IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED,	:	
Plaintiff	:	
	:	CIVIL ACTION NO.
v.	:	3:16-CV-00508(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	:	May 27, 2016

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Plaintiff Allco Finance Limited ("plaintiff" or "Allco") brings this federal preemption claim against Robert Klee ("Commissioner"), Commissioner of the Connecticut Department of Energy and Environmental Protection ("Department" or "DEEP"), and the Utility Commissioners of the Public Utilities Regulatory Authority, Arthur House, John W. Betkoski, III, and Michael Caron ("PURA Commissioners"), all in their official capacities. In its third trip to the federal courts, plaintiff once again seeks either to invalidate a renewable energy procurement that has already taken place, or to prevent a renewable energy procurement from proceeding.

Plaintiff's novel theory of federal preemption fails as a matter of law. This preemption theory now lacks any arguable basis after the US Supreme Court ruled in *Hughes v. Talen*

Energy Mktg., LLC, __ U.S. __,136 S.Ct. 1288 (2016), regarding state and federal jurisdiction under the Federal Power Act ("FPA").

As set forth fully below, this Court should dismiss the Complaint, which consists of one count. In its single count, plaintiff asserts that Connecticut cannot conduct a request for proposals for renewable energy, select the winning bidder(s) and direct its regulated electric utilities to enter into power purchase agreements with the winning bidder(s) because doing so violates Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the FPA. Plaintiff lacks standing to bring its preemption claim, as it lacks an injury-in-fact. Furthermore, plaintiff fails to state a legal claim upon which relief can be granted because Connecticut is merely encouraging bilateral contracts that are a product of FERC's regulatory regime, and its solicitations do not intrude upon that authority. The Complaint should be dismissed in its entirety.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. The Parties

Plaintiff alleges it owns, operates and develops solar projects that are Qualifying Facilities ("QF") under PURPA. Complaint, ¶16. 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.

Arthur House, John W. Betkoski, III, and Michael Caron are Utility Commissioners of the Public Utilities Regulatory Authority ("PURA"). PURA is a state agency that regulates investor-owned public utilities in Connecticut. The PURA Commissioners are appointed by the Governor and serve terms as specified in Conn. Gen. Stat. § 16-2.

Robert Klee is the Commissioner of the Connecticut Department of Energy and Environmental Protection ("DEEP"). DEEP has responsibilities related to energy policy and planning. See, *e.g.*, Conn. Gen. Stat. § 16a-3.

2. The 2013 Procurement and 2015 RFP

In 2013, the Commissioner conducted a Request for Proposals ("RFP") for renewable energy power purchase agreements pursuant to Section 6 of Public Act 13-303, now codified at Conn. Gen. Stat. § 16a-3f (the "2013 Procurement"). Section 6 authorizes the Commissioner to conduct an RFP to solicit proposals from developers of renewable energy. The RFP would culminate in long-term bilateral wholesale electric contracts for renewable energy, and the Commissioner can select from proposals to meet up to four percent of the load of Connecticut's electric distribution companies. PURA's role is to review and approve signed purchase power agreements that result from the Section 6 procurement.

The Commissioner selected two winning projects in its RFP, the Number Nine Wind Project and the Fusion Solar Project. Both projects negotiated final wholesale electricity contracts with regulated electric companies, which in turn submitted the contracts to PURA for approval. Complaint, ¶2. Plaintiff participated in the RFP for the 2013 Procurement, but was not selected.

The legislature also enacted Section 7 of Public Act 13-303, now codified at Conn. Gen. Stat. § 16a-3g. Section 7 is structured similarly to Section 6, but permits the Commissioner to solicit proposals from verifiable large-scale hydropower as well as renewable energy sources. Section 7 permits the Commissioner to select from proposals to meet up to an additional five percent of the load of Connecticut's electric distribution companies. As with Section 6, PURA's role is to review and approve signed purchase power agreements.

In 2015, the Connecticut legislature enacted Public Act 15-107, *An Act Concerning Affordable and Reliable Energy*. Appendix App. 01. Subsection 1(c) of P.A. 15-107 permits the Commissioner to solicit proposals from renewable energy sources, verifiable large-scale hydropower and associated transmission, and energy storage systems. App. 02. Subsection (g) limits the amount of resources to be procured in the RFP. Subsection (h) requires PURA's review and approval of any agreements resulting from the RFP.

On November 12, 2015, the Commissioner issued an RFP based upon Public Act 15-107 1(c), Section 7 of Public Act 13-303, and his remaining authority under Section 6 of Public Act 13-303 (the "2015 RFP"). Plaintiff did not submit a bid into the 2015 RFP. Complaint, ¶35.

3. Prior Litigation

This action, filed on March 30, 2016, is the third challenge by plaintiff to Connecticut's implementation of P.A. 13-303 and P.A. 15-107. Plaintiff has also filed two petitions at FERC and one currently pending petition at PURA.

