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	:	June 28, 2016

PURA DEFENDANTS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Allco Finance Limited's ("plaintiff" or "Allco") Memorandum of Points and Authorities in Opposition ("Opposition") [Doc. #27] to the motions to dismiss [Docs. ##20, 21] in this proceeding fails to demonstrate standing to invalidate a power purchase agreement contract between The Connecticut Light & Power Company d/b/a Eversource and Number Nine Wind Farm LLC. Likewise, it fails to demonstrate standing to enjoin Connecticut officials from carrying out a state law that does not directly affect plaintiff. Plaintiff seeks declaratory relief under the Supremacy Clause, but lacks a private right of action to raise this claim. Further, it misapplies *Hughes v. Talen Energy Mktg., LLC*, __ U.S. __, 136 S.Ct. 1288 (2016) to Connecticut's renewable energy procurements. All claims against the PURA Commissioners Arthur House, John W. Betkoski, III, and Michael Caron should be dismissed.

II. PLAINTIFF LACKS STANDING TO ASSERT ITS CLAIMS.

Plaintiff contends its lawsuit is an action to implement the Public Utility Regulatory Policies Act of 1978 ("PURPA"), but it is not. Opposition, pp. 9, 19, 40. Plaintiff has not pointed to any PURPA provision that Connecticut failed to implement, or any PURPA right that is denied by Connecticut's procurements. Accordingly, plaintiff cannot rely on 16 U.S.C. § 824a-3(f) or (h) for standing. Here, plaintiff attempts to use PURPA to force a state to act exclusively under PURPA, to rewrite state renewable energy procurement statutes to plaintiff's liking, and to deny larger scale renewable energy projects the opportunity to compete. PURPA does not provide statutory standing for any of these purposes, and plaintiff lacks standing.

Connecticut implemented PURPA nearly 35 years ago. In 1982, it passed Public Act 82-164, *An Act Concerning the Purchase of Power Produced by Cogeneration or Renewable Technology,* codified at Conn. Gen. Stat. §§ 16-243a *et seq*., and promulgated a set of implementing regulations. See, Regulations of Connecticut State Agencies Sections 16-243a-1 through 16-243a-7. This case is not about a failure to implement PURPA. PURPA simply does not regulate state activities conducted outside of PURPA, and plaintiff cannot rely on 16 U.S.C. § 824a-3(f) or (h) to interfere with Connecticut's implementation of its procurement statutes.

Plaintiff misuses PURPA to limit Connecticut's renewable energy procurements to only Qualifying Facilities, thus denying larger renewable energy generators and large-scale hydropower facilities the opportunity to compete in a request for proposals authorized by state law, and denying consumers the price benefit of those larger resources. Complaint, ¶46, 47. No provision of PURPA empowers plaintiff to eliminate competition from a state-authorized procurement, and plaintiff's reliance upon PURPA fails.

Worse, plaintiff invokes PURPA to eliminate competition while preserving for plaintiff the underlying state law policy decisions taken wholly outside of PURPA. Many years after implementing PURPA, Connecticut policymakers decided to authorize procurement of large amounts of resources.[1] The Connecticut statutes challenged here have nothing to do with PURPA or its implementation. The statutes do not fulfill PURPA, are unrelated to the must-buy obligation PURPA created for utilities,[2] and plaintiff does not claim otherwise. Indeed, if the statutes were never enacted, plaintiff could not claim Connecticut failed to implement PURPA.

Plaintiff misapplies PURPA in its effort to rewrite Connecticut statutes and impose resource size limitations, while preserving the state policy decision to potentially procure a substantial portion of electric distribution company load. Restricting Connecticut's competitive procurements to Qualifying Facilities will insert resource size limitations not intended by state legislators.[3] Plaintiff's unwillingness to compete against larger competitors does not entitle it to reform Connecticut's statutes through litigation and cause Connecticut to conduct a procurement restricted to Qualifying Facilities.[4] Plaintiff cannot rely upon PURPA for statutory standing to interfere with Connecticut's procurements.

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[1] Conn. Gen. Stat. § 16a-3f permits procurement of Class I renewable resources of up to four percent of electric distribution company load. Section 16a-3g permits procurement of Class I renewable resources or large-scale hydropower of up to five percent of electric distribution company load. PA 15-107 § 1(c) authorizes procurement of up to ten percent of electric distribution company load.

[2] PURA Defendants' Memo in Support of their Motion to Dismiss, p. 23.

[3] Qualifying small power producers cannot exceed 80MW in size. 18 C.F.R. § 292.204(a).

