IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

ALLCO FINANCE LIMITED,	:	3:13-CV-01874-JBA
Plaintiff,	:	
	:	
v.	:	
	:	
DANIEL C. ESTY	:	
Defendant.	:	MARCH 26, 2014

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Introduction

Pursuant to Section 6 of Public Act 13-303, the defendant, Daniel C. Esty,[1] ("Defendant"), Commissioner of the Connecticut Department of Energy and Environmental Protection (the "Department" or "DEEP") issued a Notice of Request for Proposals ("RFP") on July 8, 2013, soliciting renewable energy projects to meet Connecticut's energy needs. Allco Finance Limited, ("Plaintiff") responded to the RFP and submitted five different bid proposals. None were accepted and now Allco has filed a complaint ("Complaint") claiming principally that the state's program pursuant to which Allco submitted its proposals is preempted by the Federal Power Act. For the reasons described below, this Court should dismiss the Complaint because Allco lacks standing to bring this action and has failed to state a cause of action for which relief can be granted.

[1] Commissioner Daniel Esty has resigned and Acting Commissioner Robert Klee is now serving.

Factual Background

On February 19, 2013, DEEP, as directed by Conn. Gen. Stat. Section 16a-3d, released Connecticut's first Comprehensive Energy Strategy ("CES") which sets forth the key findings and policy goals that will direct the state's energy and environmental planning for the near and long-term. A key finding in the CES is that Connecticut and other New England states need to encourage new renewable energy generation in order to meet the needs of important environmental regulatory programs outlined in the state's Renewable Portfolio Standard and the Regional Greenhouse Gases Initiative programs.[2] In order to implement that policy goal, the legislature passed Public Act 13-303 (the "Act") an "Act Concerning Connecticut's Clean Energy Goals." Section 6 of Public Act 13-303 authorized the Commissioner to solicit proposals from providers of renewable energy sources and, "if the commissioner finds such proposals to be in the interest of ratepayers including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce greenhouse gas emissions . . . and in accordance with the policy goals outlined in the Comprehensive Energy Strategy, . . . the commissioner may select proposals . . . to meet up to four percent" of the state's electric load. *Compl.*, ¶ 5. Thus, the Act permitted approval of renewable energy projects to meet important state environmental goals and established that price was only one of the criteria for selection. The Act further specifies that the "commissioner may direct the electric distribution companies to enter into purchase power agreements . . . for periods of not more than twenty years." P.A. 13-303, Section 6.

[2] Conn. Gen. Stat. Section 22a-200a.

On July 8, 2013, DEEP released a Notice of Request for Proposals clearly identifying the RFP as issued pursuant to Public Act 13-303. *Compl*., ¶¶ 9, 44. On July 22, 2013, Plaintiff filed five solar power bid proposals with the Department, along with 42 other bidders. *Compl*., ¶¶ 10, 45. After an extensive review and consideration of the 47 bids, the Commissioner, in a letter dated September 18, 2013, (the "Directive") directed the electric distribution companies ("EDCs") to enter into purchase power agreements ("PPAs") with two selected projects, one of which was the Fusion Solar Center, a 20 megawatt ("MW") solar project and the other the Number Nine Wind Farm, a 250 megawatt (MW) wind power project. *Compl*., ¶ 53. None of Plaintiff's projects were selected. The September 18th letter expressly states that the Commissioner was acting under his authority pursuant to Section 6 of Public Act 13-303. *Compl*., Exhibit B.

On September 24, 2013, the Connecticut Light & Power Company ("CL&P") and the United Illuminating Company ("UI") filed for approval of PPAs with two Class I renewable energy projects. *Compl*., ¶ 54. On September 26, 2013, the Commissioner filed with the Public Utilities Regulatory Authority ("PURA") his Determination supporting his decision to select the two designated projects. *Compl*., Exhibit C.

Allco responded by filing a petition ("Petition") on September 27, 2013, seeking party status or, alternatively, seeking to intervene in the PURA proceeding.[3] Allco's Petition was based on two principal claims. The first is that the September 18th letter and the September 26, 2013 Determination issued by the Department "fall[] short of providing the required substantial evidence for the Direction." Petition, pp. 2-3. The

[3] http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/2566e4afd4a45b3c85257bf6004487c7/$FILE/Petition%20of%20Allco%20Finance%20Limited%209_27_13.pdf

second claim is that one of the two selected projects is a wind power project in Maine and "does not qualify for a PPA" because it does not create new, in-state Connecticut jobs. *Id*.

PURA denied Allco's petition on October 4, 2013.[4] Supporting its decision to deny party status, PURA stated, *inter alia*:

> disappointed bidders lack standing to challenge the selection of competing bidders unless the disappointed bidder can demonstrate that the bidding process was tainted by fraud, corruption, favoritism or other intentional acts undermining the fairness of the bidding process. *Total Energy Corp. v. Department of Public Utility Control et al*, CV 09 4020130S, Superior Court of Connecticut Judicial District of New Britain at New Britain, 2009 Conn. Super. LEXIS 1327, Memorandum of Decision (May 9, 2009, Cohn, J.); *NRG Energy, Inc. v. Department of Public Utility Control et al*., CV 07 4015528 S, Superior Court of Connecticut Judicial District of at New Britain, 2008 Conn. Super. LEXIS 398, Memorandum of Decision (February 13, 2008, Cohn, J.). Allco has not alleged or demonstrated such facts. Therefore, Allco, as a disappointed bidder, has no interest in participating in this proceeding.

Id, page 2.

PURA, after a full hearing and review, approved the two PPAs. PURA Decision, October 23, 2013. This lawsuit followed.