The first lawsuit, *Allco I*, was filed in U.S. District Court and named only Commissioner Klee in his official capacity. *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *1 (D. Conn. 2014) ("*District Court Allco I*") (App. 08). It consisted of two counts. Count I alleged a violation of the FPA and the Supremacy Clause of the United States Constitution. Count II asserted a violation of 42 U.S.C. §§ 1983 and 1988. Plaintiff's *Allco I* suit asked to: 1) void both contracts; 2) declare Commissioner Klee's order selecting the projects an illegal state action that is void under the FPA and the Supremacy Clause; 3) declare Commissioner Klee's process and selection an unlawful procedure and unlawful state action; 4) enjoin Commissioner Klee from enforcing or putting his decision into effect; and 5) award damages and fees under §§ 1983 and 1988. Plaintiff asserted that the contract with the Number Nine Wind Project was

invalid because, *inter alia*, the project was too large to be a small power production facility under PURPA. Plaintiff also asserted that the Commissioner's actions in the procurement set wholesale rates in violation of the FPA.

The district court dismissed plaintiff's lawsuit based upon lack of standing and failure to state a claim. *District Court Allco I* at *1. Judge Arterton held that plaintiff lacked standing to challenge Commissioner Klee's actions because plaintiff was a disappointed bidder. *District Court Allco I* at *5. Also, plaintiff failed to demonstrate that it is likely, as opposed to merely speculative, that its alleged injury will be redressed by a favorable decision. *District Court Allco I* at *5. It did not necessarily follow that Allco's projects would have been selected if the Number Nine Wind and Fusion Solar projects were voided, or that the Commissioner would have taken any action at all. *District Court Allco I* at *5.

Judge Arterton also found that plaintiff failed to state a valid claim, because the Commissioner did not set wholesale rates, and Section 6 is consistent with state powers to exercise buy-side authority. *District Court Allco I* at *9. Further, Judge Arterton held that Section 6 is "devoid of any … market-distorting features that encroach on FERC's exclusive jurisdiction over setting wholesale rates." *District Court Allco I* at *10. Finally, Judge Arterton dismissed plaintiff's §§ 1983 and 1988 claims because the FPA does not create any individual federal rights that can be enforced under those statutes. *District Court Allco I* at *10.

Plaintiff appealed to the Second Circuit, which affirmed on alternate grounds. *Allco Fin. Ltd. v. Klee*, 805 F.3d 89 (2d Cir. 2015), as amended (Dec. 1, 2015) ("*Second Circuit Allco I*"). Specifically, the Second Circuit held that plaintiff's PURPA-dependent legal theory required it to exhaust its administrative remedies at FERC before proceeding to U.S. District Court. *Second*

Circuit Allco I, 805 F.3d at 97-98. The Second Circuit also held that plaintiff lacked standing to void the contracts awarded to Number Nine Wind and Fusion Solar because doing so would not redress Allco's injury. *Second Circuit Allco I*, 805 F.3d at 98. Plaintiff's §§ 1983 and 1988 claims were also dismissed; plaintiff asserted harm premised upon PURPA, but PURPA's conferral of a private right of action foreclosed the §§ 1983 and 1988 remedies. *Second Circuit Allco I*, 805 F.3d at 95.

Plaintiff sought to exhaust its administrative remedies by filing a petition for enforcement at FERC on November 9, 2015. Plaintiff asked FERC to enforce PURPA against the Connecticut Department of Energy and Environmental Protection and PURA. FERC declined to initiate an enforcement action, thus freeing Allco to pursue its *Allco I* claims in federal district court. *Allco Renewable Energy Ltd. Allco Fin. Ltd.*, 154 FERC ¶ 61007, 2016 WL 126022 (Jan. 8, 2016).

While *Allco I* was pending at the Second Circuit, plaintiff filed another complaint in U.S. District Court. This complaint, known as *Allco II*, was filed on April 26, 2015. In *Allco II*, plaintiff sued the Commissioner and the PURA Commissioners, and alleged a slightly different preemption argument. Instead of claiming that Connecticut violated PURPA and the FPA by allegedly setting wholesale rates outside of PURPA, plaintiff claims in Count I that Connecticut violated PURPA and the FPA by issuing an RFP under which Connecticut would direct its regulated utility to enter a wholesale electric contract. According to plaintiff, this act constitutes regulation of wholesale sales in violation of the FPA, because Connecticut purportedly may only direct its regulated utility to enter a wholesale electric contract if acting under PURPA. Count II alleges a violation of the dormant Commerce Clause. Count III asserted similar §§ 1983 and

1988 claims as asserted in *Allco I*. Plaintiff later effectively withdrew its Count III claim in light of the Second Circuit's ruling in *Allco I*. See plaintiff's March 30, 2016 letter to Judge Haight in Allco II, p. 3 [Doc #39]. Defendants filed a motion to dismiss, which is fully briefed, and a decision is pending.

In March 2016 plaintiff filed the instant Complaint, *Allco III*. Naming both Commissioner Klee and the PURA Commissioners, plaintiff repeats its federal preemption theory asserted in *Allco II*. Plaintiff alleges that Connecticut violated PURPA and the FPA by issuing the 2015 RFP under which Connecticut would direct its regulated utility to enter a wholesale electric contract. According to plaintiff, this act constitutes regulation of wholesale sales in violation of the FPA, and Connecticut can only direct its regulated utility to enter a wholesale electric contract if acting under PURPA. Plaintiff asks to enjoin future action on the 2015 RFP, and to void the Number Nine Wind contract from the 2013 Procurement, though it has not asked in *Allco III* to void the Fusion Solar contract, as it had in *Allco I*. Thus to the extent the pending Motion to Dismiss in *Allco II* is granted, the claims in this matter would be barred by *res judicata* and collateral estoppel.

