**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF CONNECTICUT**

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| 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* | : | June 3, 2016 |

**OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION**

## I. INTRODUCTION

In a Motion for Preliminary Injunction dated April 18, 2016 ("Injunctive Relief Motion") [Doc #13], plaintiff Allco Finance Limited ("Allco" or "plaintiff") seeks to enjoin Commissioner Robert Klee of the Connecticut Department of Energy and Environmental Protection ("DEEP") from conducting a request for proposals ("RFP" or "2015 RFP") authorized by Connecticut statute, and to enjoin Utility Commissioners Arthur House, John W. Betkoski, III and Michael Caron of the Public Utilities Regulatory Authority ("PURA" or "Authority") from acting upon any application to approve a power purchase agreement or other arrangement that might result from the RFP. Plaintiff's Injunctive Relief Motion misconstrues applicable energy law and fails to satisfy any required criterion to obtain injunctive relief. Plaintiff is not irreparably harmed by the RFP, and indeed is not harmed in any way. Further, its theory of federal preemption is

incorrect and even contradicts the federal government's own views regarding state actions that are permissible under the Federal Power Act ("FPA"), 16 U.S.C. § 791a *et seq*.

Plaintiff's Injunctive Relief Motion seeks the same relief as its motion for injunctive relief in *Allco v. Klee, et al*., 3:15-CV-608 (CSH) ("*Allco II*") [Doc. #37]. Oral argument was held on that motion on April 27, 2016, and a decision is pending. Thus to the extent the pending injunctive relief motion in *Allco II* is denied, or the pending motion to dismiss that complaint is granted, the claims in this matter would be barred by *res judicata* and collateral estoppel.

## II. PROCEDURAL HISTORY

This is plaintiff's third U.S. District Court lawsuit seeking to either overturn or prevent a renewable energy procurement authorized by state law. It is plaintiff's third attempt to enjoin Commissioner Klee, and its second attempt to enjoin Commissioner Klee and Utility Commissioners House, Betkoski and Caron from acting under Sections 6 and 7 of Public Act 13-303, *An Act Concerning Connecticut's Clean Energy Goals*, and Section 1(c) of Public Act 15-107, *An Act Concerning Affordable and Reliable Energy*, under a novel legal theory that a state cannot direct a regulated utility to enter into a wholesale electric energy transaction because it is compelling wholesale sales in violation of the FPA. Plaintiff's first lawsuit attempted to overturn contracts that resulted from Commissioner Klee's 2013 procurement under Section 6, and alleged that Commissioner Klee had purportedly set wholesale rates in violation of the FPA, and could only set rates when acting under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 824a-3. In that first lawsuit, now known as *Allco I*, plaintiff also sought to enjoin Commissioner Klee from "issuing any future orders and decisions that are inconsistent with the FPA and PURPA." Prayer for Relief No. 2, First Amended Complaint for Declaratory and Injunctive Relief for Violations of the Supremacy Clause of the United States Constitution

and the Federal Power Act, *Allco Fin. Ltd. v. Klee*, No. 3:13-cv-01874-JBA (D. Conn., Feb. 26, 2014). The Second Circuit found that because plaintiff's claim was based upon PURPA, plaintiff was required to exhaust its administrative remedies under PURPA before seeking injunctive relief. *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 97-98 (2d Cir. 2015), as amended (Dec. 1, 2015).

PURA defendants moved to dismiss plaintiff's *Allco III* Complaint for lack of standing and failure to state a claim upon which relief can granted on May 27, 2016.[1] [Doc. #21]. DEEP defendants moved to dismiss on May 26, 2016. [Doc. #20]. Plaintiff's responsive pleading is pending.

## III. LEGAL STANDARDS

A party seeking a preliminary injunction must demonstrate "(1) irreparable harm in the absence of the injunction and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the movant's favor." *MyWebGrocer, LLC v. Hometown Info, Inc.*, 375 F.3d 190, 192 (2d Cir. 2004) (quoting *Merkos L'Inyonei Chinuch, Inc. v. Otsar Sifrei Lubavitch, Inc.*, 312 F.3d 94, 96 (2d Cir. 2002)). The second "serious questions" prong is also frequently termed the "fair ground for litigation" standard. (citations omitted) *Able v. United States*, 44 F.3d 128, 130-31 (2d Cir. 1995). However, "[w]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous fair-ground-for-litigation standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim." *Able v. United States*, 44

[1] To avoid repetitive filing of materials here, this Opposition will reference Appendix ("App.") documents filed with PURA's Motion to Dismiss [Doc #21-2].