[4] Further, plaintiff's attempt to restrict the statutorily-authorized RFP to QFs simply cannot be reconciled with positions it is currently taking at the Federal Energy Regulatory Commission ("FERC"). Plaintiff contends at FERC that PURPA cannot be implemented through competitive RFPs: "[t]he Commission has already declared the requirement of a request for proposal process to obtain a contract at a long-term forecasted avoided cost rate as unlawful and contrary to PURPA." May 19, 2016 *Petition of Windham Solar LLC and Allco Finance Limited* in FERC Docket No. EL16-69, at p. 13 (http://elibrary.ferc.gov/idmws/file_list.asp?document_id=14461029). Plaintiff therefore asks this Court to rewrite Connecticut's statutes into a form that plaintiff simultaneously contends before FERC is unlawful.

III. PLAINTIFF LACKS A PRIVATE RIGHT OF ACTION TO ASSERT ITS SUPREMACY CLAUSE CLAIM.

Plaintiff dismisses the legal significance of its opportunity to challenge the Number Nine Wind power purchase agreement at FERC under Sections 205 or 206 of the Federal Power Act ("FPA") (16 U.S.C. §§ 824d and 824e). Opposition, pp. 37-39. However, the existence of the FPA's remedial scheme is fatal to plaintiff's federal preemption claim. Allco must exhaust remedies available under the FPA, and cannot assert a Supremacy Clause private right of action.

The Number Nine Wind contract, and any contract resulting from the 2015 RFP, is subject to FERC jurisdiction. Plaintiff's Opposition merely questions the **manner** in which FERC exercises its jurisdiction, not the existence or applicability of FERC's remedial scheme. Opposition, pp. 38-39. For example, the FERC case of *GWF Energy LLC*, 97 FERC ¶61,297 at 62,231 (2001), *reh'g denied*, 98 FERC ¶61,330 (2002) ("*GWF*"), cited in plaintiff's Opposition at p. 39, n.34, notes that "the appropriate forum for the California Commission to raise its concerns is in a complaint filed under FPA section 206." *GWF* at ¶62,391. "[W]here Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996). See also, *Armstrong v. Exceptional Child Ctr., Inc.*, __ U.S. __, 135 S.Ct. 1378, 1385 (2015) (Medicaid Act provision, when coupled with the express provision of an administrative remedy, indicated that Congress intended to foreclose a private equitable remedy), and *Davis v. Shah*, __ F.3d. __, 2016 WL 1138768, at *10 (2d Cir., March 24, 2016) (*Armstrong* foreclosed implied right of action under the Supremacy Clause to enforce Medicaid Act's

reasonable standards provision).[5] Plaintiff can challenge and potentially invalidate contracts through the remedial scheme provided by Sections 205 and 206 (as well as Sections 306 and 309 (16 U.S.C. §§ 825e and 825h)). These sections foreclose from plaintiff a private right of action under the Supremacy Clause.[6] Notably, the *Hughes* Court identified this jurisdictional issue. See, *Hughes*, 136 S.Ct. at 1296, n.6 (Court did not decide whether plaintiffs could seek declaratory relief under the Supremacy Clause). Plaintiff's Complaint should be dismissed.

IV. PLAINTIFF ONLY SPECULATES THAT ITS CLAIM IS REDRESSABLE.

Contrary to plaintiff's assertion, PURA defendants did not provide fact testimony in the Memorandum in Support of their Motion to Dismiss.[7] Opposition, p. 16. The debate only serves to highlight the speculative nature of redress. DEEP seeks larger scale resources in its RFP. If plaintiff rewrites Connecticut's statutes through litigation, it will subvert the design of DEEP's procurement. Nothing in Sections 6 or 7, or in Section 1(c) of Public Act 15-107, requires DEEP to issue RFPs – the statutes are entirely permissive authorizations. DEEP clearly intends to capture the price benefits of larger scale energy, and it is speculative for plaintiff to presume it can subvert the design of DEEP's procurement and expect DEEP to proceed. Plaintiff cannot

[5] PURA defendants' Motion to Dismiss contends that plaintiff's claim is subject to FERC's Section 206 challenge process. Memo in Support, p. 11. When the argument was made, counsel was unaware of the recent *Armstrong* case cited above. PURA defendants have no objection if plaintiff wishes to submit a short sur-reply on this issue.

[6] Further, FERC itself directed petitioners with allegations similar to Allco to the rate approval remedial scheme of Sections 205 and 206. In *Californians for Renewable Energy, Inc., (Care) & Barbara Durkin v. Nat'l Grid, Cape Wind, & the Massachusetts Dep't of Pub. Utilities* ("*CARE*"), opponents to the state-directed Cape Wind power purchase agreement filed a complaint alleging that the Massachusetts Department of Public Utilities ("DPU"), violated the FPA and PURPA by approving the agreement, and alleged that the DPU usurped FERC's exclusive jurisdiction to determine the rates for wholesale sales of electricity under its jurisdiction. *CARE*, 137 FERC ¶ 61113 at P 1 (2011 WL 5479305, Nov. 7, 2011). FERC rejected the petition, noting that "[c]omplainants will have the opportunity to intervene in any proceeding seeking Commission approval of those rates." *CARE* at P 33.

