 7. Plaintiff has sued Commissioners House, Betkoski and Caron for purported violations of the Supremacy Clause, U.S. Constitution, art. VI, cl. 2, that have not occurred and may never occur. PURA's sole responsibility under Sections 6 and 7 is to review and approve successfully negotiated power purchase agreements upon receiving an application. At this point, it is entirely premature to conclude that any such application will reach PURA. Plaintiff's preemption claim should be dismissed as to PURA Commissioners because it is unripe.

Claims are only justiciable by federal courts when they are ripe for review. *AMSAT Cable Ltd. v. Cablevision of Connecticut Ltd. Partnership*, 6 F.3d 867, 872 (2d Cir. 1993). Further, an Article III court may not entertain a claim that is "based upon contingent future events that may not occur as anticipated, or indeed may not occur at all." (internal citations omitted, internal quotations omitted) *Thomas v. City of New York*, 143 F.3d 31, 34 (2d Cir. 1998). Cases are not ripe for adjudication when "there are nebulous future events so contingent in nature that there is no certainty they will ever occur…" *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d 1138, 1146 (2d Cir. 1993). "In determining whether a matter is ripe for decision, we look, first, to whether the issue is fit for review and, second, to the hardship to the parties of withholding review." *AMSAT Cable Ltd.*, 6 F.3d at 872.

Plaintiff seeks to enjoin PURA Commissioners from approving any application resulting from DEEP's anticipated procurement under Sections 6 and 7. However, DEEP might not adopt its Draft RFP and issue it in final form. Assuming the RFP is issued in final form, DEEP might not select any projects. Even assuming DEEP does select projects, final agreements might not be successfully negotiated. Finally, even if DEEP does select projects, it might select transmission projects that do not appear to be subject to PURA's approval.

This tenuous chain of anticipated events makes plaintiff's preemption claim against PURA Commissioners unfit for review. PURA Commissioners' purported violation of the Supremacy Clause would occur, if at all, after a series of future events that are entirely contingent in nature and are uncertain to occur. It is entirely unclear that PURA will ever be asked to rule upon an application made to it under Sections 6 or 7.

Further, plaintiff is no worse off by waiting to see whether an application ever reaches PURA before challenging whether PURA Commissioners are preempted from acting. Withholding review of PURA's powers to review and approve places no hardship on plaintiff. Plaintiff does not intend to submit a bid under the current Draft RFP, and thus will commit no resources to the Draft RFP. Plaintiff's preemption claim is unripe as to PURA Commissioners and should be dismissed under Rule 12(b)(1).

C. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S COUNT I PREEMPTION CLAIM.

Plaintiff asserts that Connecticut's implementation of Sections 6 and 7 should be preempted because it is in conflict with PURPA. This Court lacks subject matter jurisdiction over any alleged PURPA conflict in the absence of proof that plaintiff complied with

jurisdictional prerequisites and first petitioned FERC for relief pursuant to PURPA's § 210(h)(2)(B) (codified at 16 U.S.C. § 824a-3(h)(2)(B)).

Plaintiff's preemption claim is based upon its view that PURPA somehow preempts renewable energy programs legislated by states outside of PURPA. Plaintiff's preemption argument cannot be understood in the absence of its PURPA theory. Nearly every paragraph of Count I,[20] and nearly every prayer for relief associated with Count I, relates directly to PURPA.

Plaintiff cannot maintain a private action in federal district court against a state regulatory authority such as PURA based upon an alleged conflict with PURPA without first satisfying administrative prerequisites. 16 U.S.C. § 824a-3(h)(2)(B);[21] *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269 (2d Cir. 2002). Plaintiff may only bring an action in district court to require PURA to comply with PURPA if it petitions FERC, and FERC does not within 60 days initiate an enforcement action. 16 U.S.C. § 824a-3(h)(2)(B); *Niagara Mohawk*, 306 F.3d at 1269. Plaintiff did not follow this procedure before commencing the instant action, and therefore this Court lacks subject matter jurisdiction over plaintiff's preemption claim. Plaintiff's preemption claim should be dismissed.

[20] Even ¶43, which does not mention PURPA or QFs, in fact relies upon the PURPA claim. Plaintiff maintains that states can compel a wholesale transaction under PURPA, but cannot compel a wholesale transaction outside of PURPA. See, ¶ 45, and Prayer for Relief (1)(a)(i).

[21] "(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."