F.3d at 131. The exception "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able v. United States*, 44 F.3d at 131.

## IV. SUMMARY OF ARGUMENT

Plaintiff did not compete in the 2015 RFP, and lacks standing to enjoin an RFP that does not affect Allco. Plaintiff is not harmed, irreparably or otherwise, by a procurement in which it is not participating. Its purported injury-in-fact is speculative because it is based upon plaintiff's opinion about how avoided costs should be calculated, and is not based upon how avoided costs are calculated today by Connecticut law.

Plaintiff cannot succeed on the merits. Plaintiff's theory of federal preemption is without merit. Connecticut is not regulating wholesale sales, and has taken no action that violates the FPA. Connecticut is not constrained to act within PURPA, and plaintiff's continued attempts to force Connecticut to conduct its state-legislated procurements under PURPA fail as a matter of law. Its Injunctive Relief Motion fails to meet requisite standards, and should be denied.

## V. ARGUMENT

### 1. Plaintiff Lacks Standing to Raise Its Claim.

Plaintiff lacks standing to enjoin the 2015 RFP for the reasons set forth in greater detail in PURA's Motion to Dismiss and accompanying memorandum in support [Doc. #21-1]. Plaintiff asserts that Connecticut would purportedly illegally "compel" a wholesale transaction in violation of the FPA, but plaintiff would not be compelled to do anything under any circumstance. In essence, plaintiff wrongly complains that other parties would be "compelled" to enter a transaction to which plaintiff is a stranger.

Plaintiff is not a Connecticut regulated electric utility that would be directed to enter a wholesale contract under the 2015 RFP. Plaintiff simply seeks to police a procurement in which it is not participating and which would not injure plaintiff. It is an outsider to the 2015 RFP process, and merely seeks to deny others a benefit they would receive under laws passed by the Connecticut General Assembly. These are not legal interests sufficient to support standing.

Plaintiff's avoided cost argument also fails to establish an injury-in-fact. Plaintiff contends that it will suffer an injury-in-fact because the 2015 RFP will cause future reductions in the long-term forecasted avoided costs available to plaintiff under PURPA. Complaint, ¶53-4. However, plaintiff undermines its own theory of harm in its Memorandum in Support of Motion for Injunctive Relief [Doc. #13-1]. Here, plaintiff sets forth its belief that Connecticut **could** forecast long-term avoided costs based upon projections of ISO-NE clearing prices. Memorandum in Support of Motion for Injunctive Relief, p. 10. However, plaintiff does not and cannot contend that Connecticut does so presently; long-standing Connecticut law defines avoided costs based upon short-term measurements of ISO-NE clearing prices. App. 29, 39. Plaintiff's theory of harm is speculative because it is based upon what plaintiff wants avoided costs to be in Connecticut, not what they are today as a matter of law.

Plaintiff must "establish … a personal injury that is fairly traceable to the defendant's conduct and likely to be redressed by the requested relief…. In addition to preventing the judiciary from adjudicating generalized grievances better directed to the political branches … [the] standing doctrine's requirements ensure that a plaintiff has a sufficiently personal stake in the outcome of the suit so that the parties are adverse." (internal quotations and citations omitted) *Ret. Bd. of the Policemen's Annuity & Ben. Fund of the City of Chicago v. Bank of New*

*York Mellon*, 775 F.3d 154, 159 (2d Cir. 2014) *cert. denied sub nom. Ret. Bd. of Policemen's Annuity & Annuity & Ben. Fund of City of Chicago v. Bank of New York Mellon*, 136 S. Ct. 796 (2016). Plaintiff is not affected if the 2015 RFP goes forward. Other than its unfounded avoided cost argument, plaintiff does not state how conduct of the 2015 RFP personally injures Allco, and whatever rights plaintiff has under PURPA are unaffected. Plaintiff fails to meet this prerequisite for injunctive relief.

