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	:	August 7, 2015

REPLY BRIEF OF PURA COMMISSIONERS HOUSE, BETKOSKI AND CARON

I. INTRODUCTION

In its Memorandum of Points and Authorities in Opposition ("Opposition") responding to defendants' Motions to Dismiss, plaintiff Allco Finance Limited ("Allco" or "plaintiff") fails to cure the glaring jurisdictional deficiencies of its case. Plaintiff cannot raise its preemption claim in U.S. District Court because it failed to exhaust its administrative remedies under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Its claim is also not ripe, especially as to the Public Utilities Regulatory Authority ("PURA").

Connecticut's renewable energy portfolio standard ("RPS") program is a subsidy which does not offend or even implicate the Dormant Commerce Clause. Plaintiff's claim, if upheld, would require Connecticut ratepayers to subsidize renewable energy generation regardless of where it is produced and consumed, whether in Malibu, California or Eugene, Oregon. Further,

NEPOOL Generation Information System's ("NEPOOL GIS") deliverability requirement, the very source of purported discrimination alleged by plaintiff, represents the determinations of a private entity and not the state. Finally, plaintiff's § 1983 claim cannot be saved by an amended complaint. All claims against the PURA Commissioners should be dismissed.

II. THIS COURT LACKS JURISDICTION OVER THE PREEMPTION CLAIM.

1. Plaintiff's Preemption Claim Against PURA Commissioners Is Not Ripe.

PURA's Motion to Dismiss demonstrated that plaintiff's preemption claim against PURA Commissioners is not ripe because the proposed RFP may never be issued in final form. Further, even if issued, DEEP might not select any projects, and even if projects are selected, final agreements might not be negotiated, or DEEP might select transmission projects for which PURA approval may not be necessary. This tenuous chain of anticipated events makes plaintiff's preemption claim against the PURA Commissioners unfit for review. In an implicit concession, plaintiff directs its ripeness arguments only to the DEEP Commissioner (Opposition, pp. 10-15), and fails to address how its attenuated claims against the PURA Commissioners might survive a ripeness challenge. Plaintiff's Count I preemption claim is not ripe for adjudication because the PURA Commissioners will not issue the RFP, conduct the RFP, or do anything with respect to Sections 6 and 7 unless and until DEEP issues and conducts the RFP, selects a project that is subject to PURA review, and a final agreement is successfully negotiated, with the application made to PURA. The number of steps required to be taken before PURA even considers approving a project demonstrates the claim is premature.

2. This Court Lacks Jurisdiction over Plaintiff's Preemption Claim Because Plaintiff Failed to Exhaust PURPA's Administrative Remedies.

Although on the merits PURPA does not apply to the procurements challenged herein, plaintiff clearly bases its Count I claims in PURPA.[1] Plaintiff cannot maintain a private action in federal district court against a state regulatory authority such as PURA based upon an alleged conflict with PURPA without first satisfying PURPA's administrative prerequisites. 16 U.S.C. § 824a-3(h)(2)(B); *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269 (2d Cir. 2002). Plaintiff may only bring an action in district court to require PURA to comply with PURPA if it first petitions FERC, and if FERC does not within 60 days initiate an enforcement action. 16 U.S.C. § 824a-3(h)(2)(B); *Niagara Mohawk*, 306 F.3d at 1269.[2] Plaintiff's Opposition and its Complaint establish that Count I is based upon an alleged conflict with PURPA, despite plaintiff's protestation to the contrary and plaintiff's purported reliance on the Federal Power Act ("FPA"). See Opposition, p. 20.

When a plaintiff presents a claim based upon alleged PURPA violations, merely labeling it as a Supremacy Clause claim does not avoid PURPA's administrative exhaustion requirements. *Niagara Mohawk*, 306 F.3d at 1270. In *Niagara Mohawk*, plaintiff asserted a Supremacy Clause claim and a PURPA claim. However, the *Niagara Mohawk* Court concluded that the two claims presented the same legal theory, and were in fact one and the same, and PURPA's exhaustion requirement applied. *Id*.

[1] PURPA's application to Connecticut is a disputed legal issue on the merits between the parties, and need not be determined here to grant the pending motions. *Compare* PURA memo at 20 *with* plaintiff's Opposition at 17 n.4.