PROCEDURAL HISTORY

Plaintiff's Complaint names the Defendant solely in his official capacity. *Compl*., ¶ 34. It contains two counts. Count I claims that the Commissioner's letter of September 18, 2013, (the "Directive") directing the EDCs to negotiate and execute power purchase agreements with the selected projects "is preempted because it intrudes on the [Federal

[4] http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/a88cfc0e9b071b8885257bfa005d12f3/$FILE/Motion2.doc

Energy Regulatory Commission's] exclusive jurisdiction to regulate wholesale transactions for capacity and energy." *Compl*., ¶¶ 85, 79. Count II is based upon a claimed violation of 42 U.S.C. Section 1983 in that, if the Directive is not preempted, "the Commissioner impermissibly discriminated against Plaintiff's' [projects] that offered a price . . . . below the price of the Fusion Solar Project." *Compl*., ¶ 101. Plaintiff seeks declaratory and injunctive relief, specifically, that this Court find the Commissioner's letter of September 18, 2013, void as preempted by the Federal Power Act and the signed PPAs void *ab initio* and enjoining the Commissioner from enforcing the terms of the Directive. *Compl*., Prayer for Relief.

On March 26, 2014, Defendant filed this Motion to Dismiss. It is Defendant's position that Allco is a disappointed bidder with no standing to bring this action and that this Court cannot provide Allco any relevant relief. Additionally, Allco has failed to state a cause of action for which relief can be granted. Contrary to Plaintiff's claims, the Commissioner has not fixed or otherwise established wholesale energy prices and his actions are not preempted by the Federal Power Act ("FPA").

STANDARD OF REVIEW FOR A MOTION TO DISMISS

A "case is properly dismissed for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Nike, Inc. v. Already, LLC*, 663 F.3d 89, 94 (2d Cir. 2011), *aff'd*, 133 S. Ct. 721 (2013). The "plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 497 (2d Cir. 2002). "Whenever it appears by suggestion of the parties or otherwise that the

court lacks jurisdiction of the subject matter, the court shall dismiss the action." *Arbaugh v. Y & H Corp.,* 546 U.S. 500 at 506, 126 S. Ct. 1235 (2006).

A case may be dismissed under Rule 12(b)(6) for, *inter alia*, want of jurisdiction and for failure to state a claim. In ruling on a motion to dismiss under Rule 12(b)(6), the court may consider only "the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007). The court must deem all of the material facts alleged in the complaint to be true and draw all reasonable inferences in favor of the plaintiff. *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 71 (2d Cir. 1998), *cert. denied*, 525 U.S. 1103 (1999). However, the facts alleged "must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678. This standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

ARGUMENT

I. PLAINTIFF LACKS STANDING TO PURSUE ITS CLAIMS

The gravamen of Plaintiff's claim is that the Commissioner's actions in "fixing" wholesale prices for energy and directing the EDCs to enter into purchase power agreements is preempted by the Federal Energy Regulatory Commission's ("FERC") authority to regulate wholesale power markets. *Compl.*, Count I, ¶¶ 7, 16, 19, 24-26, 73-80. Plaintiff is wrong on the facts and the law and its claim lacks any merit for reasons that are discussed elsewhere in this memorandum. But this Court need not—and should not—reach the merits of Plaintiff's claims because Plaintiff lacks standing to bring them.

A. Standard of Review – Dismissal for Lack of Standing

"[S]tanding 'is perhaps the most important of the jurisdictional' doctrines.'" *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). Plaintiff bears the "burden to prove [its] standing by pointing to specific facts" that allow it to invoke this Court's Article III jurisdiction. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1154 n.4 (2013). Plaintiff has not satisfied that burden. The Supreme Court has

> consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 573-74 (1992). The Court's "refusal to serve as a forum for generalized grievances has a lengthy pedigree," including

decisions refusing to question the procedures by which constitutional provisions were ratified and by which Supreme Court justices were appointed. *Lance v. Coffman*, 549 U.S. 437, 439-40 (2007) (discussing cases).

Standing is "built on a single basic idea—the idea of separation of powers." *Allen v. Wright,* 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Standing is an essential part of the case-or-controversy requirement of Article III of the Constitution. *See* U.S. Const. art. III, sec. 2; *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). As such, the standing inquiry addresses whether a plaintiff's claims are appropriately resolved by the court. *Warth v. Seldin,* 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Standing implicates the court's jurisdiction and must be addressed before determining whether the plaintiff has adequately stated claims against defendants. *See Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 93–102, 118 S.Ct. 1003; *Ramming v. United States,* 281 F.3d 158, 161 (5th Cir. 2001)("When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."). At the pleading stage of proceedings, the plaintiff need only make general factual allegations of injury caused by defendants. *Lujan,* 504 U.S. at 561, 112 S.Ct. 2130. The court must assess the plaintiff's standing to bring each of its claims against each defendant. *See James v. City of Dallas,* 254 F.3d 551, 563 (5th Cir. 2001).

The "irreducible constitutional minimum of standing" first requires that the plaintiff have suffered an injury in fact, that is, an actual or imminent invasion of a concrete and

particularized legally protected interest. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. Second, there must be a causal connection between the plaintiff's complained-of injury and the defendant's actions. *Id.* Third, it must be likely that the plaintiff's injury will be redressed by a favorable decision from the court. *Id.* at 561, 112 S.Ct. 2130. To seek injunctive relief, a plaintiff must also allege defendants will cause it future injury and that the relief sought will redress such injury. *James,* 254 F.3d at 563.

B. Allco Failed to Establish the First Element of Standing – Lack of Injury

Plaintiff does not have a "concrete and particularized legally protected" property interest that has been injured by the Commissioner's action in this matter. Specifically, this was a Connecticut renewable energy procurement directed solely by state law and under Connecticut law unsuccessful bidders do not have a property right sufficient to grant standing.