Plaintiff has also filed a petition at PURA on March 2, 2016. PURA designated the proceeding as Docket No. 16-03-08, *Petition of Windham Solar LLC for Approval of a Power Purchase Agreement Between Windham Solar LLC and The Connecticut Light and Power Company d/b/a Eversource Energy*. In Docket No. 16-03-08, plaintiff asks that PURA order the execution of a power purchase agreement offered by plaintiff to Eversource Energy. That petition is pending. Then, on May 19, 2016, plaintiff filed a petition at FERC against PURA

regarding Connecticut's implementation of PURPA. That proceeding is designated as FERC Docket No. EL16-69, and is pending.

III. STANDARD OF REVIEW

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)).

IV. ARGUMENT

1. Summary of Argument

Plaintiff lacks standing because it lacks an injury-in-fact. It seeks to void a contract to which it is not a party, and to enjoin a procurement in which it is not participating. Further, its claim of harm is based upon its view of how avoided costs should measured, not how they have been implemented by Connecticut for sixteen years. Also, plaintiff cannot show that its claim is redressable because whether Connecticut will proceed with any procurement under Sections 6 and 7 and Public Act 15-107 1(c) if limited to small QFs is speculative and unlikely.

Allco fails to state a claim upon which relief can be granted because states act within their FPA authority when directing their regulated utilities to contract for electricity, so long as their actions are aimed at subjects left to the states to regulate, and the regulatory means do not intrude upon FERC's authority over wholesale rates. Plaintiff's federal preemption theory is a novel, antiseptic and impractical view of the Federal Power Act that is not supported by law. Plaintiff's novel theory, which bolts plaintiff's incorrect understanding of PURPA together with an incorrect understanding of the *Hughes* case, lacked merit when filed, and lacks any arguable basis now that the Supreme Court has ruled in *Hughes*. Indeed, in the time since plaintiff first constructed its view of federal preemption, a trio of US Supreme Court cases entirely unraveled plaintiff's federal preemption theory.

Plaintiff posits a fictional energy world in which states play no role in fostering wholesale electricity transactions outside of PURPA, and have no legal authority to act outside of PURPA. This is demonstrably incorrect. States can, and do, act outside of PURPA, with FERC's blessing.

Though plaintiff continues to rely upon the *Hughes* case to argue field preemption, the procurements at issue in this lawsuit are entirely unlike those at issue in *Hughes*. Rather, they follow long-standing, legally sanctioned paths established by FERC, and affirmed by the *Hughes* decision.

2. Plaintiff Lacks Standing.

Plaintiff lacks standing to challenge the completed 2013 Procurement and the pending 2015 RFP in which plaintiff did not bid. Plaintiff must establish Article III standing by demonstrating: 1) an injury-in-fact that is a concrete and particularized harm to a legally protected interest; 2) causation that is a fairly traceable connection between the asserted injury-in-fact and the defendants' alleged actions; and 3) redressability, which is a non-speculative likelihood that the injury can be remedied by the relief requested. *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Comm'n*, 768 F.3d 183, 201 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 1853 (2015).

Plaintiff cannot rely upon its status as a QF to police any procurement it wishes by suing state regulators. Though it cites 16 U.S.C. § 824a-3(h) in ¶10 of its Complaint, that section permits a suit "to require such State regulatory authority … to comply with [the requirements of subsection (f)]" of 16 U.S.C. § 824a-3. Subsection (f) only speaks to implementation of PURPA rules. Plaintiff has not identified a substantive provision of PURPA that Connecticut fails to follow. This lawsuit is not about whether Connecticut is implementing PURPA. Instead, plaintiff attempts: 1) to prevent a renewable energy procurement in which it is not participating; and 2) to invalidate a renewable energy contract to which it is not a party. Instead of relying upon PURPA to enforce a specific right it is owed under that statutory scheme, plaintiff attempts

to use PURPA as a sword to deny others contractual benefits they have obtained or may obtain in Connecticut's procurements.

Furthermore, plaintiff cites no provision the FPA that provides it standing, and none exists. Nor does QF status provide standing to challenge the Number Nine contract that was the product of FERC's ratemaking authority under the FPA. Because the Number Nine contract will be submitted to FERC, it will be subject to challenge at FERC under Section 206 of the FPA (16 U.S.C. § 824e). Plaintiff's QF status does not exempt plaintiff from FERC's Section 206 challenge process.

Plaintiff must therefore demonstrate Article III standing by claiming an injury-in-fact that is a concrete and particularized harm to a legally protected interest. Plaintiff lacks a legally protected interest in a state procurement. Plaintiff has not and will not experience an injury-in-fact from Connecticut's renewable energy procurements. Plaintiff complains that Connecticut is compelling a regulated electric utility to enter a wholesale electricity contract in violation of federal law. However, plaintiff is not a regulated electric utility and Connecticut is not compelling plaintiff to do anything. Plaintiff essentially complains of a purported harm to someone else, and is thus indistinguishable from the general public.