[2] Since defendants' Motions to Dismiss were filed, the Second Circuit Court of Appeals has asked parties to *Allco I* to address whether 16 U.S.C. § 824a-3(h)(2)(B) strips the court of jurisdiction over plaintiff's *Allco I* preemption claim.

Here, plaintiff does not assert an independent Supremacy Clause claim. It merely attaches a Supremacy Clause label to its claim of alleged PURPA violations, and its citations to 16 U.S.C. § 825p and 28 U.S.C. § 1331 do not matter. First, its Prayers for Relief related to its Count I claim all seek to rewrite DEEP's proposed RFP so that it is purportedly "PURPA compliant." Indeed, the rights asserted by plaintiff, and the harm allegedly incurred by plaintiff, all relate entirely to PURPA. Plaintiff asserts rights as a "qualifying small power producer." Complaint, ¶13. It alleges that it will be deprived of a benefit bestowed by Congress in PURPA. Complaint, ¶46; Opposition, p. 16. It claims it will suffer an injury-in-fact because it will be forced to compete with large non-QFs. Opposition, pp. 1, 14-15, 16-18. It alleges that future avoided cost pricing purportedly available to plaintiff under PURPA will be suppressed by the proposed RFP if issued in its current form. Complaint, ¶52; Opposition, p. 17. Plaintiff's entire theory of preemption presumes that states can only direct the buy-side of the transaction to enter a power purchase agreement when proceeding under PURPA. Complaint, ¶45; Opposition, p. 36.

FERC adjudicates questions just like those raised by plaintiff, and examines state-legislated programs to determine whether PURPA preempts. PURA's Motion to Dismiss cites *Otter Creek Solar LLC*, 143 FERC ¶ 61282 (June 27, 2013) and *Winding Creek Solar LLC*, 151 FERC ¶ 61103 (May 8, 2015) (petition for enforcement filed by Winding Creek Solar LLC c/o Allco Renewable Energy Limited). See PURA memo at 21-22. Although plaintiff here was involved in the *Winding Creek Solar* matter, plaintiff's Opposition fails to address these cases.

Finally, plaintiff asserts that it has prudential standing because the Supremacy Clause does not impose a zone-of-interest requirement. Opposition, p. 19. Whether the Supremacy

Clause imposes a zone-of-interest requirement is beside the point. Prudential standing is a "judicially self-imposed [limit] on the exercise of federal jurisdiction." (internal citation omitted) *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 91 (2d Cir. 2009). It "further [protects], to the extent necessary under the circumstances, the purpose of Article III." *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1106 (2d Cir. 1992). It is not a substitute for Article III standing. The Court need not explore whether prudential reasons exist to deny Allco standing to assert a Supremacy Clause claim because Allco lacks Article III standing.

III. PLAINTIFF IS ESTOPPED FROM RAISING ITS PREEMPTION CLAIM.

Though its preemption claim was specifically rejected by the District Court in *Allco Fin. Ltd. v. Klee*, No. 3:13CV1874 JBA, 2014 WL 7004024, at *1 (D. Conn. 2014) *appeal docketed*, No. 15-20 (2nd Cir. January 2, 2015) ("*Allco I*"), plaintiff contends it may re-litigate the exact same claim again. Relying upon *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 51 (2d Cir. 2003), plaintiff asserts that if a court makes a decision on multiple grounds, neither ground is subject to estoppel. Opposition, pp. 19-20. Plaintiff misreads the holding in *Postlewaite*.

The Second Circuit in *Postlewaite* affirmed the well-established legal standards governing collateral estoppel or issue preclusion as barring "the relitigation of an issue that was raised, litigated, and actually decided by a judgment in a prior proceeding." *Id.*, 333 F.3d at 48. The issue must be "actually litigated," "determined by a valid and final judgment," and the determination "must have been essential to the judgment." *Id.* In *Postlewaite*, the arbitration award below had provided no explanation for the decision, and thus the courts were required to guess as to the basis for the adverse decision. *Id*., 333 F.3d at 45-47. Because the court could not determine the legal issues underlying the arbitrators' decision, and it was "possible" that the ruling was made on another basis, it declined to apply estoppel to the claim. *Id.*, at 50-51.

