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March 29, 2016

The Honorable Charles S. Haight
Richard C. Lee U.S. Courthouse
United States District Court
141 Church Street
New Haven, CT 06510

RE: March 17, 2016 Memorandum and Order, *Allco Finance Ltd. V. Klee, House, Betkoski, and Caron*, 3:15-CV-608 (CSH)

Dear Judge Haight,

Your Honor issued an Order on March 17, 2016, directing the parties to the above referenced matter to submit letters to the Court by March 30, 2016, responding to three questions posed by the Court, specifically:

1. What effect, if any, does the Second Circuit's opinion in the 2013 proposals case, 805 F.3d 89, have upon Defendants' pending motions to dismiss Allco's complaint in the case at bar?
2. Does Allco intend to petition the FERC, as it did following the appeal in the 2013 case, to initiate enforcement proceedings against DEEP and PURA in the 2015 case? If Allco makes such a petition, and the FERC declines to take action, would Allco then bring an action against the state regulatory authority for appropriate relief?
3. In the totality of circumstances, including those referred to in Questions 1 and 2, what are counsel's perceptions as to what should happen next in this case?

Background

Pursuant to its authority under Connecticut Public Act 13-303, § 6 (Section 6), the Commissioner of the Connecticut Department of Energy and Environmental Protection (DEEP)

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selected two winners for power purchase agreements in 2013.¹ The Plaintiff, Allco Finance Ltd., filed a complaint in the U.S. District Court for the District of Connecticut, asserting that the implementation of Section 6 was preempted by the Federal Power Act (FPA). *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 93 (2d Cir. 2015) (*Allco I*). The district court dismissed Allco's complaint, and the Second Circuit affirmed on different grounds, specifically that the court lacked jurisdiction over the matter because Allco had failed to exhaust its administrative remedies with the Federal Energy Regulatory Commission (FERC) as required by Public Utility Regulatory Policies Act of 1978, (PURPA), codified in part at 16 U.S.C. §824a-3(f); *see also, Niagara Mohawk Power Company v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002). Allco responded to the Court's ruling by filing a PURPA administration implementation challenge under 16 U.S.C. §824a-3(f) with the FERC. FERC responded in the January 2016 Notice of Intent Not to Act declining to take action under PURPA.

While the *Allco I* appeal was pending, Plaintiff filed the present complaint, *Allco v. Klee et al.*, 3:15-cv-608 (filed Apr. 26, 2015) (*Allco II*), alleging substantially similar preemption and PURPA claims as it lodged in *Allco I*, along with a new dormant Commerce Clause claim. Defendants Robert Klee, Commissioner of DEEP and Arthur House, John W. Betkoski III, and Michael Caron Commissioners of the Public Utilities Regulatory Authority (PURA) filed separate motions to dismiss advancing essentially the same arguments as in *Allco I*. These motions are currently pending before the district court.

¹ Page 2 of this Court's March 17, 2016 Memorandum and Order states "Connecticut exercised its PURPA-granted authority by enacting a statute that empowered the state's Commissioner of [DEEP] to solicit proposals for renewable energy" Counsel for the Commissioner respectfully notes that Public Act 13-303 was not an exercise of any PURPA authority and granted the Commissioner of DEEP no power to set or alter wholesale rates but only to direct utilities to enter into contracts at rates set by generators. *See* Defendant Klee's Memo in Support of Defendant's Motion to Dismiss, at pp. 3-4 (Jun. 19, 2015). In fact, no Connecticut law grants the Commissioner any power under PURPA or the ability to set wholesale rates.

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After the Defendants' motions had been filed in *Allco II*, the Second Circuit issued its decision in *Allco I* described above. In addition, Allco filed its PURPA implementation challenge petition with the FERC which was declined. Both of these events were reported to the *Allco II* Court. Consequently, the Court in *Allco II* now seeks the positions of the parties as to the effects of these developments.