Specifically, the Connecticut Supreme Court has held that:

> In *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 125–130, 60 S.Ct. 869, 875–878, 84 L.Ed. 1108 (1940), it was held that prospective bidders had no standing to challenge an administrative interpretation of a public contract law because the competitive bidding statutes were enacted solely for the protection of the public and conferred no enforceable rights upon those seeking to do business with the government. "Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies." Id., 310 U.S. at 130, 60 S.Ct. at 878. . . . This court has consistently followed the view that an unsuccessful bidder has no standing to challenge the award of a public contract. *Joseph Rugo, Inc. v. Henson,* 148 Conn. 430, 171 A.2d 409 (1961); *Austin v. Housing Authority,* 143 Conn. 338, 122 A.2d 399 (1956); 10 McQuillin, Municipal

> Corporations (3d Ed.Rev.) § 29.77. Recently, in *Spiniello Construction Co. v. Manchester,* 189 Conn. 539, 456 A.2d 1199 (1983), we held that only "where fraud, corruption or favoritism has influenced the conduct of the bidding officials or when the very object and integrity of the competitive bidding process is defeated by the conduct of municipal officials," does an unsuccessful bidder have standing to challenge the award. Id., at 544, 456 A.2d 1199.

Ardmore Construction Company, Inc. v. Freedman, 191 Conn. 497, 500-501 (1983).

State law is clear, "[a] bid, even the lowest responsible one, submitted in response to an invitation for bids is only an offer which, until accepted by the municipality, does not give rise to a contract between the parties." *John J. Brennan Construction Corporation, Inc. v. Shelton,* 187 Conn. 695, 702, 448 A.2d 180 (1982), citing *Joseph Rugo, Inc. v. Henson,* 190 F.Supp. 281 (D.Conn.1960); see also *Joseph Rugo, Inc. v. Henson,* 148 Conn. 430, 171 A.2d 409 (1961). Ultimately, an unsuccessful bidder has no legal right in the contract and is in precisely the same position as any other person whose offer has been rejected and thus lacks standing. See *Austin v. Housing Authority,* supra, 143 Conn. at 349, 122 A.2d 399; *Perkins v. Lukens Steel Co.,* supra, 310 U.S. at 129, 60 S.Ct. at 877.

In this case, Allco proffered a total of five bids and was not awarded a contract and, therefore, is by definition a disappointed bidder. *Compl*., ¶¶ 10, 46. Further, the state statute in question, Public Act 13-303, provides no right of appeal. Consequently Allco is a disaffected bidder who has no legally cognizable property right under Connecticut law that has been injured, no statutory right of appeal, and thus no standing.

Interestingly, as one federal district court noted more than 50 years ago:

> Competitive bidding is not intended to benefit bidders. It is designed to protect the taxpaying public from fraud or favoritism in the expenditure of government funds for public works projects. The Michigan Supreme Court has held that the duty of public officials to consider honestly competitive bids runs directly to the community and that, therefore, only the public, through a taxpayer's suit, has standing to enjoin a proposed contract. The incidental benefit received by bidders from competitive bidding does not allow an unsuccessful bidder to bring a private action.

Malan Constr. Corp. v. Board of County Road Commissioners, 187 F. Supp. 937 (E.D. Mich. 1960). This position is echoed in *Ardmore* where it stated "the competitive bidding statutes were enacted solely for the protection of the public" and "[t]his court has frequently declared `[m]unicipal competitive bidding laws are enacted to guard against such evils as favoritism, fraud or corruption in the award of contracts, to secure the best product at the lowest price, and to benefit the taxpayers, not the bidders. *John J. Brennan Construction Corporation, Inc. v. Shelton,* 187 Conn. 695, 702, 448 A.2d 180 (1982); see also *Joseph Rugo, Inc. v. Henson,* 148 Conn. 430, 435, 171 A.2d 409 (1961); *Austin v. Housing Authority,* supra, 143 Conn. at 349, 122 A.2d 399." *Ardmore*, 191 Conn. at 500-50.

Allco's First Amended Complaint lists a series of alleged injuries that it has supposedly suffered but these do not constitute legally cognizable rights. *Compl*., ¶¶ 62-66. Specifically, Allco insists that it has a right to "be free from unlawful actions of State officials" and a right to sell energy to utilities. *Compl*., ¶ 62. Allco offers no legal support for these "rights" and it is clear that the first claimed right is precisely the sort of "generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws" that does not create

an Article III case or controversy. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-74 (1992). As to the second claimed right, Allco remains entirely free to sell whatever energy it wishes into the open market or pursue other state or federal provisions or procurements. Allco claims that the "available capacity" under Section 6 has been almost completely eliminated by the other projects and Allco seems to believe that, but for the Number Nine Wind Farm, it would have been selected. *Compl*., ¶¶ 64, 65. Even if either or both of these statements are true, they do not create standing but merely reinforce the fact that Allco is a disappointed bidder. Beyond this, Allco points to no precedent for the position that a developer has a "right" to a contract and it must be repeated that the RFP made it very clear that it would be possible that no contract awards would be made.

C. Allco Failed to Establish the Second Element of Standing - Causation

The second element of standing is that there must be a causal connection between the plaintiff's complained-of injury and the defendant's actions. *Lujan,* 504 U.S. at 560, 112 S.Ct. 2130. The Defendant's action that Plaintiff complains of is the issuance of the Directive. *Compl*., ¶¶ 17, 25-26, 64. As a practical matter, the Commissioner's actions had no effect whatsoever on the only right the Plaintiff had, specifically, the right to bid on the procurement. Further, the Plaintiff is in no manner prevented from bidding on future procurements should they occur or otherwise offering energy into the regional market.