Plaintiff contends that it will experience reduced long-term forecasted avoided costs available to plaintiff under PURPA as a result of the Number Nine Wind project, and will experience future reductions in the long-term forecasted avoided costs available to plaintiff under PURPA from the 2015 RFP. Complaint, ¶53-4. However, Connecticut does not forecast long-term avoided costs today. Sixteen years ago, the Public Utilities Regulatory Authority redefined avoided costs as the short-term average of the day-ahead market of ISO-NE, Inc., the regional

transmission organization created by FERC to operate interstate transmission in New England and to administer organized wholesale markets. PURA Decision dated December 15, 1999 in Docket No. 99-03-36, *DPUC Determination of the Connecticut Light and Power Company's Standard Offer*, p. 7 (App. 29). That is the current state of the law in Connecticut, and is reflected in the Rate 980 tariff of The Connecticut Light and Power Company. The Rate 980 tariff is attached at App. 39. Plaintiff's instant claim is not a PURPA implementation claim. It is a federal preemption claim, and plaintiff must accept Connecticut's long-standing implementation of PURPA as it is. Whether that changes in the future is yet-to-be-determined in PURA's Docket No. 16-03-08 or FERC Docket No. EL16-69.[1] Plaintiff's constructed harm in this proceeding is therefore speculative because it assumes a change in Connecticut law. The requisite concrete and particularized harm to a legally protected interest does not exist.

Plaintiff also claims an injury-in-fact based upon a purported economic interest in the 2013 and 2015 procurements. Complaint, ¶52. This conclusory statement fails because it is not concrete and particularized, and does not allege harm to a legally protected interest. In fact, in the case of the 2015 procurement, plaintiff did not even participate. With respect to the 2013

[1] Plaintiff asserts in Docket No. 16-03-08 that it can elect a measurement of avoided cost that is a long-term forecast of ISO-NE clearing prices and other assumptions. PURA does not prejudge or express any opinion regarding the merits of plaintiff's petition currently before PURA. However, for purposes of this action, PURA notes that plaintiff's Complaint in *Allco I* was premised upon a different theory of avoided costs. At ¶50, plaintiff asserted that the results of the Section 6 RFP established avoided costs in Connecticut. First Amended Complaint for Declaratory and Injunctive Relief for Violations of the Supremacy Clause of the United States Constitution and the Federal Power Act. ¶ 50, *Allco Fin. Ltd. v. Klee*, No. 3:13-cv-01874-JBA (D. Conn., Feb. 26, 2014). Plaintiff similarly argued in Massachusetts that the Cape Wind PPA established avoided costs in that state, and the Massachusetts Department of Public Utilities rejected that theory of avoided costs. Docket No. 11-59, *Petition of Allco Renewable Energy Limited pursuant to 220 C.M.R. § 8.08(2) for an Investigation by the Department of Public Utilities into Allco's Offer to Sell to Massachusetts Electric Company d/b/a National Grid, Generation Output from Various Qualifying Facilities Within the Meaning of 220 C.M.R. § 8.02* (Massachusetts Department of Public Utilities, July 22, 2014) at 1, *appeal docketed* No. SJ-2014-0337 (Massachusetts Supreme Judicial Court, August 11, 2014). This action is not a PURPA implementation action, and how Connecticut establishes avoided costs is not at issue. It does not matter which theory might be correct. Connecticut's current PURPA implementation is simple and must be accepted as it is. Plaintiff's claim of injury is inconsistent with Connecticut's current PURPA implementation as a matter of law.

procurement, plaintiff participated and lost. Merely having failed to obtain a contract grants plaintiff no economic interest in the procurement.

Plaintiff additionally alleged that it will suffer an injury-in-fact because its development costs are at risk because of the 2015 procurement. Complaint, ¶56. However, plaintiff also asserts that it did not bid into the 2015 procurement because of the facility size restrictions of the RFP. Complaint, ¶35. Plaintiff cannot simultaneously complain that it is ineligible for the RFP because of size restrictions and that it will lose development costs. If plaintiff is indeed ineligible, any development cost it incurs is a harm of its own making.

Plaintiff's claim is also not redressable. It is all-but-certain that plaintiff will gain nothing if it succeeds in this action. Sections 6 and Section 7 and Public Act 15-107 do not require any action on the part of the Commissioner. If as a result of this litigation Sections 6 and 7 and Public Act 15-107 1(c) are constructively rewritten to limit participation to only small qualifying facilities, and Connecticut can only fill 4,250 GWh/year (2750 + 1375 + 125) by using small qualifying facilities, it is clear that the sections will have been gutted, and little reason will exist for Connecticut to proceed on this basis. See Exhibit E of plaintiff's Complaint, p. 10.