D. PLAINTIFF'S COUNT II DORMANT COMMERCE CLAIM IS NOT REDRESSABLE BY THIS COURT, AND SHOULD BE DISMISSED.

The "irreducible constitutional minimum of standing" contains three elements: (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." (quotation marks, citations, alterations, and footnotes omitted) *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130 (1992). Plaintiff's dormant Commerce Clause claim cannot be redressed by a favorable decision, and should be dismissed under Rule 12(b)(1).

Plaintiff's Prayer for Relief asks this Court to strike down Connecticut's RPS compliance statute, Conn. Gen. Stat. § 16-245a(b). According to plaintiff Conn. Gen. Stat. § 16-245a(b) violates the dormant Commerce Clause because the statute recognizes NEPOOL GIS RECs, but does not recognize RECs plaintiff purportedly possesses from its Georgia and New York facilities. Complaint, ¶¶33, 68.[22] Striking down Conn. Gen. Stat. § 16-245a(b) does nothing to aid plaintiff. This Court cannot insert plaintiff's desired REC system into Conn. Gen. Stat. § 16-245a(b) to make plaintiff's RECs recognizable under the statute. This Court cannot determine that plaintiff's REC system or its RECs are legitimate or consistent with Connecticut's RPS. Therefore, plaintiff's claim of injury is not redressable by this Court, and should be dismissed.

[22] In truth, plaintiff's RECs are not banned from Connecticut by Conn. Gen. Stat. § 16-245a(b) or any other statute. Instead, Conn. Gen. Stat. § 16-245a(b) does not recognize plaintiff's RECs for statutory RPS compliance purposes.

E. PLAINTIFF FAILS TO STATE A VALID PREEMPTION CLAIM BECAUSE IT IS ESTOPPED FROM RAISING IT AND IN ANY EVENT FAILS TO ASSERT A VALID CLAIM.

Plaintiff previously litigated its preemption claim in *Allco I*, and lost. Collateral estoppel bars plaintiff from relitigating its preemption claim here. Further, even if not barred by collateral estoppel, plaintiff fails to articulate a plausible preemption claim, and its Complaint should be dismissed.

1. Plaintiff is Estopped from Relitigating its Preemption Claim.

"Under the doctrine of offensive collateral estoppel, a plaintiff may preclude a defendant from relitigating an issue the defendant has previously litigated and lost to another plaintiff." *Faulkner v. Nat'l Geographic Enterprises Inc*., 409 F.3d 26, 37 (2d Cir. 2005), citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645 (1979). Plaintiff is barred from litigating an issue on collateral estoppel grounds if: "(1) the issues in both proceedings [are] identical, (2) the issue in the prior proceeding [was] actually litigated and actually decided, (3) there [was] a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated [was] necessary to support a valid and final judgment on the merits." *Faulkner*, 409 F.3d at 37. Plaintiff previously pursued its exact same preemption claim in federal district court, was found to have failed to state a claim and its suit was dismissed. See *Allco I*, at *6-10. Indeed, plaintiff filed in this record a Notice of Related Case, citing *Allco I* as related to the instant action.

In *Allco I*, Count I of plaintiff's complaint was entitled "Violation of the Federal Power Act and the Supremacy Clause of the United States Constitution." In its prior Count I, plaintiff claimed DEEP violated the Supremacy Clause by: 1) conducting a Section 6 RFP in which it selected the winning bidder; and 2) directing regulated electric distribution companies to enter

into power purchase agreements. *Allco I* at *1, 7-8. Here, Count I of plaintiff's complaint has the exact same title, and claims DEEP and PURA will violate federal law because: 1) DEEP will conduct a Section 6 and Section 7 RFP under which it will select the winning bidder(s); and 2) DEEP will direct regulated electric distribution companies to enter into power purchase agreement(s). Complaint, ¶43. In *Allco I*, plaintiff justified its preemption theory based upon rulings from the Third and Fourth Circuits. *Allco I* at *9. Here as well, plaintiff justifies its preemption theory on the very same cases. Complaint, ¶43.