A. The Second Circuit has ruled that this Court Lacks Jurisdiction

1. *What effect, if any, does the Second Circuit's opinion in the 2013 proposals case, 805 F.3d 89, have upon the defendants' pending motions to dismiss Allco's complaint in the case at bar, the 2015 proposals case?*

The Second Circuit held in *Allco I* that: "(1) Allco cannot bring claims under §§ 1983 and 1988 to vindicate any rights conferred by PURPA . . . ; (2) Allco failed to exhausted its administrative remedies, a prerequisite . . . to vindicate specific rights conferred by PURPA." *Allco I*, 805 F.3d 89. Counts I and III in *Allco II* advance essentially the same claims, namely that the Commissioner of DEEP is preempted from directing utilities to enter into contracts with renewable energy providers outside of the terms of PURPA and that Allco may seek damages under 42 U.S.C. §§ 1983 and 1988. Complaint, *Allco II*, 3:15-CV-00608 (CHS), at ¶¶ 40-62 & 72-80. It is not disputed that Allco has not sought redress of any of its claimed injuries in *Allco II* from the FERC pursuant to 16 U.S.C. §824a-3(f). Because the same plaintiff is raising the same legal claims against the same defendant, these claims are barred under the doctrine of *res judicata*, which encompasses claim and issue preclusion, and gives preclusive effect to a prior federal judgment. *Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 288, 286 (2d Cir. 2002).

In *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees. Inc.*, 779 F.3d 102, 107-08 (2d Cir. 2015), the Second Circuit has recently stated that:

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The term *res judicata*, which means essentially that the matter in controversy has already been adjudicated, encompasses two significantly different doctrines: claim preclusion and issue preclusion. *See Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008). Under claim preclusion, “a final judgment forecloses successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit.” *Id.* (internal quotation mark omitted). The doctrine precludes not only litigation of claims raised and adjudicated in a prior litigation between the parties (and their privies), but also of claims that might have been raised in the prior litigation but were not. *See St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d Cir.2000). The doctrine of issue preclusion, in contrast, “bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.” *Taylor*, 553 U.S. at 892, 128 S.Ct. 2161. (internal quotation marks omitted). . . .

Preclusion of a claim under this doctrine requires a showing that “(1) the previous action involved an adjudication on the merits; (2) the previous action involved the [same adverse parties] or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action.” *TechnoMarine*, 758 F.3d at 499 (alteration omitted).

Marcel Fashions, 779 F.3d 102, 107-08 (2d Cir. 2015) (internal quotation marks omitted; citation omitted) (emphasis added).

The preemption and § 1983 claims in *Allco I* and *Allco II* present identical issues of law and have been fully briefed, argued and decided by an appellate court of competent jurisdiction. The cases involve the same Plaintiff as well as the same Defendant Commissioner Klee. While PURA was not a defendant in *Allco I*, it is an adjudicative body within DEEP, has the same legal standing as a state agency and has no interests in either litigation that diverge from DEEP's. For these reasons, Counts I and III of *Allco II* should be dismissed. *See, e.g., Austin v. Downs, Rachlin & Martin*, 270 F. App'x 52 (2d Cir. 2008).

2. *Does Allco intend to petition the FERC, as it did following the appeal in the 2013 case, to initiate enforcement proceedings against DEEP and PURA in the 2015 case? If Allco makes such a petition, and the FERC declines to take action, would Allco then bring an action against the state regulatory authority for appropriate relief?*

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Counsel for the Commissioner of DEEP respectfully relies on Plaintiff's counsel to address whether Allco intends to petition FERC under PURPA and whether it will pursue any subsequent action.

3. *In the totality of circumstances, including those referred to in Questions 1 and 2, what are counsel's perceptions as to what should happen next in this case?*

Counsel believes that because Counts I and III are precluded, for the reasons outlined above. *See supra* Part A. With regard to Allco's remaining Count II, that Connecticut's renewable portfolio standard (RPS) program violates the Commerce Clause, counsel believes that it should be dismissed for the reasons stated in Defendant's motion to dismiss and subsequent associated briefings.

Respectfully submitted,

COMMISSIONER DANIEL C. ESTY

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ATTORNEY GENERAL

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