Finally, plaintiff still lacks standing to invalidate the Number Nine Wind contract. In *Allco I,* plaintiff sought to invalidate the contract between The Connecticut Light and Power Company and Number Nine Wind. Plaintiff failed to demonstrate that it is likely, as opposed to merely speculative, that its alleged injury will be redressed by a favorable decision. *Allco I District Court* at *6. It did not necessarily follow that Allco's projects would have been selected if the Number Nine Wind project is voided, or that the Commissioner would have taken any action at all. *Allco I District Court* at *6. The Second Circuit held that plaintiff seeks only to

deny its competitor a contractual benefit, which by itself would not provide plaintiff a path to obtain a Section 6 contract. *Second Circuit Allco I* at 98. Here, plaintiff cannot require the Commissioner to conduct future procurements under PURPA, and has a mere speculative claim that it would receive a Section 6 contract. This logic extends to the 2015 RFP as well. Plaintiff lacks standing to press its claims regarding both the 2013 Procurement and the 2015 RFP.

3. States Possess FPA Authority to Direct Buy-Side Activities of Regulated Electric Utilities in Wholesale Markets.

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 (2002), citing Order No. 888, FERC Stats. & Regs. ¶31,036, 31,782, n.544 (May 10, 1996).[2] Here, the electric distribution companies are the buy-side of any wholesale transaction fostered by Sections 6 and 7 and Public Act 15-107 1(c) because they may purchase energy, energy and RECs, or energy and transmission. The state is merely directing the electric distribution company to accept an offer to sell. Because Connecticut's actions under Sections 6 and 7 and Public Act 15-107 1(c) are entirely consistent with U.S. Supreme Court precedent, plaintiff's proffered theory of preemption fails as a matter of law.

[2] *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).

4. Connecticut's Actions Are Consistent With FERC Jurisdiction.

States have authority to act within their reserved authority under the FPA, but cannot exercise that authority in a manner that intrudes on FERC's jurisdiction over wholesale rates. Three recent US Supreme Court cases demonstrate that plaintiff's theory of field preemption fails as a matter of law. The interrelationship between state and federal jurisdiction is complex and nuanced, and does not resemble the simplistic portrait of jurisdiction depicted in plaintiff's Complaint.

In *Oneok, Inc. v. Learjet, Inc.*, __ U.S. __, 135 S.Ct. 1591 (2015) ("*Oneok*"), the Supreme Court upheld state authority to raise state law antitrust claims against natural gas companies even when these actions incidentally affect interstate wholesale gas rates under FERC's Natural Gas Act ("NGA") jurisdiction.[3] *Oneok*, 135 S.Ct. at 1599-1600. In so holding, the Court noted that "Platonic ideals" of sharply delineated state and federal jurisdictions under the NGA do not exist. *Oneok*, 135 S.Ct. at 1601. Instead, its analysis focused on the target of state regulation, relying on *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U.S. 493, 514 (1989), where state regulation concerning the timing of gas production from a gas field was not preempted because it was aimed primarily at protecting the rights of gas producers, which was an area reserved to states under the NGA, even though the costs and prices of interstate gas sales might be affected. *Oneok*, 135 S.Ct. at 1600. In contrast, the *Oneok* Court noted, state securities regulation that targeted an interstate pipeline company's equity levels was **directed at** controlling the interstate rates FERC would set, and were preempted. *Oneok*, 135 S.Ct. at 1600, citing *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306-309 (1988). Applying these precedents to

[3] The Natural Gas Act ("NGA") and the Federal Power Act are analogous, and the Supreme Court relies upon NGA cases when determining the scope of the FPA. *Hughes*, 136 S.Ct. 1288, 1298, n. 10.

the facts in *Oneok*, the *Oneok* Court concluded that the regulatory target of state antitrust laws were all businesses in the marketplace, not natural gas companies, and the state laws were thus not preempted. *Oneok*, 135 S.Ct. at 1601.

In *FERC v. Elec. Power Supply Ass'n*, __ U.S. __, 136 S.Ct. 760, 762 (2016), as revised (Jan. 28, 2016) ("*EPSA*"), the Supreme Court addressed the question of whether FERC encroached upon state authority when including demand response offers in organized federal energy markets. In *EPSA*, the Court upheld FERC's actions that appeared to operate in retail markets reserved to states. Central to the Court's analysis was the observation that "wholesale and retail markets in electricity are inextricably linked." *EPSA*, 136 S.Ct. at 766. The Court reiterated its conclusion that no "Platonic ideal" of strict separation exists between federal and state jurisdictions under the FPA. *EPSA*, 136 S.Ct. at 776. Instead, the Court recognized that "wholesale and retail markets in electricity … are not hermetically sealed from another." *EPSA*, 136 S.Ct. at 776. Even though FERC's actions incorporating demand response into energy markets had an effect on retail rates, FERC did not exceed its jurisdictional authority. *EPSA*, 136 S.Ct. at 776.