Plaintiff's preemption claim is collaterally estopped because the same exact issue was fully litigated in *Allco I*. The Section 6 challenge is exactly the same. Though *Allco I* did not concern Section 7, that statute is identical to Section 6 in all material respects, particularly in regard to plaintiff's preemption claim. Specifically, Section 7 permits DEEP to conduct a RFP and empowers DEEP to direct electric distribution companies to enter power purchase agreements. Collateral estoppel does not require a complete identity of issues to satisfy the first prong. *In re Raytech Corp*., 217 B.R. 679, 687 (Bankr. D. Conn. 1998), citing *Greene v. United States*, 79 F.3d 1348, 1352 (2d Cir.1996), *cert. denied*, 519 U.S. 1028, 117 S.Ct. 582 (1996). Instead, collateral estoppel applies if the subject issue is "in substance the same." *In re Raytech*, 217 B.R. at 687, citing *Montana v. United States*, 440 U.S. 147, 155, 99 S.Ct. 970 (1979). It is also sufficient if the subject issue had been decided by implication in the prior court. *In re Raytech*, 217 B.R. at 687, citing *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 117 F.3d 674, 677 (2d Cir.1997). Here, plaintiff tested the question of whether a completed procurement conducted under Section 6 ran afoul of the Supremacy Clause, and received the answer that it did not. *Allco*

I, at *6-10. *Allco I* has already decided that a procurement to be conducted under Section 6 will not violate the Supremacy Clause, and Section 7 rises and falls with the same analysis.

As to the second prong of collateral estoppel, the Supremacy Clause issue raised by plaintiff here was actually litigated and actually decided in *Allco I*. Plaintiff received a decision on the merits that fully considered and rejected its merits claims. *Allco I*, at *6-10. Similarly, the third prong of collateral estoppel is also satisfied. Plaintiff had a full and fair opportunity to litigate its claims in *Allco I*, as demonstrated by the district court's careful, extensive consideration of plaintiff's claims.

Finally, the fourth prong of collateral estoppel is also satisfied. The district court could only issue a judgment on the merits by addressing plaintiff's Supremacy Clause argument. Plaintiff's Supremacy Clause argument was the central issue reached on the merits by the district court. Indeed, it was Count I of plaintiff's complaint. *Allco I* at *10. The Supremacy Clause issue was raised, litigated and decided against plaintiff. Because the legal issues in Count I have already been litigated and decided in a prior case, Count I should be dismissed in its entirety.

2. Plaintiff Fails to Assert a Valid Preemption Claim.

Plaintiff claims to own Qualifying Facilities under PURPA. PURPA was adopted to provide Qualifying Facilities the right to sell power to electric utilities, and creates for electric utilities a corresponding obligation to buy their power. It does not require that all power procurement be conducted under PURPA, and it does not require that Sections 6 and 7 be conducted pursuant to PURPA. More importantly, FERC has adopted the rebuttable presumption that the PURPA must-buy requirement no longer exists in Connecticut, rendering plaintiff's basis of preemption a legal impossibility. A state does not violate the Supremacy Clause by regulating the buy-side of a wholesale power transaction and directing a utility to

accept an offer to sell, and enter a power purchase agreement. Consequently, plaintiff entirely fails to state a plausible claim that DEEP's proposed procurement violates the Supremacy Clause. Count I should be dismissed for failure to state a claim if the Court does not dismiss on ripeness grounds or due to a lack of subject matter jurisdiction.

With Section 210 of PURPA's Title II, 92 Stat. 3144, 16 U.S.C. § 824a–3, Congress sought to foster the development of cogeneration and small power production facilities. *FERC v. Mississippi*, 456 U.S. 742, 750, 102 S.Ct. 2126 (1982). However, Congress determined that traditional utilities would be reluctant to purchase power from, and to sell power to, these new nontraditional facilities. *FERC v. Mississippi*, 456 U.S. at 750-751. Therefore, it directed FERC, in consultation with state utility commissions, to require utilities to sell electric generation to and buy electric generation from QFs. *FERC v. Mississippi*, 456 U.S. at 751; 16 U.S.C. § 824a–3(a). In this regard, PURPA acts as a "must-buy" requirement for QFs.

However, states have never been constrained to act only through PURPA merely because a QF may be involved. In 1997, FERC held that "states have numerous ways outside of PURPA to encourage renewable resources." *Midwest Power Systems, Inc.*, 78 FERC ¶¶ 61,067, 61248, 1997 WL 34082 (January 29, 1997). More recently, FERC held:

> Nothing in the Commission's regulations limits the authority of either an electric utility or a QF to agree to rates for any purchases or terms or conditions relating to any purchases which differ from the rates or terms or conditions which would otherwise be required by the Commission's regulations [implementing PURPA].

Otter Creek Solar LLC, 143 FERC ¶ 61282 (June 27, 2013). In *Otter Creek*, Vermont statutorily created a program to encourage the development of renewable energy facilities in that state. *Otter Creek*, 143 FERC at ¶ 61282. The statute permitted the Vermont Public Utilities Board to create a market-based mechanism that would form the contract price, instead of the PURPA

avoided cost measure. 30 V.S.A. § 8005a(f). FERC noted that the Vermont program was an optional program that did not foreclose participation in Vermont's long-standing PURPA program. *Otter Creek*, 143 FERC at ¶ 61282. FERC chose not to initiate an enforcement action against Vermont, and chose not to issue an order invalidating the new renewables program. *Id*.