D. Allco Failed to Establish the Third Element of Standing Because This Court Cannot Provide Allco the Relief It Requires.

The Complaint also fails under the third element of standing, specifically, the likelihood that the injury will be redressed by a favorable decision or, as noted by the Supreme Court that the "prospect of obtaining relief from the injury as a result of a favorable ruling" is not "too speculative." *Allen v. Wright*, 468 U.S. 737, 752 (1984).

1. **Plaintiff Would Overturn the State Process Under Which It Bid**.

Allco claims that the Commissioner's letter of September 18, 2013, will cause Plaintiff to suffer substantial economic losses because the "capacity available to legally qualified generators under Section 6 is reduced. . . ." *Compl*., ¶ 64. The Complaint then argues that the Commissioner's Directive, which was the result of a statutorily authorized RFP process under which Allco offered its bids, is preempted and should be held unconstitutional.[5] *Compl*., ¶¶ 62-66, Prayer for Relief. It is not explained why Allco believes that there is a limit on amount of solar energy that can be sold in Connecticut or the New England region, but even if there was such a limit, that does not create a property right in any given potential supplier. More to the point, even if Plaintiff should obtain the result it seeks, this would not result in Allco getting a bid award because it

[5] If, somehow, Allco is correct that the FPA preempts P.A. 13-303, then this matter must be transferred to FERC. Only FERC, which has "exclusive authority to regulate the . . . sale at wholesale of electric energy in interstate commerce," *New England Power Co. v. N.H.*, 455 U.S. 331, 340 (1982) (citation omitted), may decide whether and how state-supported resources participate in wholesale markets. Technically, a court has no jurisdiction to address whether a state sponsored resource interferes with the marketplace. Since FERC rules govern the market participation of state-supported power resources, plaintiff must raise its pre-emption claim with FERC, the agency with jurisdiction over wholesale interstate rates. *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442, 448 (1907).

would strike down as unconstitutional the very process Allco relied upon to seek a contract.

2. **Section 6 Procurement Did Not Infringe On Any Rights Plaintiff May Have To Sell Power Under PURPA.**

Allco seems to argue that, in the absence of Public Act 13-303, it would have had a "mandatory" right to sell its power to the utilities under the Public Utilities Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. Section 824a-3(h). *Compl*., ¶¶ 38, 62. This was not a PURPA procurement. This procurement was conducted pursuant to state law, specifically, Public Act 13-303 and not under PURPA and that statute simply is of no relevance in resolving this motion. Moreover, even if PURPA applies, the proper forum for this litigation would be before FERC or, more likely, in state court because FERC relies on state regulators to determine what constitutes avoided costs for their regulated utilities. *Southern California Edison Company*, 70 FERC P 16215, 1995 WL 169000 (1995).[6] Beyond this, Section 1253 of the Energy Policy Act of 2005 provides utilities the opportunity to seek relief of the statutory obligations of PURPA relied upon by the Plaintiff, which relief United Illuminating has sought and obtained.[7]

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[6] Plaintiff claims that utilities must purchase its power from its QFs, which are described only as being 80 MW or less, at "avoided cost." *Compl*., ¶¶ 37, 45. "It is obvious to all Parties that the term "avoided cost" . . . as currently being applied in existing [PURPA] contracts is no longer applicable as the EDCs have divested their generation assets from which the original "avoided cost" calculations were made." *DPUC Review of the Electric Generation and Financing Requirements of Resource Recovery Facilities*, Docket No. 06-08-25 (2007). Thus, even if Plaintiff has an inchoate PURPA-based right of some type to sell power to utilities, it still has that right and can offer to sell to any regional EDC at the wholesale market rate.

[7] The United Illuminating Company, 123 FERC ¶ 61,269.

II. FAILURE TO STATE A CLAIM

A. Standard of Review – Failure to State a Cause of Action

Beyond the lack of standing, the Complaint fails to state a cause of action for which relief can be granted. "On a Rule 12(b)(6) motion to dismiss a complaint, the [C]ourt must accept a plaintiff's factual allegations as true and draw all reasonable inferences in [the plaintiff's] favor." *Gonzalez v. Caballero,* 572 F.Supp.2d 463, 466 (S.D.N.Y. 2008). The Supreme Court has held that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (alteration in original) (alteration, citation, and internal quotation marks omitted). Instead, the Court has emphasized that "[f]actual allegations must be enough to raise a right to relief above the speculative level," *id.,* and that "once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint," *id.* at 563, 127 S.Ct. 1955. "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (alteration in original) (citation omitted) (quoting Fed.R.Civ.P. 8(a)(2). When

the allegations in a complaint, however true, could not raise a claim of entitlement to relief, " 'this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.' " 5 Wright & Miller § 1216, at 233–234 (quoting *Daves v. Hawaiian Dredging Co.,* 114 F.Supp. 643, 645 (D.Hawai 1953*)).*

There are two major flaws in Plaintiff's Complaint. The first is that the Commissioner did not "fix" prices or otherwise get involved in regulating wholesale market prices. To the contrary, the procurement was a pedestrian request for proposals that invited sellers to offer prices which, if the projects met state renewable energy goals, were to be accepted by buyers, in this case the EDCs. The Commissioner never dictated to bidders the price at which they could sell their energy.

Second, the FPA does not preempt a state's authority to regulate its domestic utilities, and FERC has explicitly agreed that states may direct their utilities to obtain renewable power or otherwise act to meet important state policies. The State of Connecticut did precisely that by soliciting offers in a competitive bidding process.