Three months later, the Supreme Court completed this trio of federal-state jurisdiction cases by ruling in *Hughes*. As explained by the *Hughes* Court, FERC typically exercises its regulatory authority over wholesale transactions in one of two ways. One is through bilateral contracts negotiated between buyers and sellers, subject to FERC review. This regime was described in depth in an earlier Supreme Court case, *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 535-538 (2008) (sellers file tariffs that state that the seller will enter into freely negotiated contracts with purchasers, provided the seller

lacks market power, and FERC may review contracts after-the-fact). *Hughes*, 136 S.Ct. at 1292-1293. The other is through organized markets or auctions such as those administered by regional transmission organizations such as ISO-NE. *Hughes*, 136 S.Ct. at 1293.

In *Hughes*, FERC designed a mid-Atlantic regional capacity auction to send price signals to generators that would encourage them to build if the region experienced a shortage of capacity. If insufficient capacity cleared FERC's auction, capacity prices would be driven higher, thus encouraging new entry. *Hughes*, 136 S.Ct. at 1293. Maryland is located within FERC's mid-Atlantic capacity market region. However, Maryland sought to encourage the construction of new generating facilities by requiring the generator to sell its electric capacity into the FERC electric capacity auction and then paying the generator a set price generally above the FERC capacity market price. This form of contracting is known as a contract-for-differences. Maryland's actions were field preempted because the contract-for-differences replaced the price created by FERC's capacity auction, and made generators indifferent to the auction, thus interrupting its price signal mechanism. *Hughes*, 136 S.Ct. at 1297.

This trio of cases demonstrates that, as a matter of law, the hermetic seal plaintiff imagines between state and federal jurisdiction simply does not exist. Plaintiff asserts that whenever a state directs a regulated utility to enter a wholesale contract, it has regulated a wholesale transaction. This claim fails as a matter of law. Plaintiff seeks to impose a new bright line and claims that Connecticut has transgressed that line.[4]

[4] To be sure, bright lines do exist between state and federal jurisdiction. States **cannot** set the rates of wholesale transactions. While plaintiff argued in *Allco I* that Connecticut's Section 6 procurement set interstate rates, that argument was rejected by Judge Arterton. *District Court Allco I* at *9-10. Plaintiff does not repeat its ratesetting claim in this proceeding.

Instead, the *Hughes* Court held that states can act within their reserved authority under the FPA, but cannot exercise that authority in a manner that intrudes on FERC's authority over wholesale rates. *Hughes*, 136 S .Ct. at 1298. Connecticut is encouraging bilateral contracts, and is thus directly operating within FERC's *Morgan Stanley* regulatory construct. It is not attempting to regulate sellers' costs so that FERC's ratemaking powers are constrained, as was the case in *Schneidewind*. Connecticut's regulatory actions are not directed at sellers, or sellers' rates. Sellers are free to set their offering price, and are indeed free to not participate at all. Connecticut exercises no regulatory authority over sellers; FERC retains complete regulatory authority over the sellers. FERC retains regulatory authority over the transaction through its ability to review the contract. Connecticut is soliciting bilateral contracts that are entirely compatible with FERC's jurisdiction. It is not insulating sellers from FERC's markets, nor obtaining contracts-for-differences that short-circuit FERC's capacity market price signals. The contracts do not target FERC's markets by compensating generators in exchange for bidding into FERC's auctions; they compensate generators for commodity energy. In short, Connecticut's procurement is **a product of** FERC's regulatory construct, and does nothing to invade FERC's regulatory turf. Contracts that result from the procurements are **a product of** FERC's regulatory jurisdiction, and do not run counter to that jurisdiction.

The *Hughes* holding is expressly limited to the question of state-sponsored contracts-for-differences, which act as a system of price supports for electric capacity that targeted and interfered with FERC's markets. *Hughes*, 136 S.Ct. at 1299. Plaintiff does not assert that the Number Nine Wind contract is a contract-for-differences, and the 2015 Procurement expressly states that no capacity support payments will be created in that RFP. Exhibit E of plaintiff's

Complaint, Section 2.2.4 of the 2015 RFP (p. 24 of the RFP, p. 86 of 157 of plaintiff's Complaint). Further, the *Hughes* Court noted that state-sponsored bilateral contracts do not invade FERC jurisdiction, because commodity changes hands and title for the commodity passes. *Hughes*, 136 S.Ct. at 1299. This is important because under the contracts-for-differences, parties merely exchanged money based upon the auction results. *Hughes*, 136 S.Ct. at 1299. That is not the case here, as the generator delivers power, and money changes hands based upon the delivery of energy. Exhibit A of plaintiff's Complaint, Section 2.2.3 of the 2013 Procurement, (p. 6 of the RFP, p. 23 of 157 of plaintiff's Complaint). Connecticut's bilateral contracts are consistent with *Hughes*, and consistent with the FERC regulatory regime described in *Morgan Stanley*.

Further, the federal government entirely disagrees with plaintiff's view of federal preemption. In its *amicus curiae* brief before the U.S. Supreme Court in January of this year in the *Hughes* case, the U.S. Solicitor General wrote that it would have been perfectly acceptable if Maryland eschewed contracts-for-differences and "had instead **ordered** its utilities **to enter into** bilateral contracts with the state selected generator to build new capacity… ." January 29, 2016 *Amicus Curiae* Brief of the United States in *Hughes v. Talen Energy Marketing, LLC*, p. 18 ("*Solicitor General Hughes Amicus*") (App. 80). The federal government views it jurisdictionally proper when states order utilities to enter into bilateral contracts. The federal government has expressly opined that bilateral contracts do not trigger federal preemption.