By contrast, the district court in *Allco I* specifically and comprehensively addressed plaintiff's preemption claim, and held that plaintiff failed to raise a claim upon which relief can be granted. *Allco I* at *6-*10. Dismissal for failure to raise a claim has preclusive effect. *Alliance for Envtl. Renewal, Inc. v. Pyramid Crossgates Co.*, 436 F.3d 82, 89 n.6 (2d Cir. 2006). Plaintiff litigated the exact same legal issue and lost. It cannot get a second bite at the apple and re-litigate its preemption challenge here.

IV. PLAINTIFF'S DORMANT COMMERCE CLAUSE CLAIM MUST BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

Connecticut's RPS system is a subsidy that does not implicate the Dormant Commerce Clause. Even if analyzed under the Dormant Commerce Clause, Connecticut's RPS system does not protect any state interest at the expense of out-of-state interests, but rather sends 90% of that subsidy to other states.

Plaintiff pled that Connecticut's renewable portfolio standard program is a subsidy. Complaint, ¶66. Plaintiff fails to address, much less rebut, the binding precedent that a state subsidy does not violate the Dormant Commerce Clause. PURA memo at 28. Nor does it address the fact that Connecticut's RPS subsidy creates commerce that did not exist prior to Connecticut's enactment of its RPS, as opposed to placing a burden upon interstate commerce. Put simply, if Connecticut repealed its RPS tomorrow, and no longer subsidized the Connecticut Class I renewable energy certificate it created, the Dormant Commerce Clause would not be offended. The Commerce Clause does not require Connecticut to continue its RPS program.

Instead of addressing the subsidy issue created by its own pleading, plaintiff attempts to establish a Dormant Commerce Clause violation by relying on: 1) a Seventh Circuit case dealing not with RPS but with cost allocation of transmission lines; and 2) a non-binding advisory

opinion issued by the NEPOOL Advisory Board. Opposition, pp. 41-47. Neither support plaintiff's position.

In 2013, the Seventh Circuit Court of Appeals considered a case dealing with cost allocation of transmission lines. *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 772 (7th Cir. 2013) *cert. denied sub nom. Schuette v. FERC*, 134 S.Ct. 1277 (2014) and *cert. denied sub nom. Hoosier Energy Rural Elec. Co-op., Inc. v.* FERC, 134 S.Ct. 1278 (2014) ("*ICC v. FERC*"). The Midwest Independent System Operator introduced a tariff amendment that would allocate transmission costs, and the tariff was approved by FERC. *ICC v. FERC*, 721 F.3d at 772. The State of Michigan opposed the cost allocation proposal, arguing in part that the costs Michigan would incur from the tariff would far outweigh the benefits it would receive. *ICC v. FERC*, 721 F.3d at 775. Michigan argued in part that costs would exceed benefits because state law would not credit wind power from out of state. *Id*. The Court (Posner, J.) rejected this argument because it assumes an outcome that the Court concluded would run afoul of the Dormant Commerce Clause. *ICC v. FERC*, 721 F.3d at 776. However, Connecticut's law does not forbid it to credit renewable energy from out of state and does not discriminate against out-of-state renewable energy, two concerns expressed by the Seventh Circuit Court of Appeals in rejecting Michigan's argument. *ICC v. FERC*, 721 F.3d at 776.

RPS constitutionality was not before the Seventh Circuit Court of Appeals in *ICC v. FERC*. In contrast, the 10th Circuit Court of Appeals recently upheld Colorado's RPS law when directly challenged under the Dormant Commerce Clause. *Energy & Env't Legal Inst. v. Epel*, -- F.3d --, No. 14-1216, 2015 WL 4174876 (10th Cir. July 13, 2015) ("*EELI v. Epel*"). The Court held that Colorado's RPS does not discriminate against out-of-state rivals or consumers, and

does not violate the extraterritorial conduct prong of the Dormant Commerce Clause. *EELI v. Epel* at *4. Thus, the only federal court of appeals to examine an RPS law has upheld that law.

Nor does the NEPOOL Advisory Board opinion cited by plaintiff in its Opposition at pp. 46-48 strengthen its position. The March 4, 2009 non-binding advisory opinion (*In the Matter of the Appeal Case of Brookfield, Energy Marketing, Inc.*, No. 02-NE-BD-2008 (NEPOOL Board of Review, 2009)) only serves to demonstrate the inner workings of NEPOOL. It supports defendants' argument that the deliverability requirement is a product of a private organization that operates under the auspices of the federal government, and is not an attempt by any state government to favor in-state interests over out-of-state interests. See PURA memo at 32-33.