Similarly, FERC very recently chose not to act when a QF asked it to initiate an enforcement action against the California Public Utilities Commission for creating a renewable energy program that is an alternative to PURPA. *Winding Creek Solar LLC*, 151 FERC ¶ 61103 (May 8, 2015). As with Vermont's alternative program, FERC held the California alternative renewables program did not foreclose participation in California's standard PURPA program. *Id*.

More fundamentally, however, PURPA cannot conflict with DEEP's proposed procurement because: 1) Congress has severely reduced PURPA's role in restructured states (like Connecticut);[23] and 2) FERC has terminated PURPA's must-buy requirement in Connecticut for any QF that is 20 MW or larger.

Congress' historical concern regarding QF access to market is ameliorated by the existence of federally regulated wholesale markets, particularly in restructured states. Congress recognized this shift, and amended PURPA to provide for the potential termination of the PURPA must-buy requirement when certain circumstances are met. Section 1253(a) of the Energy and Policy Act of 2005 added to PURPA section 210(m) for this purpose. Specifically, this section permits FERC to terminate the must-buy requirement if FERC finds that QFs have nondiscriminatory access to markets. 16 U.S.C. § 824a-3(m).

[23] Vermont has not restructured, and California halted its restructuring effort.

FERC has made this finding for Connecticut. It has terminated the must-buy provisions with respect to QFs that are larger than 20 MW, subject to a rebuttable presumption. *New PURPA Section 210(m) Regulations Applicable to Small Power Prod. & Cogeneration Facilities*, 117 FERC ¶ 61078, para. 117 (Oct. 20, 2006). Because DEEP's Draft RFP seeks to purchase energy or energy and RECs from facilities 20 MW and greater, FERC has already found that PURPA does not and cannot apply in this situation.[24] Plaintiff's claim of PURPA-based preemption is not just implausible, it is legally impossible. The claim should be dismissed in its entirety.

Plaintiff's Complaint also constructs a new theory that a state can only direct a state-regulated utility to enter a wholesale power contract if the state acts under PURPA, and any attempt to direct a state-regulated utility to enter a wholesale power contract outside of PURPA encroaches upon FERC's powers under the FPA. Complaint, ¶¶21, 42-43, 45. Plaintiff points to no provision of PURPA to this effect, and points to no case law in support of this newly-minted legal theory.

Indeed, the proffered legal theory is plainly incorrect. The FPA reserves for states the ability to regulate the buy-side of a wholesale power transaction. The Supreme Court has expressly recognized that under the FPA, states retain authority over "administration of integrated resource planning and utility buy-side and demand-side decisions." *New York v. FERC*, 535 U.S. 1, 24, 122 S.Ct. 1012 (2002), citing Order No. 888, FERC Stats. & Regs.

[24] Nor can plaintiff ask this Court to rebut the presumption established by FERC. Pursuant to FERC's regulations, a QF must petition FERC to seek reinstatement of the PURPA must-buy provisions. *New PURPA Section 210(m) Regulations*, 117 FERC ¶ 61078, para. 192 (October 20, 2006); 18 C.F.R. § 292.311.

¶31,036, 31,782, n.544 (May 10, 1996).[25] Here, the electric distribution companies are the buy-side of any wholesale transaction fostered by Sections 6 and 7 because they may purchase energy or energy and RECs. The state is merely directing the electric distribution company to accept an offer to sell. Sections 6 and 7 are entirely consistent with U.S. Supreme Court precedent, and plaintiff's proffered theory of preemption is not supported by statute or case law.

Nor does plaintiff's incorrect analogy to recent Third and Fourth Circuit decisions support its claim of field preemption. Complaint, ¶43. Plaintiff correctly states that the Third and Fourth Circuit decisions invalidated state actions by New Jersey and Maryland on field preemption grounds. *Id*. However, those programs are entirely dissimilar to Sections 6 and 7. *Allco I* at *9. Further, the Third and Fourth Circuits did not invalidate the programs because the state regulated the buy-side of the transaction, which is plaintiff's theory here. The programs were invalidated because the state allegedly functionally set the rate for electric capacity, and setting rates for electric capacity is FERC jurisdiction. *PPL EnergyPlus v. Solomon*, 766 F.3d 241, 253 (3rd Cir. 2014), *petition for cert. filed, Joseph Fiordaliso, in His Official Capacity as Commissioner of the New Jersey Board of Public Utilities, et al v. PPL EnergyPlus, LLC, et al.*, (U.S. December 12, 2014) (No. 14-694); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 476 (4th Cir. 2014), *petition for cert. filed*, (U.S. November 26, 2014) (No. 14-614) Plaintiff's field preemption claim therefore lacks legal support, is not plausible, and should be dismissed.

