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	:	April 14, 2016

OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

In a Motion for Preliminary Injunction dated March 30, 2016 ("Injunctive Relief Motion") [Doc #37], plaintiff Allco Finance Limited ("Allco" or "plaintiff") seeks to enjoin 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 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. It cannot succeed on the merits because it has failed to exhaust its administrative remedies. 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*.

II. PROCEDURAL HISTORY

On April 30, 2015, plaintiff filed a Complaint [Doc #1] requesting this Court to halt a renewable energy procurement to be conducted by DEEP (Count I), to award money damages and fees under §§ 1983 and 1988 (Count III), and to strike down the State of Connecticut's renewable energy portfolio compliance program administered by PURA (Count II). On June 19, 2015, DEEP and PURA each filed a Motion to Dismiss plaintiff's Complaint [Doc ##12, 13]. After briefing closed, defendants notified the court of two significant developments related to this case: 1) the Second Circuit's decision in *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 97 (2d Cir. 2015), as amended (Dec. 1, 2015) ("*Allco I*"), in which the Second Circuit dismissed a nearly identical action by this plaintiff because Allco failed to exhaust administrative remedies under the Public Utility Regulatory Policies Act of 1978 ("PURPA") [Doc ##31, 32]; and 2) the issuance of a Notice of Intent Not to Act by the Federal Energy Regulatory Commission ("FERC") subsequent to the Second Circuit's dismissal of *Allco I* [Doc #33]. On March 17, 2016, this court issued a Memorandum and Order to solicit parties' views in letter form as to the meaning and importance of the two developments and to determine next steps in this case [Doc #34]. On March 30, 2016 defendants responded to the court's Memorandum and Order by submitting the requested letter [Doc ##35, 36]. Plaintiff also responded by letter [Doc #39], but additionally submitted the instant Injunctive Relief Motion.

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. *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." (internal citation omitted) *Able v. United States*, 44 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. ADDITIONAL FACTUAL BACKGROUND

PURA's Memorandum in Support of its Motion to Dismiss described Connecticut's move to a restructured retail electric market. Memorandum, p. 4. PURA also described the significant narrowing of PURPA by Congress in Section 1253(a) of the Energy and Policy Act of 2005, and by FERC in *New PURPA Section 210(m) Regulations Applicable to Small Power Prod. & Cogeneration Facilities*, 117 FERC ¶ 61078 (Oct. 20, 2006), culminating in the elimination of

the must-buy provision for Qualifying Facilities[1] larger than 20 MW, subject to a rebuttable presumption. Memorandum, pp. 22-23.

However, FERC also approved an application by The United Illuminating Company[2] to terminate, entirely, PURPA's must-buy requirement within that utility's territory. Order Granting Application to Terminate Purchase Obligation, *The United Illuminating Co.*, 123 FERC ¶ 61269 (June 19, 2008). Thus, for the respective areas of Connecticut's investor-owned utilities, PURPA does not apply in approximately 25 percent of the state, and applies in limited fashion within Eversource Energy's territory. Eversource Energy is the only Connecticut utility even subject to the must-buy provision, and there is a rebuttable presumption that it does not apply for Qualifying Facilities larger than 20 MW.

At the state level, Connecticut long ago stopped calculating avoided cost for PURPA. The last time Connecticut calculated avoided cost was nearly twenty years ago in 1998. PURA Decision dated August 21, 1998 in Docket No. 98-03-04, *13th* Annual Review of The Connecticut Light and Power Company and The United Illuminating Company Integrated Resource Planning, pp. 2-4 (App 2-5). There would never be a 14th annual integrated resource plan review at which avoided cost was calculated. Instead, in 1999, at the very outset of retail competition, PURA redefined avoided cost as the avoided cost of the price of energy in the ISO New England market, and never again calculated avoided costs. 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 17). It redefined avoided cost because the utility no

[1] A QF is a generating facility that meets certain standards set by the FERC regarding matters such as size, fuel use, and efficiency. See 18 C.F.R. § 292.101.