[7] Plaintiff also asserts that PURA defendants supplied testimony by providing the current state of Connecticut law with respect to avoided costs. Opposition, pp. 16-17. PURA defendants supplied a decision approved by PURA, and a tariff approved by PURA, not testimony. Plaintiff further states that how avoided costs are calculated in Connecticut is irrelevant to plaintiff's preemption theory. Opposition, p. 17, n.15. This mischaracterizes PURA defendants' argument. How avoided costs are defined today is entirely relevant to plaintiff's claimed injury-in-fact. See, Memo in Support of Motion to Dismiss, pp. 11-12.

show it is "likely, as opposed to merely speculative, that Allco will eventually receive a Section 6 [Section 7 or PA 15-107] contract." See, *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 98 (2d Cir. 2015), as amended (Dec. 1, 2015).

V. CONNECTICUT'S PROCUREMENTS ARE JURISDICTIONALLY PROPER AND CONSISTENT WITH *HUGHES*.

Plaintiff asserts a federal preemption claim that is at odds with everything the federal government has ever said on the issue of state authority under the FPA. Where the U.S. Solicitor General expressly cited bilateral contracts under Section 6 as jurisdictionally appropriate under the FPA, plaintiff states it did not. Where the U.S. Supreme Court held that contracts-for-differences ("CfD") are not bilateral contracts, plaintiff insists they are the same. Where the Second Circuit and FERC recognize state authority over buy-side decisions of regulated utilities, plaintiff insists states cannot direct regulated utilities to enter into contracts.

Plaintiff misconstrues the limited nature of the holding in *Hughes*. Plaintiff contends that the *Hughes* Court provided a prescriptive list of state actions that do not include bilateral contracts. Opposition, p. 28. It did no such thing. The *Hughes* Court unambiguously stated that "[it] … need not and [does] not address the permissibility of various other measures States might employ to encourage development of new or clean generation …." *Hughes*, 136 S.Ct. at 1299. If the *Hughes* Court intended to create a prescriptive list, it would have so stated.

Plaintiff misapprehends the *Hughes* Court's substantive ruling as well. First, the *Hughes* Court sided with the U.S. Solicitor General. PURA defendants' Memo in Support, pp. 19-20. This means Allco's positions before the Court in *Hughes* were not adopted. Specifically, the *Hughes* Court did not adopt Allco's *Hughes* argument that CfDs are economically identical to

bilateral contracts.[8] Likewise, the *Hughes* Court ignored Allco's *Hughes* argument that Maryland could only act within PURPA.[9] Both arguments are central tenets of plaintiff's incorrect legal theory here (and in *Allco II*), and both were ignored.

The *Hughes* Court instead sided with the Solicitor General and held that state-directed CfDs are preempted because they directly target FERC's capacity market. *Hughes*, 136 S.Ct. at 1298. It did not hold that state-directed CfDs are preempted because they are state-directed. Accordingly, plaintiff's central theory in this case and in *Allco II* is not supported by *Hughes*.

Plaintiff argues the *Hughes* Court did not adopt the position taken by the State of Connecticut (along with other States, public utility commissions and utility consumer advocates) in a *Hughes amicus curiae* brief. Opposition, p. 33. This means nothing, except to simplify the *Hughes* holding – Allco argued in *Hughes* that CfDs and bilateral contracts were the same, and both should be preempted; states argued that CfDs and bilateral contracts were similar, and CfDs should not be preempted. The *Hughes* Court adopted neither position. Instead, it adopted the Solicitor General's view that CfDs and bilateral contracts are not the same, and a state-directed CfD that disregards an interstate wholesale rate is preempted.

Plaintiff's arguments regarding "tethering" also demonstrate a misunderstanding of the *Hughes* case. Opposition, p. 34. A contract that is tethered to a FERC-jurisdictional market will "condition payment of funds" upon wholesale market participation, without transfer of title. *Hughes*, 136 S.Ct. at 1299. The parties to a CfD exchange money based solely upon the outcome of the wholesale auction, without transfer of title to the commodity. *Id*. Here, plaintiff concedes that title transfers under Connecticut's program ("…the Connecticut utility takes

[8] 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.
[9] *Id*., at 12.

delivery of the energy in Maine"), but mischaracterizes "tethered" to include a contract in which a generator is compensated for generating and delivering electricity to an agreed-upon point, and the energy enters a FERC-jurisdictional auction. Opposition, p. 34.