[25] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,626 n.544 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, 31,782 n.544 (1996), *clarified*, 76 FERC ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *clarified*, 79 FERC ¶ 61,182 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1, 122 S.Ct. 1012 (2002).

Nor has plaintiff stated a plausible conflict preemption claim. Plaintiff claims that Connecticut's implementation of Sections 6 and 7 results in a state regulatory framework that conflicts with the framework of voluntarily negotiated contracts adopted by FERC in that Connecticut's actions result in wholesale power contracts that are not voluntary and are result in a price that differs from the prevailing market price. Complaint, ¶44. However, plaintiff fails to identify which FERC-regulated market price Connecticut is supposedly undermining, and misconstrues what the term "voluntary" means in this context.

Neither FERC nor any court has ever held that under FERC's regime, a power purchase agreement can only be considered voluntarily negotiated if it is entirely free of state buy-side regulation. Similarly, neither FERC nor any court has ever held that when a state directs an electric utility to accept a freely submitted offer to sell, the transaction is not voluntary for purposes of FERC's regulatory scheme. Plaintiff points to no law in support of either proposition. States do not and cannot act outside of FERC's voluntarily negotiated long-term contracts framework by merely exercising powers reserved to them under the FPA.

Indeed, measuring or quantifying state buy-side regulatory involvement to determine what is or isn't voluntary would be folly. At some level, all electric utility power purchases occur under a state mandate. In a non-restructured environment, electric utilities must build or buy sufficient electric generation to meet customer load. A utility which fails to do so could lose its franchise. In a restructured environment, electric utilities are statutorily required to purchase wholesale generation supply to serve those customers which have not chosen a competitive retail electric provider (standard offer). See Conn. Gen. Stat. § 16-244c(a). Maine also has restructured its retail electric market, and requires the public utility commission to solicit

wholesale standard offer supply contracts, select winning bids, and direct the electric utility to enter into wholesale power contracts. 65-407 CMR Ch. 301, § 8A.2. In other words, Maine procures standard service by directly selecting bids and directing contracts, the very functions plaintiff claims are preempted, and has done so for fifteen years.

Finally, plaintiff's Complaint fails to identify how a wholesale power transaction fostered by Sections 6 and 7 results in a price that differs from some unnamed prevailing market price. Plaintiff expressly acknowledges that while FERC administers day-ahead energy auctions (which set the price at which generators will provide a block of energy for a single hour in the near future), it also allows buyers and sellers to enter bilateral contracts for much longer periods of time. Complaint, ¶44. Further, the Supreme Court has held that the FPA permits bilateral contracts. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 531, 128 S.Ct. 2733 (2008). Plaintiff's Complaint does not specify which prevailing market price is being subverted, and does not and cannot allege that bilateral contracts permitted by the FPA subvert the day-ahead market. In failing to even identify what prevailing market price is being subverted, plaintiff fails to set forth a plausible conflict preemption claim.

F. PLAINTIFF'S COUNT II DORMANT COMMERCE CLAUSE CLAIM FAILS TO STATE A CAUSE OF ACTION AND SHOULD BE DISMISSED.

1. Connecticut's Class I RECs are a State-Created Subsidy Which Do Not Implicate the Dormant Commerce Clause.

Connecticut created the Connecticut Class I REC, a state-created subsidy that does not implicate the dormant Commerce Clause. The subsidy does not construct an in-state preference of any sort, and instead fully ninety percent of the Class I subsidy flows out-of-state. Indeed, plaintiff's complaint is that the subsidy does not flow far enough out-of-state, and that

Connecticut ratepayers will not subsidize plaintiff's Georgia facility for merely generating renewable power in Georgia for consumption in Georgia. The dormant Commerce Clause is simply inapplicable to this subsidy, and does not require that Connecticut ratepayers subsidize potentially any renewable energy facility anywhere in the United States.