The Department has strictly followed Section 6 of Public Act 13-303 and Plaintiff makes no assertion to the contrary. Clearly, Plaintiff attempts to preserve the Section 6 renewable energy procurement, but force the Department to procure the energy through moribund provisions of PURPA instead of adhering to the terms of the statute and procuring energy through market-based means which are fully consistent with the market-based rate regime established by FERC. Plaintiff does not and cannot assert a legal basis to prevent a state from lawfully conducting a market-based procurement of power. Plaintiff's claim is without legal basis, without merit, and should be dismissed.

B. The Section 6 Procurement Solicited Market Price Offers.

Plaintiff repeatedly asserts that the Commissioner "fixed" the contract prices and thus trespassed on FERC's exclusive authority over interstate rates. *Compl*., ¶¶ 16, 25, 80, 86. For example, the Complaint refers to the "Commissioner fixing [the] price. . . ." *Compl*., ¶ 86. Of course, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Nor is the court "bound to accept as true a legal conclusion couched as a factual allegation." *Id*.

The Commissioner did not "set" the price for the PPAs. The Commissioner did not "fix the rates" for the PPAs. Section 6 of Public Act 13-303, and the documents attached to Plaintiff's Complaint, demonstrate that the Commissioner solicited proposals for PPAs and the bidders supplied the prices at which they were willing to supply power.

Section 6 of Public Act 13-303 states, in pertinent part:

> On or after January 1, 2013, the commissioner of [DEEP] . . . may . . . solicit proposals . . . from providers of Class I renewable energy sources . . . if the commissioner fins such proposals to be in the interest of ratepayers . . . [he or she] may select proposals from such resources to meet up to four per cent of the load distributed by the state's electric distribution companies. The commissioner may direct the electric distribution companies to enter into power purchase agreements for energy, capacity and environmental attributes, or any combination thereof, for periods of not more than twenty years. . . .

Nowhere in Section 6 is the Commissioner permitted or authorized to pre-determine the rate at which bidders would supply power.

Exhibit A to the First Amended Complaint is the Request for Proposals published July 8, 2013 by the Commissioner. Consistent with Section 6, the RFP clearly states that the Commissioner was "*soliciting* proposals for Class I renewable energy resources. . . ." *Compl*., Ex. A, Section 1.1, 1.2. (Emphasis added.) Section 2.2.12 of the RFP sets forth the allowable forms of pricing that may be proposed by bidders and Section 2.2.12(a) states that "[t]he **proposal** must provide fixed prices (in $/MWh) annually for the term of the contract." (Emphasis added.) *Compl*., Ex A. The RFP is clear that it was possible that no bids would be accepted and no PPAs executed. See, *Compl*., Ex. A, sections 1.1, 1.2 and 1.6. All offered prices were to be set by the generators and not by the Commissioner. Nowhere in the RFP is there a single statement that the Commissioner would set or mandate any particular price. Notably, Allco submitted five bids in response to the RFP. *Compl*., ¶ 10. Allco freely determined the prices offered in its bids and it does not, and cannot, assert otherwise.

It is an elementary proposition of contract law that no contract exists unless there is an offer and acceptance. Contracts, Farnsworth, Section 3.3. With the RFP, as the text of Exhibit A makes very clear, the bidders were invited to make an offer. The Commissioner selected which proposals, at whatever price the market offered, met state policy goals and then, assuming the contracts were consistent with the EDCs' "contracting processes," and all negotiations were completed, would be accepted by the buyers, the EDCs. *Compl*., Ex. A,1.6, At no point did or could the Commissioner dictate what price would be offered.

Exhibit C to the First Amended Complaint sets forth the manner in which the Commissioner implemented Section 6. Nothing in the Commissioner's Determination states or indicates that the Commissioner set prices. Instead, the Executive Summary states that in response to the RFP, "[p]rojects were submitted with prices ranging from under 8 cents/kilowatt hour (kWh) to over 20 cents /kWh." *Compl*., Ex. C, p.1. The bidders set the prices, which varied considerably. Pages 7 and 8 of the Determination set forth the pricing analysis conducted by the Department. There would have been nothing to analyze if the Commissioner established the price. The Commissioner implemented Section 6 in accordance with the statute and Plaintiff cannot assert otherwise.

The statute, RFP and the Commissioner's Determination all demonstrate that the winning bidders, and not the Commissioner, establish the price of the PPAs. All of Plaintiff's claims fail as a matter of law because the prices in the PPAs were set by the winning bidders, not the Commissioner.[8]

Near the end of the Complaint there is the statement that "wholesale electric energy prices must be freely negotiated between electric generation facilities and distributors. Any attempt by a State to compel distributors to purchase energy from generation facilities at a particular price is void under the doctrine of conflict preemption." *Compl*., ¶ 77. There is no citation for this proposition but, more importantly, the Section 6 procurement did not create any such price compulsion; it

[8] The Complaint repeatedly refers to the Commissioner's letter of September 18, 2013 as an "order." *Compl*., ¶¶ 13, 14, 23, 25, 26, 85, 88, 89. It is not an order under Connecticut law and Public Act 13-303 only permits the Commissioner to direct the utilities to enter into contracts under defined circumstances.

expressly permitted generators to offer whatever price they wished. All PPAs, therefore, would be signed at the price freely offered by the generators and accepted by the EDCs and the Commissioner had no ability to change that price. The entire premise of the Complaint is that the Commissioner was somehow interfering with FERC's control of the interstate market. The truth is the exact opposite, the Commissioner was asking the market to offer prices which might, or might not be accepted by buyers. That is what markets do and thus this procurement is a clear example of a permissible action under the FPA as implemented by FERC.