More directly, the federal government specifically approved of Connecticut's 2013 Procurement as an example of a bilateral contract that is jurisdictionally proper. *Solicitor General Hughes Amicus* at 34-35 (App. 96-97). The Solicitor General cited Judge Arterton's decision in *Allco I*, including her holding that the 2013 Procurement is "devoid of any * * *

market-distorting features that encroach [upon] FERC's exclusive jurisdiction over setting wholesale rates," because the arrangement was one in which energy was actually purchased from generators *Solicitor General Hughes Amicus* at 34 (App. 96-97). Incredibly, in this action, plaintiff asks this Court to invalidate the Number Nine Wind contract based upon federal preemption even though the federal government has already cited that very contract as jurisdictionally proper.

Further, in all of *Allco I, II* and *III*, plaintiff has never cited a case that prohibits a state from directing its regulated utility to enter bilateral contracts, or that limits a state's role to PURPA. To the contrary, FERC has approved interaffiliate, non-PURPA wholesale sales in part **because** the state established a procurement process.

For over fifteen years, restructured states have required regulated electric companies to enter wholesale agreements to provide standard service, which is generally a safety net retail offering for customers who do not choose competitive supply. All restructured states (except Texas), require it; for example, standard service is mandated in some form by state legislatures in Connecticut, Delaware, Maine, Massachusetts, New Jersey, Ohio, Pennsylvania and Rhode Island.[5] Standard service requires wholesale agreements that are subject to FERC jurisdiction. Most states established competitive processes for procuring wholesale standard service agreements. Like the contracts at issue in this proceeding, sellers are granted market-based rate authority from FERC, and the contracts are submitted by sellers to FERC after-the-fact.

[5] Connecticut's standard service obligation is created at Conn. Gen. Stat. § 16-244c; Delaware's can be found at 26 Del.C. § 1007; Maine's obligation can be found at 65-407 CMR Ch. 301, § 1; Massachusetts' standard service is codified at M.G.L.A. 164 § 1B; New Jersey's basic generation service (long predating and unrelated to New Jersey's contracts-for-differences) is required at N.J.S.A. 48:3-57; Ohio's obligation is authorized at Ohio Rev. Code Ann. § 4928.142; Pennsylvania' default service obligation is codified at 66 Pa.C.S.A. § 2807(e), and Rhode Island's requirement is codified at Gen. Laws 1956, § 39-1-27.3.

Standard service wholesale contracts are FERC-jurisdictional bilateral electricity contracts, but tend to be shorter term. These contracts are all outside of PURPA.

Long before *Hughes*, FERC approved an application that relied upon and recognized Maryland's role in directing a utility to procure wholesale standard service contracts. *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61082, 2004 WL 1700580 (July 29, 2004) ("*Allegheny*"). Allegheny Energy Supply, LLC ("AES"), a competitive affiliate of a regulated electric company called Potomac Edison Company ("Potomac"), sought FERC authorization to make wholesale power sales to Potomac. *Allegheny* at ¶2-3. Potomac utilized an RFP process to procure wholesale standard service contracts subject to Maryland Public Service Commission ("MPSC") supervision. The process was approved by MPSC. *Allegheny* at ¶4. It is monitored by an MPSC-selected independent consultant that takes direction from MPSC. *Allegheny* at ¶16. The MPSC approves the results of the RFP. *Allegheny* at ¶7.

FERC approved AES's application for authorization to make wholesale power sales because, *inter alia*: 1) the MPSC proceeding approving the RFP process was a public design process (*Allegheny* at ¶19); and 2) the independent consultant selected by MPSC and which took direction from MPSC was a conduit during the RFP design process and is involved in the administration and bid evaluation stages of the RFP (*Allegheny* at ¶34, 39). Indeed, FERC referred to the process as "the Maryland Commission competitive bid process." *Allegheny* at ¶21.

FERC approved the process based in part upon the existence of MPSC oversight. FERC authorized the affiliate sale because it was obtained through the Maryland Commission competitive bid process. It authorized the affiliate sale even though the Maryland Commission

competitive bid process solicited non-PURPA contracts. Under plaintiff's field preemption theory, FERC should have rejected AES's application. FERC's approval illuminates the fatal flaw in plaintiff's legal construct.

Plaintiff's assertion that a state cannot direct a regulated utility to enter a specific wholesale transaction also fails. Complaint, ¶¶8, 25. Directing a regulated utility to enter a specific wholesale transaction is part of the buy-side authority states possess under the FPA, and this assertion fails to state a claim upon which relief can be granted. *Hughes* turned on whether Maryland's Generation Order targeted a FERC market; the case did not hold that the mere issuance of the Generation Order regulated a wholesale transaction because it directed a regulated utility to enter a specific wholesale transaction. If plaintiff's theory were true, the U.S. District Court, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court would not have analyzed the effect of the Generation Order on FERC's market. If plaintiff's theory were true, the U.S. Solicitor General's *Hughes amicus* brief would have railed against a state ordering a bilateral contract with a specific, **state-selected** generator. To the contrary, the Solicitor General looked approvingly upon a bilateral contracts with state-selected generators. *Solicitor General Hughes Amicus* at 18 (App 58).

