IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

COALITION FOR COMPETITIVE ELECTRICITY et al., Plaintiffs, v. JOHN B. RHODES, in his official capacity as Chair of the New York Public Service Commission, et al., Defendants.	Case No. 1:16-cv-08164-VEC

SUPPLEMENTAL MEMORANDUM OF INTERVENORS CONSTELLATION ENERGY NUCLEAR GROUP, LLC, EXELON CORPORATION, R.E. GINNA NUCLEAR POWER PLANT LLC, AND NINE MILE POINT NUCLEAR STATION LLC

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In *Allco Finance Ltd. v. Klee*, the Second Circuit rejected a Federal Power Act ("FPA") preemption challenge to a Connecticut program that selected renewable generators from whom the states' utilities would buy electricity at wholesale. It also rejected a Dormant Commerce Clause challenge to the state's renewable energy credit ("REC") program. The Second Circuit's reasoning reinforces the grounds for dismissal set forth in Constellation's motion to dismiss.

ARGUMENT

I. *Allco* Confirms That Plaintiffs Fail To State A Field Preemption Claim.

In several respects, *Allco* confirms that Plaintiffs fail to state a field preemption claim. *First*, *Allco* rejects a field preemption claim, and this case is even easier. The Connecticut program concerned contracts *for wholesale electricity sales*—the subject of the federal field. Slip 3, 9 (explaining that the program involved "new bilateral wholesale energy contracts between [utilities] and generators"). Yet still it was not preempted because states act "within the scope of [their] power to regulate … utilities" when they direct utilities to buy electricity from renewable generators and "specify[] the sizes and types [of generators] … that may" participate. *Id.* at 38. This case concerns *environmental* attributes that, as *Allco* confirms, fall wholly within state jurisdiction. *Id.* at 18.[1] *Allco* reiterated that credits like RECs and ZECs "are inventions of state property law whereby" attributes of *generation* "are 'unbundled' … and sold separately." *Id.* at 18 (quoting *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 15 (2d Cir. 2008) (per curiam)). RECs fall under state jurisdiction because they certify particular

[1] The *Allco* plaintiff argued that the Connecticut program was preempted because it "compelled" utilities to enter wholesale contracts with generators on state-imposed terms. The Second Circuit found that the program did not, in fact, compel wholesale transactions, and reserved the question of whether compelled wholesale electricity contracts would be preempted. Slip 28-39, 36 & n.15. The "compulsion" issue arose in *Allco* only because the Connecticut program featured alleged state compulsion of the sale of *electricity* at wholesale, the very thing over which FERC has jurisdiction. This case, by contrast, does not involve the sale of electricity, compelled or otherwise—it involves environmental credits that are wholly within state jurisdiction. *See supra*. Compelling the purchase of such credits, unlike compelling the purchase of electricity itself, raises no preemption issue at all.

methods of production and are sold to retailers, and states have authority over generation facilities that produce electricity and retail sellers of electricity. 16 U.S.C. § 824(b)(1); Mem. 4.[2]

Second, the Second Circuit confirmed that *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), does not support Plaintiffs. It holds that *Hughes* established a "bright line," invalidating only programs that "are '[]tethered to a generator's wholesale market participation' or that 'condition[] payment'" on the generator's successful sale of electricity (known as "clearing") in the wholesale auction. Slip 39. Again and again, *Allco* characterized preemption under *Hughes* as turning on whether the state required wholesale auction participation and clearance as a condition for payment.[3] And again and again, *Allco* emphasized *Hughes*' statements that programs lacking those features are not preempted.[4] Because Connecticut had not "violate[d] th[is] bright line," the challenge failed. *Id.* The same is true in this case. Thus, *Allco* supports Constellation's arguments concerning *Hughes*. *See* Mem. 12-14; Reply 5-8.

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[2] "Mem." is Intervenors' Memorandum in Support of Motion to Dismiss, ECF No. 77; "Opp." is Plaintiffs' Memorandum in Opposition to Motions to Dismiss, ECF No. 95; "Reply" is Intervenors' Reply in Support of Motion to Dismiss, ECF No. 103.