[2] The United Illuminating Company is one of two investor-owned electric utilities in Connecticut. The other is Eversource Energy.

longer owned generation after restructuring, and no longer served customers through owned generation. Consequently, the utility no longer avoided the cost of constructing generation, but instead only avoided the cost of purchasing energy on the ISO New England Market.

Finally, PURA notes that the RFP response date for the 2015 procurement was January 28, 2016.[3] Plaintiff did not submit a bid into the 2015 RFP.[4]

V. 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.

Plaintiff cannot succeed on the merits. Plaintiff has failed to exhaust its administrative remedies, and its theory of federal preemption is without merit. Connecticut is not constrained to act within a "PURPA exception," and indeed no such PURPA exception exists. Connecticut is not compelling wholesale sales, and has taken no action that violates the FPA.

PURPA has limited relevance in Connecticut. Avoided costs have not been calculated by the Authority since 1998. PURPA's relevance has been severely diminished by a combination of federal and state law: 1) state legislation encouraged utilities to exit the electric generation function; 2) Congressional legislation allowed for termination of the PURPA must-buy provision; and 3) FERC terminated the PURPA must-buy provision for large portions of Connecticut and most QFs. Because Connecticut has a competitive electric market, where its electric utilities no longer own electric generating facilities, the utilities no longer have these

[3] See https://cleanenergyrfp.com/timeline/
[4] See https://cleanenergyrfp.com/bids/

costs to avoid. Connecticut's 2013 and 2015 renewable energy procurements are not conducted under PURPA authority; the procurements have nothing to do with PURPA.

Plaintiff's continued attempts to force Connecticut to procure renewable energy under PURPA fail as a matter of law. Its Injunctive Relief Motion fails to meet requisite standards, and should be denied.

VI. ARGUMENT

1. Plaintiff Lacks Standing to Raise Any if Its Claims.

PURA's Motion to Dismiss focuses on plaintiff's lack of standing to raise its Count II dormant Commerce Clause challenge to Connecticut's REC program. It is now abundantly clear that plaintiff entirely lacks standing to raise Counts I and III as well. The 2015 RFP was issued, and plaintiff did not respond to the RFP. Because it is not participating in the 2015 RFP, plaintiff lacks standing to enjoin an RFP that potentially affects others, but not Allco.

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, 159-160 (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 loses nothing if the 2015 RFP goes forward. PURA's implementation of PURPA will not change if the 2015 RFP goes forward. PURA's implementation of PURPA is

fixed by tariff, which sets forth the avoided cost rate available to Allco. That avoided cost rate is the ISO-NE clearing price regardless of the 2015 RFP. There is no injury traceable to the 2015 RFP that affects Allco.

Plaintiff has in earlier filings asserted that "the addition of the selected projects would have on the Connecticut Utilities' cost structure in a manner that would cause Allco to earn lower profit from future energy sales under a PURPA contract." Allco Opposition to Motion to Dismiss [Doc. #16], p. 17. While this might have been true in 1995 it is absolutely incorrect now, and has been incorrect for over sixteen years. The utilities have no cost structure for owned electric generation, because they are no longer required to serve customers with a portfolio of owned generation. Plaintiff lacks standing to challenge the 2015 RFP because it is not harmed by the 2015 RFP.

2. Plaintiff Did Not Bid Into the 2015 RFP, and Cannot Be Irreparably Harmed by It.

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, 233-34 (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's Injunctive Relief Motion did not articulate a harm that is actual and imminent if the 2015 RFP proceeds. Indeed, plaintiff is not even participating in the RFP. No actual or imminent harm can befall plaintiff from a procurement it is not even participating in.

Plaintiff has asserted in the past that PURPA avoided cost rates would be affected by a successful RFP, but does not make that argument in its Injunctive Relief Motion. However, even if it had, that argument would be entirely wrong. As set forth above, avoided cost rates established and approved by PURA cannot be affected by the 2015 RFP because they are set, by tariff, as the ISO-NE clearing price. It makes no difference whether the 2015 RFP is entirely successful or not successful at all. There is no calculation based upon the amount of native load served by utility owned generation or other sources, nor has there been since 1998.