The ability to direct a regulated utility to enter a specific wholesale transaction is inherent in the buy-side authority states possess under the FPA. Under plaintiff's theory, if a state believed that a power purchase agreement with hypothetical Generator A was more consistent with an RFP, it could only exercise that authority *ad seriatim* by repeatedly rejecting a utility's proposal to enter a contract with hypothetical Generators B, C, D and so on. Plaintiff's theory is impractical and illogical, and does not support a claim upon which relief can be granted.

Finally, plaintiff fails to identify what federal regulatory jurisdiction is trampled upon when a state directs a regulated utility to enter a specific wholesale transaction. FERC does not regulate the buyer's choices. FERC exerts authority over the seller, over the rates, and over the transaction. These federal powers are undiminished when a state directs a regulated utility to enter a specific wholesale transaction.

Plaintiff's preemption theory fails because a state may direct its regulated utility to enter into a wholesale transaction outside of PURPA, as long as it is a bilateral contract subject to FERC review. The contracts at issue are bilateral contracts explicitly subject to FERC review, consistent with long-standing judicial and agency jurisprudence, and are not preempted under the FPA.

5. States Can Act Outside of PURPA.

Plaintiff has constructed a theory under which PURPA limits a state's authority to direct a regulated utility to enter into wholesale electricity contracts. There is no support for this theory.

PURPA does not exist to constrain a state's procurement activities. 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.

Putting aside PURPA's current diminished role as a result of Congressional legislation,[6] no court has ever held that states may only act through PURPA, and FERC has held the opposite. 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). This holding does not mean, as plaintiff contended in the April 27, 2016 argument in *Allco II* (Transcript at 58-59), that states may only act outside of PURPA to order utilities to construct and own generation. Instead, FERC held:

> As a general matter, 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 if state law so permits. **They also**, assuming state law permits, **may order utilities to purchase** renewable generation. . . . States also may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies.

(emphasis added) *Midwest Power Systems, Inc.*, 78 FERC at ¶ 61248, citing *Southern California Edison Company and San Diego Gas & Electric Company*, 71 FERC ¶ 61,269, 1995 WL 327268 (June 2, 1995) ("*SoCal Edison*"). *Midwest* holds that states may direct regulated utilities to **purchase** generation outside of PURPA, and directly contradicts plaintiff. *SoCal Edison*, in fact, directly states that renewable generators do not have to be QFs at all. *SoCal Edison*, 71 FERC at ¶ 62,080. Throughout *Allco I*, *II*, and *III*, plaintiff has maintained that states cannot act outside of PURPA, and yet FERC has repeatedly held the opposite.

Even as recently as 2013, in an application filed by plaintiff's affiliate, Otter Creek, FERC rejected plaintiff's view that states cannot act outside of PURPA. *Otter Creek Solar LLC*, 143 FERC ¶ 61282, 62969, 2013 WL 3243131 (June 27, 2013). In that case, Vermont

[6] Section 1253(a) of the Energy and Policy Act of 2005 added to PURPA section 210(m), permitting FERC to terminate the must-buy requirement if FERC finds that QFs have nondiscriminatory access to markets. 16 U.S.C. § 824a-3(m).

established a renewable energy program outside of PURPA. Otter Creek objected. FERC rejected Otter Creek's petition, stating that nothing prevents a utility from agreeing to a rate outside of PURPA. *Otter Creek Solar LLC*, 143 FERC at 62969.

In *Allco II*, plaintiff attempted to distinguish *Otter Creek* by arguing, without support, that there is somehow a difference between Vermont exerting its authority by directing utilities to enter wholesale electricity contracts through a statutorily created program, and Connecticut requiring a utility to enter specific contracts. Plaintiff's August 10, 2015 Sur-reply, p. 6. There is no difference. In both cases, the state passed a statute obligating the regulated utility to enter wholesale contracts. The fact that Connecticut exercises that authority slightly differently does not cross any jurisdictional divide, and does not force Connecticut to act within PURPA.

Notably, though plaintiff's theory of preemption has always relied upon the *Hughes* case, that case entirely undercuts plaintiff's theory. Plaintiff asserts that states can only direct utilities to enter into wholesale electricity transactions when acting under PURPA. Maryland did not proceed under PURPA. If plaintiff's restricted view of the energy world was correct, five federal courts, including the Supreme Court, did not need to examine the relationship between states' actions and federal capacity markets. They would have merely concluded that Maryland lacked the power to act outside PURPA. They did not, because the bright line plaintiff imagines simply does not exist.

Plaintiff's federal preemption theory is an amalgamation of: 1) plaintiff's incorrect view of the FPA and the *Hughes* case, combined with 2) plaintiff's incorrect view of PURPA. Plaintiff fuses these two halves together to create a novel federal preemption theory that does not exist. Plaintiff therefore fails to state a claim upon which relief can be granted.

V. 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 May 27, 2016, 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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