State's Retain Full Authority To Procure Renewable Energy

States have unquestioned authority to decide which products retail utilities buy and from whom. Under the FPA, states retained their traditional authority over "`integrated resource planning and utility buy-side . . . decisions,'" "`utility generation and resource portfolios,'" and the imposition of "`non-bypassable distribution . . . charges'" effectuating those decisions. *New York v. FERC*, 535 U.S. 1, 24 (2002) (quoting FERC order on review).[9] Wholesale ratemaking "does not [generally] determine whether a purchaser has prudently chosen from among available supply options." *Ameren Energy Mktg. Co.*, 96 FERC ¶ 61,306, 62,189 (2001). "That is generally a question that the state commissions address," *id.*,[10] typically based on a

[9] *See also Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 222 (1983) ("Congress has allowed the States to determine—as a matter of economics—whether a nuclear plant vis-a-vis a fossil fuel plant should be built.").

[10] *See also*, *e.g.*, *Kentucky W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 608-09 (3d Cir.) ("FERC"s rate-making determination does not govern the entire wholesale transaction" or preclude states from exercising their "traditional power to

"combination of price and non-price factors," *Allegheny Energy Supply Co.*, 115 FERC ¶ 61,221, P 9 (2006); *Commonwealth Atl. Ltd. P'ship*, 51 FERC ¶ 61,368, 62,238 & nn.11-12 (1990).[11]

Along with after-the-fact prudence reviews, states exercise their authority by supervising competitive power-supply solicitations. *E.g.*, *Commonwealth Atl. Ltd. P'ship*, *supra*; *see also* 18 C.F.R. § 35.27(b)(1) (providing that nothing in FERC's rate-filing regulations "[l]imits the authority of a State commission in accordance with State and Federal law to establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale."). And far from disapproving of state involvement, FERC has encouraged and even relied on it. *E.g.*, *Allegheny Energy Supply Co.*, 108 FERC ¶ 61,082, PP 18, 36-39 (2004) (emphasizing that a utility's solicitation was based on an RFP developed in a PSC proceeding and subject to PSC and PSC-selected consultant supervision).

Without doubt, the Section 6 procurement implicates the state's authority to supervise competitive power supply solicitations in the context of important state goals and policies. As the Complaint itself acknowledges, the Section 6 procurement effort was part of a deliberate and carefully thought-out legislative process designed to

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consider the prudence of a retailer's purchasing decision."), *cert. denied*, 488 U.S. 941 (1988); Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities, Order No. 697-A, 73 Fed. Reg. 25,832, 25,892 & n.597 (May 7, 2008), *cert. denied sub nom. Pub. Citizen Inc. v. FERC*, 133 S. Ct. 26 (2012) ("Order No. 697-A"); *Central Vt. Pub. Serv. Corp.*, 84 FERC ¶ 61,194, at 61,972 (1998), and cases citing therein.

[11] The only exception, not present here, is "in the narrow situation where the Commission, in setting a wholesale rate, leaves the purchaser no legal choice but to purchase a specified amount of power" from a specific resource, precluding alternatives. Order No. 697-A, P 416.

encourage the development of renewable energy resources. *Compl*. ¶ 5. The 2013 Integrated Resources Plan clearly identified a statutory obligation to meet the state's renewable energy goals from appropriate renewable energy sources and noted that the ratepayers would suffer significant penalties if the state failed to meet these goals. The legislature responded by passing P.A. 13-303 and explicitly identified compliance with state policies as an evaluation criterion for the planned procurement. Even as FERC has no authority to interfere with State regulation of domestic utilities, FERC also has no jurisdiction over state laws requiring the procurement of renewable energy.

This is not new law. The state's authority to direct the procurement of renewable energy has been expressly identified by FERC when it recognized that "states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities as state law so permits. *They also, assuming state law permits, may order utilities to purchase renewable generation*." (Emphasis added.) *Southern California Edison Company*, 71 FERC P 61269, 1995 WL 327268. "We respect the fact that resource planning and resource decisions are the prerogative of state commissions and that states may wish to diversify their generation mix to meet environmental goals in a variety of ways." *Southern California Edison Company*, 70 FERC P 61215, 1995 WL 169000. See also,

Midwest Power Systems, Inc., 78 FERC 61,067, 1997 WL 34082 (FERC held that "states have numerous ways outside of PURPA to encourage renewable resources.").[12]

This is especially true in the New England region. FERC has recognized that the entry of such state-sponsored new resources into the FERC-regulated market administered by ISO-New England, subject to applicable market rules, is consistent with FERC's regulation of the interstate wholesale markets. *See, e.g.*, *ISO New England, Inc.*, 135 FERC ¶ 61,029 (Apr. 13, 2011) at P 170 ("The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction"); P 171 ("We recognize that states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals . . . ."). As FERC has recognized, therefore, the design of the market rules in FERC-regulated markets neutralizes any potential adverse impacts of state initiatives on market rates while accommodating states' rights to ensure reliability for their citizens and pursue "legitimate policy goals."

It is beyond dispute that important state goals and policies are directly implicated in the Section 6 procurement at issue in this case. The enabling legislation driving this procurement effort clearly and explicitly identified the need for more renewable generation, greater portfolio diversity and the critical importance of meeting regional greenhouse gas emissions goals. After careful review by DEEP technical staff, it was determined that two projects provided material assistance in meeting these goals, all of

[12] Among other policy objectives, Connecticut is pursuing a goal of having 20 percent of all energy used in the State of Connecticut come from clean and renewable resources by 2020. *See* Public Act 07-242, An Act Concerning Electricity and Energy Efficiency (July 2007).

which are unequivocally outside any jurisdictional interference from FERC. *Compl.*, Exhibit C, Determination of September 26, 2013, pp. 1, 10-11.