Finally, instead of articulating actual or imminent harm, plaintiff's Motion 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 (D. Conn. 2015) at *2 for the purpose of a preliminary injunction. Motion for Injunctive Relief, p. 5. Merely citing a case for the purpose of a preliminary injunction entirely omits the requisite showing of harm. This failure to address the single most important prerequisite for the issuance of a preliminary injunction 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 (as argued above); 2) Connecticut is acting under express rights reserved to states under the FPA; 3) PURPA does not apply to the 2015 RFP, and no law requires Connecticut to conduct procurements under PURPA; and 4) even if PURPA does apply, which it does not, plaintiff failed to exhaust its administrative remedies under PURPA. Plaintiff cannot prevail on the merits of its underlying claim, and its injunctive action must fail.

As set forth more fully in Section VI.1 above, plaintiff lacks standing to enjoin an RFP that potentially affects others, but not Allco. Consequently, Allco cannot succeed on the merits.

Connecticut's 2015 RFP is an exercise of long-standing authority reserved to states under the FPA in 1935, and not PURPA, which was enacted in 1978. Codified at 16 U.S.C. § 824(b)(1), Section 201 of the FPA reserved 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).[5] Here, the utility is the buyer in any wholesale contract that may result from the 2015 RFP, and Connecticut is exercising authority over the utility. Further, the 2015 RFP is plainly directed at the portfolio of resources purchased by the utility. Connecticut is acting within its reserved authority under the FPA.

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) (App 38). 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, and of Public Act 15-107.

[5] *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).

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 (App 38). Thus, plaintiff's central claim, that Connecticut is regulating wholesale energy sales, has already been rejected, and is simply incorrect.

Plaintiff's claim that Connecticut is "regulating wholesale sales" is based entirely on the following logic. Plaintiff asserts that states can order utilities to enter into wholesale energy contracts if: (1) the utility issues an RFP reviewed and approved by the state; (2) the utility conducts the RFP and selects the winning bidder; and (3) the state reviews the utility's decision in hindsight before approving the transaction and ordering the utility to enter into the wholesale energy contract.[6] Plaintiff asserts that states are in contrast field and conflict preempted from: (1) issuing an RFP in consultation with the utility; (2) evaluating bids in consultation with the utility; (3) selecting the winning bidder(s) in consultation with the utility; and (4) issuing an order to the utility to enter a contract with the winning bidder(s). In both cases, the state orders the utility to enter the contract. But plaintiff asserts, without support, that when the state chooses the winning bidder, it has "regulated a wholesale sale" and compelled a transaction in contravention of the Federal Power Act, and must act under PURPA.[7]

[6] See, transcript from July 30, 2014 oral argument in *Allco I*, where Allco stated: "…what many states do is they simply have a competitive procurement where people place bids and then the utilities choose and they say we want a contract with X, we want a contract with Y, the utility gets to choose. The state then has the power after the fact to say, okay, now we've looked at the choice you made and [we] think that was a prudent choice in light of the alternatives available to you … That kind of review after the fact for the prudence of business judgment doesn't involve the state actually regulating the wholesale sale itself. When the state compels the entry into the contract, it is regulating [a] wholesale sale." (App 82).

[7] In *Allco I*, plaintiff asserted that the jurisdictional flaw in the state choosing the winning bidder(s) was that the state impermissibly set a wholesale rate. Judge Arterton correctly rejected this claim as well, holding that under the RFP mechanism used by Connecticut, bidders, and not the state, determined the rates they would offer. *Allco Fin. Ltd. v.*

Connecticut is not implementing PURPA in its 2015 RFP or the underlying state statutes, and is not required to conduct the RFP under PURPA. Connecticut's actions are entirely consistent with the buy-side authority reserved to it under the FPA.