Plaintiff's claim is also not redressable. The Second Circuit held that voiding Section 6 contracts would not redress plaintiff's purported injury in *Allco I. Allco Fin. Ltd. v. Klee*, 805 F.3d at 98. Now that plaintiff has exhausted its administrative remedies, the same is true with respect to the 2015 RFP. Plaintiff gains nothing from enjoining the 2015 RFP. Plaintiff lacks standing because its claim is not redressable.

**2. Plaintiff Cannot Be Irreparably Harmed by the 2015 RFP.**

Plaintiff did not and cannot articulate any irreparable harm to Allco if the 2015 RFP proceeds. The irreparable harm requirement is "the single most important prerequisite for the issuance of a preliminary injunction." (internal quotations and citations omitted) *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir.1999). A motion for a preliminary injunction should be denied unless a movant can show "an injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages." (internal quotations and citations omitted) *Rodriguez v. DeBuono*, 175 F.3d at 234.

Plaintiff asserts irreparable harm only to its lawsuit if the 2015 RFP proceeds, and does not assert irreparable harm to plaintiff's own legal interests. Memorandum in Support of Motion for Injunctive Relief, pp. 19-20. The question before the Court is what irreparable harm may befall **plaintiff** if the 2015 RFP proceeds; the question is not what harm may befall its litigation

prospects. Plaintiff cannot manufacture irreparable harm by simply filing the instant lawsuit and claiming harm to its litigation prospects. Plaintiff merely expresses a desire to maintain the status quo, citing *Schipke v. Tracfone Wireless, Inc.*, No. 3:15-cv-1244 (SRU), 2015 U.S. Dist. LEXIS 157690 at *2 (D. Conn. 2015). Further, the harm plaintiff has alleged in the form of avoided cost reductions, though incorrect, could be remedied by monetary damages. Thus, under plaintiff's own theory of harm, monetary damages would compensate plaintiff for the purported reduction in avoided costs. Having failed to articulate irreparable harm to its legal interests, plaintiff fails to address the single most important prerequisite for the issuance of a preliminary injunction. This omission is fatal to plaintiff's Motion, which must be denied.

**3. Plaintiff Cannot Succeed on the Merits.**

Plaintiff cannot succeed on the merits because: 1) it lacks standing; 2) Connecticut is acting under express rights reserved to states under the FPA; and 3) PURPA does not apply to the 2015 RFP, and no law requires Connecticut to conduct the legislated procurements under PURPA. Plaintiff cannot prevail on the merits of its underlying claim, and its injunctive action must fail.

Codified at 16 U.S.C. § 824(b)(1), Section 201 of the FPA reserves for states jurisdiction over the facilities used for the generation of electric energy. These powers include "authority over … administration of integrated resource planning and utility buy-side and demand-side decisions [and] authority over utility generation and resource portfolios." *New York v. FERC*, 535 U.S. 1, 24, 122 S.Ct. 1012 (2002), citing Order No. 888, FERC Stats. & Regs. ¶31,036, 31,782, n.544 (May 10, 1996).[2] Connecticut is acting within its reserved authority under the FPA

[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.

because: 1) the utility is the buyer in any wholesale contract that may result from the 2015 RFP, and Connecticut is exercising authority over the utility; and 2) the 2015 RFP is directed at the portfolio of resources purchased by the utility.

Plaintiff is unlikely to succeed on the merits because Judge Arterton correctly recognized that Connecticut's implementation of Section 6 of Public Act 13-303 "is a permissible regulation of utilities under the State's jurisdiction." *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *10, *aff'd on other grounds*, as amended (Dec. 1, 2015) 805 F.3d 89 (2d Cir. 2015). Judge Arterton's ruling is entirely correct, and this court should adopt and apply Judge Arterton's rationale here, as this case concerns Connecticut's implementation of Sections 6 and 7 of Public Act 13-303, as well as Section 1(c) of Public Act 15-107.