C. FERC Jurisdiction Does Not Eliminate State Regulatory Authority

Finally, a common theme in Allco's Complaint is that the Commissioner's Directive to the EDCs is preempted by the FPA. *Compl.*, ¶¶ 16, 17, 26, 85, 89. Plaintiff specifically points to *PPL EnergyPlus LLC v. Nazarian*, 2013 U.S. Dist. LEXIS 140210, (D. Md. 2013) and *PPL EnergyPlus, LLC v. Hanna*, 2013 U.S. Dist. LEXIS 147273 (D.N.J. 2013), two recent federal decisions finding that the actions of the states of New Jersey and Maryland were preempted. *Compl.*, ¶ 89, fn 8. Neither of these cases is on point and deal with different factual scenarios under different state laws.[13] More to the point for the purposes of this case, it is very clear that the FPA does not preempt the Commissioner's authority in this matter and FERC has explicitly approved state-sponsored renewable energy procurements.

The FPA Does Not Preempt State Authority

As the Supreme Court has recognized, the regulation of utilities is "one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citing *Munn v. Illinois,* 94 U.S. 113 (1877)).

In 1927, after some electric utilities began contracting bilaterally with each other for wholesale power or standby capacity, the Supreme Court found that the States

[13] Among other things, these cases involve contracts-for-differences that refer to prices in a FERC-regulated wholesale electricity market to incentivize the development of new, in-state gas-fired generation. The Section 6 procurement sought energy, renewable energy credits and capacity at whatever price the markets offered.

lacked authority to regulate wholesale power sales between utilities in different States in light of the dormant Commerce Clause. *See Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927). In 1935, Congress enacted the FPA, which vested in FERC (formerly the Federal Power Commission) the authority to regulate "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. §§ 824(a), (b)(1).

In enacting the FPA, Congress made clear that the grant of authority to FERC extended "*only to those matters which are not subject to regulation by the States*." *Id.* § 824(a) (emphasis added). In addition, the FPA identified specific areas of State authority on which federal jurisdiction was not to encroach. For example, section 201(b) provided that FERC "shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy . . . ." *Id.* § 824(b)(1). Even the First Amended Complaint itself admits that "States have jurisdiction over, *inter alia*, `facilities used for the generation of electric energy.' [16 U.S.C. § 824(b)(1)]." *Compl.*, ¶ 74.

Nothing in the FPA purports to establish the outer limit of state authority with respect to the regulation of generation resources or the financing of such generation resources through the state's regulated public utilities. The FPA contains no preemption provision and no evidence of Congressional intent to displace state authority with respect to generation resources.[14] Indeed, the FPA's explicit reservation

[14] Without express statutory preemption and because the FPA constitutes legislation in a field which the States have traditionally occupied, the presumption against preemption applies in this case. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-

of authority to the states with respect to generation facilities, *id.* § 824(b)(1), suggests the contrary. *See also Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983) (the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"). Subsequent to the passage of the FPA, the states continued to make decisions regarding whether to finance the construction of new generation resources, and the optimal mix of generation resources to serve their citizens.

The plain text of the FPA demonstrates that the statute does not establish a comprehensive federal regulatory scheme that extends to displace traditional state authority to encourage new renewable generation resources through regulated utility procurements and long-term contracts. Rather, Congress expressly provided that FERC lacks jurisdiction to intrude on traditional state authority to regulate generation resources. *See* 16 U.S.C. § 824(b)(1).

The advent of federally regulated regional markets for electricity and deregulation[15] in multiple states did not alter the states' independent obligation to "keep the lights on" or diminish state authority to determine whether to develop — through long-term contracts, tax relief, or other subsidies — new renewable generation resources to serve their citizens' needs and protect the environment. *See Conn. Dep't*

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emption cases, and particularly in those in which Congress has legislated . . . in a field which the States have traditionally occupied . . . we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress").

[15] Beginning in the 1990s, many states restructured their electric industries by separating generation functions from the transmission and distribution functions of public utilities.

of Pub. Util. Control v. Fed. Energy Regulatory Comm'n, 569 F.3d 477, 481 (D.C. Cir. 2009), *cert. denied*, 558 U.S. 1110 (2010) ("State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from [FERC]").

FERC has acknowledged on multiple occasions that states have the authority to promote the development of new renewable generation resources through long-term contracts. Significantly, in a rulemaking clarifying the requirements for sellers of wholesale electricity to obtain market-based rate authorization — *i.e.*, blanket approval from FERC to enter into freely negotiated contracts with purchasers for energy, capacity, and ancillary services — FERC expressly recognized the continuing authority of state commissions to "establish . . . [c]ompetitive procedures for the acquisition of electric energy . . . purchased at wholesale . . . . " Order 697, Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services By Public Utilities, 119 FERC ¶ 61,295 (2007) at PP 1078-79. The entire provision states:

> Nothing in this part--
>
> (a) Shall be construed as preempting or affecting any jurisdiction a State commission or other State authority may have under applicable State and Federal law, or
>
> (b) Limits the authority of a State commission in accordance with State and Federal law to establish
>
> > (1) Competitive procedures for the acquisition of electric energy, including demand-side management, purchased at wholesale . . . .