PURPA is not the lens through which all state-mandated electric procurement must pass. That is why FERC held in 1997 that "states have numerous ways **outside of PURPA** to encourage renewable resources." (emphasis added) *Midwest Power Systems, Inc.*, 78 FERC ¶¶ 61,067, 1997 WL 34082 (January 29, 1997). That is why FERC in 2013 declined to strike down a market-based program created by Vermont **outside of PURPA** to encourage the development of renewable energy facilities, despite Allco's petition requesting that it do so. *Otter Creek Solar LLC*, 143 FERC ¶ 61282 (June 27, 2013). That is why the U.S. Solicitor General in January of this year cited *Midwest* in an *amicus curiae* brief to the U.S. Supreme Court in a case regarding preemption under the Federal Power Act, stating that "[p]ermissible state programs may include a requirement that local utilities purchase a percentage of electricity from a particular generator or from renewable resources…." January 29, 2016 *Amicus Curiae* Brief of the United States in *Hughes v. Talen Energy Marketing, LLC, cert. granted*, 83 U.S.L.W. 3450 (U.S. Oct. 19, 2015) (No. 14-614), p. 34 (App 79). Thus, in a field preemption case, the federal government cited *Midwest* to show state activities that are **not** field preempted, and those activities necessarily include renewable energy programs **outside** of PURPA.

At its height, PURPA addressed one corner of the electricity market – the market for output from generating facilities up to 80 MW. Today, in Connecticut, PURPA is severely diminished in legal applicability and relevance. PURPA no longer creates a must-buy obligation

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Klee, No. 3:13CV1874 JBA, 2014 WL 7004024, at *9 (App 37). Here, Allco's Complaint attacks the RFP mechanism because it purportedly regulates wholesale sales by compelling transactions. Complaint, ¶¶5, 21 and 43.

for Connecticut's utilities to purchase the output from all Qualifying Facilities up to 80 MW. It requires only one of its utilities to purchase the output from Qualifying Facilities 20 MW and less.

Though electric generating facilities can range from 1 MW to 1,200 MW or more, and though PURPA now only applies to a small fraction of the market in a part of the state, and though plaintiff already lost a case at FERC attempting to force Vermont to procure solely through PURPA, plaintiff asserts Connecticut must act through that statute. Plaintiff is incorrect.

PURPA does not contain a statutory exception through which Connecticut must act. Plaintiff has never identified any such statutory provision, and no such provision exists.[8] PURPA only created a must-buy obligation for utilities to purchase the output of QFs, and that must-buy obligation is now significantly diminished. There is no general rule that states may only procure electric generation if they act within PURPA. There is no "PURPA exception." There is no general rule that a state can only order a utility to enter a wholesale contract with a Qualifying Facility of 80 MW or less.

In the *Hughes* case, Maryland ordered a utility to enter a contract with a 661 MW facility, which far exceeds the size limitation for a QF. *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 822 (D. Md. 2013) *aff'd*, 753 F.3d 467 (4th Cir. 2014).[9] No reviewing court cited PURPA as a basis for invalidating Maryland's actions because the state ordered a utility to enter a contract with a large non-QF. No court mentioned PURPA at all. *Hughes* shows that a state

[8] In describing the background of this case, the March 17, 2016 Memorandum and Order stated that "… PURPA contains an exception which permits states to regulate wholesale sales by qualifying facilities … ." Memorandum and Order, p. 2. PURA understands this statement as merely setting forth plaintiff's claim for purposes of issuing questions to counsel, and not a substantive ruling. As this Opposition demonstrates, defendants strongly contest plaintiff's legal arguments regarding the proper scope and application of PURPA.

[9] Douglas R.M. Nazarian was Chairman of the Maryland Public Service Commission when the state issued the challenged orders, but is no longer a member of the Commission. W. Kevin Hughes is now Chairman. PPL EnergyPlus, LLC now conducts business as Talen Energy Marketing, LLC.

can order a utility to enter a wholesale contract with a generating facility, **regardless** of its size, provided other potentially distortive features are absent.