RECs are wholly a state creation. *Am. Ref-Fuel Co., Covanta Energy Grp., Montenay Power Corp., & Wheelabrator Technologies Inc.*, 105 FERC ¶ 61004, 61007 (Oct. 1, 2003). They are part and parcel of a state-legislated system intended to subsidize and incentivize the construction and operation of renewable energy generating facilities. Plaintiff in fact acknowledges that RECs are a subsidy. Complaint, ¶66. This subsidy flows from Connecticut ratepayers to generators of renewable energy. However, the subsidy begins with the renewable energy portfolio standard imposed upon the state's retail electric providers pursuant to Conn. Gen. Stat. § 16-245a(a). Specifically, the RPS obligation creates demand for NEPOOL GIS RECs, which are documentation of RPS compliance. Supply of RECs comes from NEPOOL GIS, which disburses RECs to New England renewable energy generators and those of adjacent control areas. Completing the cycle, those generators' Class I NEPOOL GIS RECs have value because Connecticut law recognizes them for Connecticut RPS compliance. The subsidy renewable generators receive is created by this cycle of state-mandated RPS obligation and state-recognized documentation and compliance. It is funded by the state-regulated retail transaction and flows from Connecticut ratepayers, through retail electric providers, to any renewable generator that can obtain a NEPOOL GIS Class I REC for generating renewable energy, whether in-state or out-of-state.

Plaintiff's Georgia and New York facilities do not receive a subsidy from Connecticut ratepayers for generating renewable energy in Georgia and New York that is consumed in Georgia and New York. Its Count II claim essentially asserts that interstate commerce is burdened under the dormant Commerce Clause because Connecticut does not require its ratepayers to subsidize Georgia-based renewable energy generation. Plaintiff is incorrect.

Subsidies generally do not burden interstate commerce under the dormant Commerce Clause. "A pure subsidy funded out of general revenue ordinarily imposes no burden on interstate commerce, but merely assists local business." *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199, 114 S.Ct. 2205 (1994). While the RPS requirement is not funded out of general revenue, it is funded by Connecticut's regulated retail electric generation services transactions. However, unlike the subsidy contemplated in *West Lynn*, Connecticut's RPS subsidy is not limited to local business. Indeed, the Class I subsidy flows principally out-of-state, such that only 10% of the subsidy is retained in-state.

Further, the Class I subsidy program exists only because Connecticut created it. Commerce which owes its existence to a state subsidy program does not implicate the dormant Commerce Clause. *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 815, 96 S.Ct. 2488 (1976). In *Hughes*, the State of Maryland established a "bounty" to speed up the scrap cycle associated with abandoned cars. *Hughes*, 426 U.S. at 797. The bounty was paid by the State of Maryland to anyone who could obtain specified documentation demonstrating clear title to the vehicle. *Hughes*, 426 U.S. at 798. However, Maryland imposed a more exacting documentation requirement on out-of-state processors than in-state processors. *Hughes*, 426 U.S. at 800-802.

The Supreme Court held that the subsidy in *Hughes* was not a "barrier of a type forbidden by the Commerce Clause…" *Hughes*, 426 U.S. at 809-810. The subsidy may have impeded the movement of abandoned cars out-of-state, but the abandoned cars were free to react to market forces. *Hughes*, 426 U.S. at 810. Importantly, Justice Stevens' concurrence recognized that the very subsidized commerce which the *Hughes* plaintiff claimed to be burdened "would never have existed if in the first instance Maryland had decided to confine its subsidy to operators of Maryland plants." *Hughes*, 426 U.S. at 815.

Here, the state has done nothing to impede the movement of plaintiff's electricity in interstate commerce. Plaintiff can sell electricity wherever it chooses. As to RECs, Connecticut has not burdened interstate commerce, but instead **added** to interstate commerce by statutorily creating a new subsidy-related product that did not exist before: the Connecticut Class I REC.

Precisely on-point, Justice Stevens' concurrence in *Hughes* observed that the "failure to create [abandoned car] commerce would have been unobjectionable because the Commerce Clause surely does not impose on the States any obligation to subsidize out-of-state business." *Hughes*, 426 U.S. at 815-816. Here, Connecticut would not have violated the Commerce Clause if it had never created its RPS in the first place. Indeed, most states do not even have an RPS, and therefore do not monetize RECs at all. Connecticut's creation, its Class I RPS subsidy, does not burden interstate commerce and does not implicate the dormant Commerce Clause.

Not only does Connecticut's RPS create a Connecticut Class I REC that did not exist before, and would not exist but for Connecticut's legislation, but Connecticut actively sets targets for and influences the prices obtained for the product it created. It does so by adjusting

the RPS obligation, by amending the statutory definitions of qualifying sources, by statutorily capping the price, and now by effectuating an increase in supply.