18 C.F.R. § 35.27 ("Authority of State Commissions").

The text of the FPA itself plainly indicates that Congress did not intend FERC's jurisdiction over wholesale power transactions to supersede traditional State authority over, among other things, renewable generation portfolios and public utilities. FERC is not empowered to determine the scope of the states' traditional powers to regulate integrated resource planning, renewable generation, public utilities, or otherwise, but to the extent there is any ambiguity regarding the limits of FERC's jurisdiction, FERC's implicit acknowledgment of such limitations in section 35.27 may be entitled to deference. *See City of Arlington v. FCC*, 133 S. Ct. 1863, 1874-75 (2013). *See also New York*, 535 U.S. at 24 ("FERC has recognized that the States retain significant control" in "traditional areas," including generation and transmission siting and "local service issues, including reliability of local service; administration of integrated resource planning and utility buy-side and demand-side decisions . . . ; authority over utility generation and resource portfolios; and authority to impose non-bypassable distribution . . . charges") (citing Order 888, 75 FERC ¶ 61,080 nn.543, 544 (1996)).

Consistent with its acknowledgment of state authority to "establish . . . competitive procedures for the acquisition of electric energy . . . purchased at wholesale," 18 C.F.R. § 35.27, FERC has developed market rules in New England and other regional markets in furtherance of "just and reasonable" market prices, without ever suggesting that such state programs are unlawful or that FERC has the ability to interfere with state processes. The ongoing participation of new generation resources with long-term contracts in federally regulated markets demonstrates that state

programs to promote the development of new renewable generation resources are compatible with federal regulation of interstate wholesale markets.

Consistent with 18 C.F.R. § 35.27, which recognizes the authority of the states to "establish . . . competitive procedures for the acquisition of electric energy . . . purchased at wholesale," FERC has expressly acknowledged specific exercises of state authority designed to promote the construction of power plants through long-term contracts. Indeed, FERC has accommodated the participation of such new generation resources subject to market rules designed to satisfy its FPA mandate to ensure that market prices are "just and reasonable."

Addressing the participation of Connecticut power plants holding long-term contracts in the regional New England market, FERC recognized that "states and state agencies may conclude that the procurement of new capacity, even at times when the market-clearing price indicates entry of new capacity is not needed, will further specific legitimate policy goals . . . . " *ISO New England, Inc.*, 135 FERC ¶ 61,029 (2011) at P 20. *See also id.* at P 170 ("The Commission acknowledges the rights of states to pursue policy interests within their jurisdiction").[16]

Moreover, FERC recently implemented certain market rules requiring all new capacity resources, including power plants holding long-term contracts with a state's

[16] *See also ISO New England, Inc.*, 126 FERC ¶ 61,080 (2009) at P 38 ("The Commission has accepted the use of long-term bilateral contracts, such as the Connecticut state-sponsored requests for proposals . . . to meet installed capacity and local sourcing requirements"); *ISO New England, Inc.*, 122 FERC ¶ 61,016 (2008) at P 26 ("The Commission's long-standing policy, consistent with a substantial body of judicial precedent, has been to protect the stability of long-term contracts. Contracts, especially long-term contracts like the ones at issue here, provide certainty and stability in energy markets").

utilities, to make "competitive" offers (as defined by the rules) to satisfy its concerns about the alleged impact of such power plants on the market clearing price. *ISO New England, Inc.*, 142 FERC ¶ 61,107 (2013), *reh'g pending*. At no point in its orders addressing the New England regional market has FERC suggested that Connecticut procurement initiatives are unlawful or pose an obstacle to the administration of the market.[17]

The Complaint has failed to demonstrate that the FPA preempts state law. States, and not FERC, have the authority to order utilities to procure renewable generation, and the prices were set by the sellers, not the Commissioner, and thus the Plaintiff has failed to state a cause of action.

The State Law Process Does Not Violate Section 1983

The Second Count of the Complaint alleges a Section 1983 claim against the Commissioner arguing that if the Defendant's procurement process is deemed a "valid exercise of the state's authority under PURPA, the Commissioner impermissibly discriminated against the Plaintiff's QFs" because its projects were ostensibly offered at a lower cost. *Compl*., ¶¶ 101-103.

"Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271, S. Ct. 807, 811 (1994)(internal citations omitted.) Thus, a 1983 action can be

[17] Indeed, the D.C. Circuit has acknowledged the authority of the states to take a wide range of actions "in their role as regulators of generation facilities without direct interference" from FERC, despite the fact that state decisions regarding generation resources necessarily "affect the pool of bidders in the Forward Market, which in turn affects the market clearing price for capacity." *Conn. Dep't of Pub. Util. Control*, 569 F.3d at 481.

based only on a constitutional claim or a claim of a violation of a federal right. *Blessing v. Freestone*, 520 U.S. 329, 340 (1997)("In order to seek redress through section 1983, . . . a plaintiff must assert the violation of a federal right, not merely a violation of a federal law.") The FPA does not create a federal right enforceable by an action under Section 1983.

There is also no violation of a federal right because the FPA does not create one. Ultimately, the section 6 procurement is authorized by Public Act 13-303 and is thus purely a state law matter. There is no state law right to an award of a contract and, if there were, any concerns about whether this procurement was validly conducted should be addressed in state court and there is no federal issue sufficient to support a Section 1983 claim.[18] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984)(Eleventh Amendment bars all federal claims against state officials if based upon allegations of violations of state law.)

[18] Finally, it must be noted that while Allco argues that its projects offered lower prices and therefore should have been chosen, this misses the point that price was only one component of the Section 6 procurement. As the statute in question itself states, the Commissioner may evaluate greenhouse gas emissions issues and consistency with the state's goals under the Comprehensive Energy Strategy which goals included portfolio diversity and reliability. The statute did not limit the Commissioner to just these factors but also included the broader category of whether projects were deemed to be in the interest of ratepayers.

CONCLUSION

For the reasons set forth above, Defendant respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

Respectfully submitted,

COMMISSIONER DANIEL C. ESTY

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2014, 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/ Robert D. Snook
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