Judge Arterton also held that plaintiff's substantially identical *Allco I* claim "fail[ed] on the merits, because Defendant's implementation of Section 6 does not seek to regulate wholesale energy sales… ." *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *10. Thus, plaintiff's central claim, that Connecticut is regulating wholesale energy sales, has already been rejected, and is simply incorrect. The claim wrongly conflates a state's exercise of buy-side authority permitted by the FPA with what plaintiff believes constitutes regulation of wholesale sales. This simplistic theory is not the law.

The United States Supreme Court's recent decision in *Hughes v. Talen Energy Mktg., LLC*, __ U.S. __, 136 S.Ct. 1288 (2016) represents the state of the law, which supports

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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).

defendants. The *Hughes* Court acknowledges the FERC-established regulatory regime 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. It acknowledges that Congress assigned regulatory authority to states in the FPA, and acknowledges that such exercise of authority may incidentally affect areas in FERC's domain; however, *Hughes* holds that a state's exercise of its authority cannot intrude on FERC's authority over interstate wholesale rates as Maryland did with its contracts-for-differences. *Hughes*, 136 S.Ct. at 1298.

Connecticut's contracts are a **product of** FERC's regulatory regime, and do not intrude upon FERC regulatory authority. Bidders supply offers to sell, at whatever price they choose, and Connecticut exercises its buy-side authority over the regulated electric company by directing it to accept the best offer and enter into a power purchase agreement. FERC wholesale rates are formed under its regulatory regime; the wholesale rates are not disregarded as found in *Hughes*. *Hughes*, 136 S.Ct. at 1298-1299. FERC retains authority over the transaction through its after-the-fact review authority. Section 2.5.4 of the 2015 RFP expressly states that any FERC-jurisdictional agreement must be filed with FERC under Section 205 of the Federal Power Act. Exhibit E to plaintiff's Complaint, Nov. 12, 2015 RFP, Section 2.5.4, p. 36 (page 101 of 157 of Doc. #1). Thus, Connecticut's 2015 RFP is fully consistent with FERC jurisdiction, not contrary to it.[3]

[3] Further, the "parade of horribles" listed by plaintiff on p. 12 of its Memorandum in Support of its Motion for Injunctive Relief are inapt. States would not set rates at their discretion; rates are formed by offers to sell into a

Connecticut simply is not exerting regulatory authority over the wholesale transaction regulated by FERC, and the case relied upon by plaintiff, *Federal Power Commission v. Southern Cal. Edison*, 376 U.S. 205, 215 (1964) ("*FPC*"), is irrelevant. Memorandum in Support of Motion for Injunctive Relief, p. 5. That case concerned whether FERC's predecessor agency, the Federal Power Commission, properly asserted jurisdiction over electric energy transactions that were previously regulated by the state public utility commission. *FPC*, 376 U.S. at 206-207. The Court of Appeals for the Ninth Circuit held that the Federal Power Commission lacked jurisdiction because it was permissible under the FPA for the state public utility commission to regulate the sale. *FPC*, 376 U.S. at 209-210. The United States Supreme Court reversed, holding that the FPA and cases construing it grant explicit ratemaking authority for interstate electricity transactions to the Federal Power Commission, and the Boulder Canyon Project Act's licensing authority granted to the Federal Power Commission for construction of the Hoover Dam also granted incidental ratemaking authority to that agency. *FPC*, 376 U.S. at 211-220. Here, there is no question that FERC has exclusive regulatory authority over the rates of any contract that would result from the 2015 RFP. Connecticut is not regulating the sale, and does not assert that the FPA grants it authority to regulate the sale.

Returning to *Hughes*, Connecticut's contracts would be bilateral power purchase agreements, not contracts-for-differences that intrude upon FERC ratemaking authority as found in that case. The *Hughes* Court distinguished bilateral contracts from contracts-for-differences, holding that the former transfer ownership of the commodity, while the latter do not. *Hughes*, 136 S.Ct. at 1299. The 2015 RFP seeks bilateral contracts in which title for electricity will

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competitive procurement process. States are not replacing FERC's market construct, but working within FERC's market construct. States are not regulating wholesale sales, and are only regulating buy-side activity. No FERC-regulated seller is required to do anything.

change hands. Exhibit E to plaintiff's Complaint, Nov. 12, 2015 RFP, Section 2.2.7, p. 23 (page 88 of 157 of Doc. #1).