Fixed price bilateral contracts in which energy enters a FERC-jurisdictional auction are not tethered under *Hughes*. Parties exchange money based upon a **fixed price** for the commodity, and not based upon the results of a FERC-jurisdictional auction. See, Solicitor General *Amicus Curiae* Brief, attached to PURA's Motion to Dismiss [Doc. #21-2] at p. 18 (labeled Appendix ("App") 80) ("Petitioners analogize [CfDs] to traditional bilateral contracts. But the [CfDs] do not provide for the purchase of capacity in exchange for a fixed payment."). Connecticut's bilateral contracts are not tethered because electricity is purchased at a fixed price,[10] delivered, and title passes.

VI. STATES HAVE BUY-SIDE AUTHORITY UNDER THE FPA.

Without legal support, plaintiff continues to equate "regulation of wholesale sales" with the exercise of buy-side authority permitted under the FPA. Plaintiff overlooks FERC's interpretation of this traditional state authority recognized by the FPA, and ignores actual instances when FERC is aware of, and relies upon state involvement in RFPs.

Plaintiff has invented a bright line divide between state and federal jurisdictions under the FPA, and claims Connecticut transgressed that line. Opposition, pp. 21-29. In January of this year, the Supreme Court stated that the FPA's division of jurisdictional responsibility between states and FERC "… generates a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity are inextricably linked." *FERC v.*

[10] Exhibit A of plaintiff's Complaint, p. 25 of 157 ("[t]he proposal must provide fixed prices (in $/MWh) annually for the term of the contract") and Exhibit E of plaintiff's Complaint, p. 90 of 157 (same).

Elec. Power Supply Ass'n, __ U.S. __, 136 S.Ct. 760, 766 (2016), as revised (Jan. 28, 2016). Connecticut crosses no jurisdictional divide when it directs its regulated utility to enter into contracts for renewable generation – it is affecting the resource portfolio that serves retail customers.

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).[11] Utility buy-side authority is not a phrase Connecticut invented, as plaintiff implies. Opposition, p. 1. It is FERC's language, repeated in a Supreme Court decision. Further, the Court in *Hughes* did not reject Maryland's right to regulate the buy-side of the transaction, as plaintiff contends. Opposition, p. 33. Plaintiff provides no citation for this purported rejection. The *Hughes* Court's actual, limited holding is that "States … may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain … [but] States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates…." *Hughes*, 136 S.Ct. at 1298. States possess jurisdiction over buy-side regulatory decisions, but may not misuse those powers.

Bringing buyers and sellers together in an RFP is a proper use of buy-side regulatory authority. Directing the regulated utility, the buy-side of the transaction, to enter the transaction

[11] *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).

is a proper use of buy-side regulatory authority. Plaintiff contends that *Allegheny Energy Supply Company, LLC*, 108 FERC ¶ 61082, 2004 WL 1700580 (July 29, 2004) ("*Allegheny*") is unavailing for defendants because FERC's approval related to prevention of interaffiliate abuses. Opposition, pp. 39-40. Plaintiff's attempt to distinguish *Allegheny* fails. *Allegheny* is entirely relevant because it is an example of a state exercising buy-side jurisdiction in RFPs, and with FERC's knowledge and blessing. It matters not whether FERC's purpose is to prevent against interaffiliate abuse – if state involvement in RFPs touches a jurisdictional third rail under the FPA, as plaintiff insists, FERC could not approve the process for **any** purpose. Instead, FERC regularly approves applications similar to *Allegheny*, including one from Illinois after its legislature created the state Illinois Power Agency,

> with responsibility to, among other things, **design and administer** power procurement through a competitive request for proposal (RFP) process to serve [standard service] customers - **with the utilities being required to sign** the contracts with the winning bidders.

(emphasis added) *Exelon Corporation*, 121 FERC P 61092, at ¶¶6, 18, 2007 WL 3125530, (October 26, 2007). Standard service procurement demonstrates why plaintiff's claim fails. It is a routine exercise of buy-side authority outside of PURPA, which plaintiff asserts cannot exist. Plaintiff fails to assert a claim upon which relief can be granted, and its Complaint should be dismissed in its entirety.

VII. 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,

PURA COMMISSIONERS HOUSE,
BETKOSKI AND CARON

GEORGE JEPSEN
ATTORNEY GENERAL

BY: /s/ *Seth A. Hollander*

Seth A. Hollander
Assistant Attorney General
Federal Bar No. CT28857
10 Franklin Square
New Britain, CT 06051
Tel: (860) 827-2681
Fax: (860) 827-2893
e-mail seth.hollander@ct.gov
Attorney for Defendants PURA Commissioners House, Betkoski and Caron.

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 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