Plaintiff wrongly characterizes the geographic limitation on receiving Connecticut's subsidy as a burden on interstate commerce. Complaint, ¶68. The geographic limitation on the subsidy is a condition that must be satisfied to receive the subsidy. The condition is that the generator must either create electrons within the ISO-NE control area or meet the NEPOOL GIS Rule 2.7(c) deliverability requirement. Conn. Gen. Stat. § 16-245a(b)(1). In adopting NEPOOL's deliverability requirement, Connecticut incorporated NEPOOL's judgment that RECs should recognize the realities of how power moves, should accurately reflect the emission characteristics of energy consumed, and should lead to the displacement of fossil fuel generation in New England. Therefore, the condition is directly related to the benefits Connecticut expects to receive in exchange for providing the subsidy. Plaintiff, however, is not interested in providing benefits by displacing New England fossil fuel generation with its New York generation. Complaint, ¶34. And under no circumstances does the NEPOOL GIS deliverability rule consider Georgia generation as displacing New England generation.

Connecticut ratepayers simply have no obligation to subsidize a New York facility for generating renewable energy consumed in New York, or a Georgia facility for generating renewable energy consumed in Georgia. Likewise, they have no obligation to subsidize an Arizona facility for generating renewable energy consumed in Arizona, or to rebate energy efficient appliances in Oregon.

Here, Connecticut has created a subsidy, and has opened that subsidy to any generator that can displace New England fossil fuel generation and obtain a Connecticut Class I REC from

NEPOOL GIS. It routinely sends ninety percent of that subsidy out-of-state. Chart I, Class I Generator Location, from PURA Docket No. 10-09-06, p. 5, and Docket No. 13-06-11, p. 11. The fact that Connecticut will not send its subsidy across the country does not implicate the dormant Commerce Clause, and Count II should be dismissed for failure to state a claim.

2. Connecticut's RPS Law Does Not Discriminate Against Interstate Commerce.

As set forth above, the dormant Commerce Clause is simply inapplicable to the REC subsidy created by Connecticut. However, even if analyzed under dormant Commerce Clause tests, no argument can be made that Connecticut's RPS law discriminates against interstate commerce.

The dormant Commerce Clause preserves a national market for competition that is undisturbed by preferential advantages given by a state to its residents or resident competitors. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007). Dormant Commerce Clause challenges are analyzed by first determining whether a law clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce. *Southold*, 477 F.3d at 47. For purposes of the dormant Commerce Clause, "discrimination … means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." (internal citations omitted, internal quotation marks omitted) *Southold*, 477 F.3d at 47. If a law discriminates against interstate commerce, it is virtually per se invalid and can only survive scrutiny "if it is demonstrably justified by a valid factor unrelated to economic protectionism." *Southold*, 477 F.3d at 47.

Plaintiff asserts that Connecticut's law discriminates against out-of-state business, both facially and in effect. Complaint, ¶64. However, plaintiff fails to state a valid claim here. "To be prohibited, a statute … must favor an in-state commercial interest over a corresponding out-of-state commercial interest…" *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 219 (2d Cir. 2004). Conn. Gen. Stat. § 16-245a(b) does not bestow a preferential advantage to any in-state generator of renewable energy. Nor does plaintiff identify any in-state interest that is favored, directly or indirectly, by the RPS statute. Indeed, nothing in Conn. Gen. Stat. § 16-245a(b) prevents the possibility of every single Connecticut Class I REC originating from out-of-state.

The reality, however, is that fully ninety percent of Connecticut Class I RECs originate out-of-state. Chart I, Class I Generator Location, from PURA Docket No. 10-09-06, p. 5, and Docket No. 13-06-11, p. 11. Thus, plaintiff's bare assertion that Connecticut's law discriminates in effect against out-of-state business is unsupported, and is entirely contradicted by past experience. If only ten percent of the Connecticut Class I RECs used for RPS compliance originate in Connecticut, the program cannot discriminate in effect against out-of-state interests.

Nor can any protectionist motive be ascribed to Connecticut's legislation. Connecticut adopted a standard that was created by NEPOOL membership, which acted to ensure the integrity of the REC system it developed for RPS compliance throughout New England. The deliverability requirement was not devised by a state at all, much less a state attempting to provide an in-state advantage. Further, the deliverability requirement was created under the auspices of a federally approved NEPOOL governance structure. Plaintiff's implausible dormant Commerce Clause allegation, therefore, is that a rule developed by a regional private organization, acting under a federally approved governance structure to ensure the integrity of a

regional RPS compliance system, somehow discriminates against interstate commerce when incorporated by a state. Connecticut's RPS law does not discriminate against interstate commerce, either facially or in effect.