[3] Slip 32-33 ("The Supreme Court found the [*Hughes*] scheme to be preempted" because "'Maryland … requires [the generator] to participate in the PJM capacity auction, but guarantees [it] a rate distinct from the clearing price for its interstate sales of capacity to PJM. By adjusting an interstate wholesale rate, Maryland's program invades FERC's regulatory turf.'" (quoting *Hughes*, 136 S. Ct. at 1297) (first alteration added)); *id.* at 33 ("the Court determined that" the Maryland program was preempted because it "'operates within the auction'" (quoting *Hughes*, 136 S. Ct. at 1299)); *id.* at 36 ("*Solomon* … differs from the case before us …. [T]he Third Circuit's finding of field preemption was based specifically on the fact that New Jersey 'command[ed] generators to sell capacity' into the FERC-approved interstate auction …." [*PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 252-53 (3d Cir. 2014).] … Thus, the New Jersey scheme, like … *Hughes*, suffered the 'fatal defect' of having the state 'condition payment of funds on capacity clearing the [FERC-approved interstate] auction.' *Hughes*, 136 U.S. at 1299." (first and third brackets added)).

[4] Slip 33 ("[*Hughes*] noted" that its "'holding is limited. We reject Maryland's program only because it disregards an interstate wholesale rate required by FERC. … Nothing in this opinion should be read to foreclose … States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation. So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.'" (quoting *Hughes*, 136 S. Ct. at 1299)); *id.* at 34 ("There are … telling distinctions between the Maryland program and Connecticut's RFPs. … Connecticut's program does not condition capacity transfers on any such auction."); *id.* at 39 ("Allco has not successfully alleged that the [program] is likely to produce contracts that violate the bright line laid out in *Hughes*: the RFPs do not, for instance, require bids that are '[]tethered to a generator's wholesale market participation' or that 'condition[] payment of funds on capacity clearing the auction.'" (quoting *Hughes*, 136 S. Ct. at 1299) (first bracket added)).

Allco also rejects the specific arguments Plaintiffs raise in their attempt to read *Hughes* more broadly. First, they argue that *Hughes* invalidates any "subsidy" that "supplement[s]" revenues of "a favored generator." Opp. 2-3. But the *Allco* program's *whole point* was to supplement the revenues that certain renewable generators would receive by providing for 20-year "power purchase agreements" at rates above the wholesale market price. Second, Plaintiffs argue that *Hughes* invalidates the ZEC Program because it "directly" affects wholesale rates resulting from FERC auctions. Opp. 18-19. But in *Allco*, the plaintiff similarly alleged that the program would "increase the supply of electricity" and so "place downward pressure on" wholesale prices. Slip 38-39. Yet *Allco* reaffirmed that this "effect on wholesale prices does not" yield preemption. *Id.* at 39. Third, Plaintiffs argue that *Hughes* prohibits any "tether" to wholesale "prices," not just to wholesale market *participation*. Opp. 25. *Allco* refutes that argument, too. The *Allco* plaintiff likewise argued that the program was "tied to the … auction market" because of its pricing: The state provided "guaranteed payment[s]" with a "financial adjustment … to account for the difference in the FERC market price and the guaranteed price." Reply at 14, *Allco v. Klee*, No. 16-2946 (2d Cir. Nov. 29, 2016), Doc. 140. This did not matter to the Second Circuit. Finally, Plaintiffs argue that *Hughes* proscribes any subsidy whose recipient has no *practical* "alternative to selling" in the FERC auction. But the "bright line laid out in *Hughes*" asked solely whether "the RFPs"—that is, *the state*—required auction clearance as a condition for payment. Slip 39; *see id.* at 36 (whether "the state" conditioned payment). Because it did not, there was no preemption.

II. *Allco* Confirms That Plaintiffs Fail To State A Conflict Preemption Claim.

Plaintiffs claim the ZEC Program is conflict-preempted because it contradicts FERC's supposed policy of "markets[] … in which competitive forces set … electricity prices" without the

influence of any "state subsidy" affecting "market signals." Opp. 32-33. *Allco* confirms no such policy exists: It approved Connecticut's program despite undoubted effects on wholesale rates. Slip 39. That accords with FERC precedent upholding states' authority to enact programs regulating generation despite similar effects on wholesale rates, including REC programs. Mem. 7-10; Reply 2-5, 8-9.