The United States Solicitor General expressly cited the bilateral nature of Section 6 contracts as the reason why Judge Arterton's *Allco I* decision was correctly decided. In its *amicus* brief to the Supreme Court in *Hughes*, the Solicitor General stated:

> [Section 6] did not directly distort the wholesale market because Connecticut required the electric distribution companies to purchase renewable energy directly from the selected generators, rather than requiring the generators to sell their capacity to a FERC-approved wholesale-market operator through its auction.

App. 96-97. The 2015 RFP at issue in this lawsuit includes Section 6, and is jurisdictionally proper.

Nor would any resulting contracts include capacity support payments, as did the contracts-for-differences in *Hughes*. Exhibit E to plaintiff's Complaint, Nov. 12, 2015 RFP, Section 2.2.4, p. 21 (page 86 of 157 of Doc. #1). This means the contracts would be devoid of the feature that was fatal to Maryland's program – conditioning payment of funds upon capacity clearing FERC's capacity auction. *Hughes*, 136 S.Ct. at 1299. Connecticut's program differs markedly from Maryland's program, and plaintiff's federal preemption theory will not succeed on the merits.

Notably, the *Hughes* case does not stand for the central legal proposition underlying plaintiff's Complaint, which is that a state can only direct a regulated utility to enter a wholesale contract if it acts under PURPA. If plaintiff's preemption theory were true, the Supreme Court and underlying courts applied the wrong preemption theory, and Maryland's program was preempted because it directed a regulated utility to enter a wholesale contract outside of PURPA.

The *Hughes* Court did not so hold, despite the fact that Allco argued the identical incorrect legal theory to the Supreme Court in the *Hughes* case.[4]

The Second Circuit's decision in *Allco I* did not adjudicate plaintiff's federal preemption theory, as plaintiff contends. Instead, the Second Circuit dismissed for failure to exhaust administrative remedies. *Allco Fin. Ltd. v. Klee*, 805 F.3d at 97-98. Because plaintiff's federal preemption claim is based in part upon PURPA, plaintiff was required to first present that claim to FERC. *Allco v. Klee*, 805 F.3d at 96-98. FERC, in turn, determined that it would not act on plaintiff's federal preemption theory. *Allco Renewable Energy Ltd. Allco Fin. Ltd.*, 154 FERC ¶ 61007, 2016 WL 126022 (Jan. 8, 2016). Consequently, no court or regulatory agency has ever endorsed plaintiff's federal preemption theory.

Plaintiff's PURPA theory cannot succeed on the merits either. Connecticut is not implementing PURPA in its 2015 RFP or the underlying state statutes, and is not required to conduct the RFP under PURPA. FERC has held that "states have numerous ways **outside of PURPA** to encourage renewable resources." (emphasis added) *Midwest Power Systems, Inc.*, 78 FERC ¶¶ 61,067, 61248, 1997 WL 34082 (January 29, 1997). More recently, FERC rejected a petition by Allco in 2013 and held that Vermont could create a market-based program **outside of PURPA** to encourage the development of renewable energy facilities. *Otter Creek Solar LLC*, 143 FERC ¶ 61282 (June 27, 2013).

Plaintiff has never cited a provision of PURPA upon which it can prevail. Its Complaint does not cite a PURPA provision that Connecticut violates. Instead, plaintiff has constructed a preemption theory by attempting to fuse its incorrect theories of PURPA with its incorrect

[4] See, *amicus curiae* brief of Allco Renewable Energy Limited in *Hughes*, p. 30-31, at http://www.scotusblog.com/wp-content/uploads/2016/01/14-614-bsac-Allco-Renewable-Energy-Limited.pdf

theories of the FPA. Plaintiff cannot succeed on the merits, and its Motion for Injunctive Relief fails.

## VI. CONCLUSION

For the reasons set forth above, defendants PURA Utility Commissioners House, Betkoski and Caron respectfully request that this Court deny plaintiff's Motion for Injunctive Relief.

Respectfully submitted,

COMMISSIONERS HOUSE, BETKOSKI AND CARON

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 3, 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*
Seth A. Hollander
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