Nor does the statute violate the test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844 (1970). "Under the *Pike* balancing test, [plaintiffs] must show that a statute enacted for a legitimate public purpose, although apparently evenhanded, actually imposes burdens on interstate commerce that exceed the burdens on intrastate commerce, and that those excess burdens on interstate commerce are clearly excessive in relation to the putative local benefits." (internal citations omitted, internal quotations omitted) *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004).

Plaintiff has the burden to frame a plausible *Pike* test violation, but has not and cannot. Plaintiff has not and cannot proffer any allegations that interstate commerce is burdened. Connecticut has not prohibited out-of-state commerce.[26] It has not taxed out-of-state commerce. It has not imposed higher costs upon out-of-state commerce. It treats in-state renewable energy and out-of-state renewable energy uniformly, as both are eligible for RPS compliance so long as the generator can obtain a NEPOOL GIS REC. Clearly, plaintiff's actual complaint is that the

[26] In fact, though plaintiff's RECs are ineligible for Class I RPS compliance, it is entirely possible that they are eligible under other Connecticut programs. Specifically, Connecticut's Clean Energy Options program, created under Conn. Gen. Stat. § 16-244c(b), recognizes almost any REC:

> The Department will retain the geographical eligibility for the source location of any qualified resource to include RECs generated from the contiguous United States and the Eastern Canadian Provinces of New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Ontario, Quebec and Labrador. The Department will retain the NEPOOL GIS, New York "conversion transaction" systems, PJM GATS, WREGIS (excluding Canadian provinces British Columbia and Alberta), M-RETS and ERCOT tracking systems as REC verification for the CCEO program. The Department accepts NAR as a tracking system for verification of RECs from within the contiguous United States to service the CCEO program.

PURA Decision dated March 30, 2011 in Docket No. 10-05-07, DPUC Review of the Connecticut Clean Energy Options Program, p. 15. Plaintiff understandably wishes to receive higher revenues from the RPS program, but plaintiff's ineligibility does not mean its RECs are banned from the state. It merely means they are ineligible to receive the RPS subsidy.

RPS subsidy system Connecticut created fails to value its renewable generation, even though it does not or cannot meet NEPOOL GIS deliverability requirements.

Nor has plaintiff identified a strictly local benefit that Connecticut has elevated over purported interstate commerce burdens. The deliverability requirement does not create a local benefit at all; it creates a regional benefit. By creating the RPS and adopting the NEPOOL GIS REC system, Connecticut has fostered renewable energy development throughout New England and in adjacent control areas. Plaintiff has entirely failed to state a cognizable claim under the dormant Commerce Clause, and Count II should be dismissed in its entirety.

G. PLAINTIFF'S 42 U.S.C. § 1983 CLAIM MUST BE DISMISSED.

All of plaintiff's 42 U.S.C. 1983 claims seek monetary damages from the PURA Commissioners and are barred by the Eleventh Amendment. These claims fail as a matter of law. Plaintiff may not maintain an action in federal court for monetary damages against state officials sued in their official capacity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304 (1989). Because the Eleventh Amendment bars such a suit, Claim III must be dismissed.

Second, PURPA has its own comprehensive enforcement scheme, and plaintiff may not skirt its requirements. "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). PURPA includes specific and detailed remedies in 16 U.S.C. § 824a–3(g) and (h) (see *Niagara Mohawk*, 306 F.3d at 1268), and therefore demonstrates congressional intent to preclude suits under § 1983 for violations of

PURPA. . Plaintiff may not maintain a claim under § 1983 based upon violation of its PURPA rights.

Finally, as this Court held in *Allco I*, Plaintiff must assert a violation of a federal right to seek redress through § 1983, but the FPA creates no individual federal rights that can be enforced under § 1983. *Allco I* at *10. See *Albright v. Oliver*, 510 U.S. 266, 271, 114 S.Ct. 807 (1994). For all of the foregoing reasons, plaintiff's § 1983 claim fails as a matter of law.

IV. CONCLUSION

For the reasons set forth above, defendants PURA Commissioners House, Betkoski and Caron respectfully request that this Court dismiss plaintiff's Complaint in its entirety.

Respectfully submitted,

COMMISSIONERS HOUSE, BETKOSKI AND CARON

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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/ Seth A. Hollander
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Assistant Attorney General