Allco also underscores a second reason the ZEC Program is not conflict preempted: FERC has the ability to address any issues it perceives. In *Allco*, any "bilateral contract" entered as a result of the Connecticut program would "be subjected to review by FERC for justness and reasonableness." Slip 34. Likewise here, when generators receiving ZECs sell their electricity at wholesale, they do so pursuant to FERC approved tariffs. FERC has full ability to ensure that the prices for those sales are just and reasonable. If Plaintiffs believe the auction rules need to be changed to do so, they can make (and, indeed, have made) that argument to FERC. FERC is actively considering a range of options to address "the interplay between state policy goals and the wholesale markets," *see* ECF No. 121-1, including REC/ZEC programs like the Connecticut and New York programs.[5] The Court should reject Plaintiffs' attempt to obtain a preemption holding that would short-circuit FERC's process and limit its discretion.

III. *Allco* Confirms That Plaintiffs Fail To State A Dormant Commerce Clause Claim.

Allco rejected Commerce Clause challenges identical to Plaintiffs' here. To satisfy Connecticut's REC program, a credit had to be produced by a generator in the state's "regional grid" or an "adjacent control area[]" that could transmit into the state. Slip 19-20, 48. The plaintiff claimed this discriminated against a Georgia generator. *Id.* at 40. *Allco* rejected this argument. It

[5] None of those options requires preemption to protect FERC's markets. Notice Inviting Post-Tech. Conf. Comments at 1, *State Policies and Wholesale Markets Operated by ISO New England Inc., New York Independent System Operator, Inc., and PJM Interconnection, L.L.C.*, Docket No. AD17-11-000 (FERC May 23, 2017), https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14595026.

observed that RECs are creatures of state law, and Connecticut had created "RECs that differ[] from [the] Georgia facility's RECs." *Id.* at 48. This choice was permissible, and not discriminatory: Connecticut had an interest in providing its consumers a "more diversified and renewable energy supply" that was "accessible to them." *Id.* This was a "legitimate interest in promoting … renewable power … *in the region*, thereby protecting its citizens' health[and] safety," and "would not be served" by facilities that could not transmit into Connecticut. *Id.* at 48, 51 (emphasis added). The same is true here. Plaintiffs claim the ZEC Program discriminates because eligibility is based on "verifiable historic contribution … to the clean energy resource mix consumed by retail consumers in New York." Opp. 37. That limit serves the same interest as in *Allco*—supporting clean energy "in the region" "accessible to" New York customers. Slip 48, 51.[6] While only New York facilities have so far qualified, that, as in *Allco*, reflects "regionalization" "FERC itself … has instituted." *Id.* at 52. New York's grid is operated by the single-state New York Independent System Operator. Mem. 3. So, as in *Allco*, the results merely "piggyback[] on top of geographic lines drawn" under FERC's oversight. Slip 51.[7]

Allco also confirms that *Pike* claims like Plaintiffs' are suitable for resolution on motion to dismiss. *Allco* held that "the same reasons" above compelled the conclusion that Connecticut's RPS program passed muster under *Pike*. *Id.* at 53. Because the program was a "legitimate state pursuit … relat[ed to] the health, life, and safety of [its] citizens," the *Pike* claim failed, with no factual development required. *Id.* (quotation marks omitted). The same is true here.

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[6] *See* Order 8, 51, 66, 125, 144; Mem. 22-24, 25 n.14; *see also* ECF No. 86 at 11-12, ECF No. 107 at 1-7 (amicus briefs of Environmental Defense Fund "underscor[ing] the fundamental legitimacy and profound purpose of the … ZEC program").

[7] *Allco* also underscores why Plaintiffs lack standing to challenge the ZEC Program as discriminatory. The Second Circuit found that the *Allco* plaintiff had standing because it owned an out-of-state plant that, but for the alleged discrimination, would have been eligible to participate. *See* Slip 41 (grounding standing on "differential treatment of RECs produced by Allco's Georgia facility"). But here, Plaintiffs do not allege that they own out-of-state nuclear plants that could participate in the ZEC Program but for its alleged discrimination. Reply 15.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify on July 10, 2017, a true and correct copy of the foregoing was filed with the Clerk of the United States District Court for the Southern District of New York via the Court's CM/ECF system, which will send notice of such fling to all registered CM/ECF users.

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