Brookfield was ultimately unsuccessful in its attempt to relax the deliverability requirement. However, the episode demonstrates two important points. First, it shows that Connecticut's law is not discriminatory; if NEPOOL had in fact relaxed the deliverability requirement as requested by Brookfield, the RPS statute would automatically recognize the additional renewable generation. No amendment would be required. Second, it demonstrates that plaintiff's remedy is with NEPOOL, and not with federal courts. If plaintiff wishes to relax the deliverability requirement, it should approach NEPOOL's governance structure directly instead of constructing a Dormant Commerce Clause claim.

Plaintiff accuses the state of a form of regional balkanization that offends the Dormant Commerce Clause. Opposition, pp. 44-45. Plaintiff's cites *NE Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985), but this case misses the mark. In *NE Bancorp*, the U.S. Supreme Court forewarned in *dicta* against a hypothetical scenario. In that hypothetical, a group of states establishes a system of regional banking by excluding bank

holding companies from outside the region, thereby violating the Dormant Commerce Clause. *NE Bancorp*, 472 U.S. at 174. Here, states merely relied upon a regional clearinghouse established by a regional power pool for consistent RPS compliance reporting. Plaintiff complains of governing rules created by the clearinghouse, not by states themselves.

Further, what plaintiff labels a "ban" (Opposition, pp. 41-46) is not a ban at all, but is in reality a failure to create demand. Plaintiff's RECs are not banned from entering the state. They are not burdened in any way, and plaintiff may freely sell its RECs to whomever will buy them. Some may use the RECs for the Connecticut Clean Options program, and some may have other uses for them. But it is not incumbent upon Connecticut to create demand for plaintiff's RECs in the Connecticut RPS program or to otherwise subsidize them.

Connecticut has not balkanized economic trade in Connecticut Class I RECs; it has wholly created interstate trade in Connecticut Class I RECs which did not exist prior to its actions. Allco's citation to *Maryland v. Wynne*, 135 S.Ct. 1787, 1794 (2015) is therefore unavailing. Further, the merits of that case did not concern RECs, but instead considered the manner in which the State of Maryland taxed the income of its residents. Plaintiff does not assert that out-of-state RECs are taxed more heavily than in-state RECs, and in fact RECs are not taxed at all. Plaintiff's Count II fails to state a claim and should be dismissed.

V. PLAINTIFF'S 42 U.S.C. § 1983 CLAIM CANNOT BE SAVED BY AMENDMENT.

As an initial matter, plaintiff's Count III 42 U.S.C. § 1983 claim should be dismissed for all of the reasons set forth above. It is unripe, because the PURA Commissioners have not yet acted in connection with the proposed RFP, no application has been placed before PURA, and an application may never be placed before it.

Moreover, plaintiff implicitly concedes that its claim for monetary damages against the PURA Commissioners in their official capacities is barred by the Eleventh Amendment. Plaintiff does not dispute that neither the FPA nor PURPA supports a violation of federal law under 42 U.S.C. § 1983. Opposition, pp. 48-56. For these reasons alone, plaintiff's Count III should be dismissed.

Faced with fatal legal defects in its Count III, plaintiff requests that this Court grant leave to amend the Complaint to sue the PURA Commissioners in their individual capacities instead of official capacities. Certainly, if this Court grants defendants' motions to dismiss, the request is moot. However, even if the motions to dismiss are not granted, the Court should deny plaintiff's request. This Court has examined four factors when considering a request for leave to amend: 1) undue delay and undue prejudice to the opposing party; 2) bad faith or dilatory motive; 3) repeated failure to cure deficiencies by amendments previously allowed; and 4) futility of amendment. *Roller Bearing Co. of Am. v. Am. Software, Inc.*, 570 F. Supp. 2d 376, 384-387 (D. Conn. 2008). For the reasons set forth above, plaintiff's claims lack any legal merit.

Finally, if the § 1983 claim is repled, PURA Commissioners' actions will be entitled to qualified immunity. *Luna v. Pico*, 356 F.3d 481, 490 (2d Cir. 2004). Thus, the proposed amendment would be futile. Plaintiff's Count III claim should be dismissed for the reasons set forth in defendants' motions to dismiss (PURA memo at 34-35).

VI. CONCLUSION

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

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, a copy of the foregoing was electronically filed. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Seth A. Hollander
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