The *Hughes* case concerns only the question of whether the contract-for-differences used in Maryland to subsidize capacity should be preempted.[10] Judge Arterton also correctly held that field and conflict preemption rulings by the Fourth Circuit in the *Hughes* case are inapplicable here. *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *9-*10 (App. 37-38). The Fourth Circuit's holding was expressly limited to contracts-for-differences, and expressed no opinion about other arrangements. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d at 478. Connecticut is not soliciting contracts-for-differences. It is soliciting bilateral contracts.

If anything, the federal government's positions in the *Hughes* case entirely support Connecticut. The federal government believes bilateral contracts do not encroach upon federal jurisdiction. More directly, the federal government expressly agrees with Judge Arterton's merits holding in *Allco I*.

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 [661 MW] generator to build new capacity… ." January 29, 2016 *Amicus Curiae* Brief of the United States in *Hughes v. Talen Energy Marketing, LLC*, p. 18 (App 63). The federal government views bilateral contracts as

[10] Maryland conducted an RFP which solicited bids for a generator to name a price under which it would enter a long-term contract with a utility. Under the long-term contract, the generator would be obligated to build a plant and offer its capacity into a federally-administered wholesale market. Each year, the contract price was compared to the results of the capacity auction. If the capacity auction yielded a lower price than the auction, the generator was reimbursed by the utility (and, in turn, ratepayers) for the difference. If the auction yielded a higher price than the auction, the generator reimbursed the utility (and, in turn, ratepayers) for the difference. The Fourth Circuit found this arrangement functionally set the rate that the generator received in the federally-administered market, and effectively supplanted the rate received in that market. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d at 476.

jurisdictionally proper. The federal government views a state ordering a utility to enter a bilateral contract as jurisdictionally proper.

In fact, the Solicitor General in its *amicus* brief **expressly approved** of Connecticut's bilateral contracts obtained in *Allco I*. It cited Connecticut's bilateral contracts as perfectly acceptable under an FPA preemption analysis. *Id*., at pp. 34-35 (App 79-80). Consequently, the federal government, the supposed victim of alleged Connecticut's jurisdictional transgression under Allco's theory, wholly disagrees that Connecticut has violated the FPA.

Plaintiff's efforts to blur the distinction between Connecticut's bilateral contracts and contracts-for-differences stand in direct contradiction to the federal government, and are of no avail. Instead of heeding the federal government's distinction between bilateral contracts and contracts-for-differences, plaintiff repeatedly provides a numerical example to attempt to establish that they are the same. Allco Opposition to Motions to Dismiss [Doc #16], p. 35; March 30, 2016 Response to Memorandum and Order [Doc #39]. Plaintiff is asserting that because bilateral contracts are financially settled, and because contracts-for-differences are financially settled, there is no jurisdictional difference between the two. This is a reckless argument that would place into question the jurisdictional nature of the entire energy market, and is wrong. The federal government already knows bilateral contracts are financially settled. The FERC Energy Primer states that bilateral contracts in federally administered markets are settled financially. FERC Energy Primer, p. 57.[11] The federal government is entirely aware bilateral contracts are financially settled and does not equate them with contracts-for-differences, and neither should this court.

[11] The FERC Energy Primer may be found at http://www.ferc.gov/market-oversight/guide/energy-primer.pdf

Finally, plaintiff cannot succeed on the merits because it has failed to exhaust its administrative remedies. If plaintiff wishes to argue that Connecticut is preempted because it is constrained to PURPA when ordering a utility to enter a contract, it must exhaust this claim at FERC. It has not with respect to Section 7 of Public Act 13-303 and Public Act 15-107, two of the statutes upon which the 2015 RFP is based. Nor has plaintiff exhausted its claim at FERC with respect to the specific terms of the 2015 RFP.

VII. CONCLUSION

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

Respectfully submitted,

COMMISSIONERS ARTHUR HOUSE,
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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 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
Assistant Attorney General