Tel: (860) 827-2681
Fax: (860) 827-2893

March 30, 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 in *Allco Finance Ltd. v. Klee, House, Betkoski and Caron*, 3:15-CV-608 (CSH)

Dear Judge Haight:

This letter responds to your March 17, 2016 Memorandum and Order in the above-captioned case. The Memorandum and Order asks counsel to respond by letter to three questions posed in light of two significant developments which occurred after reply briefs were filed. The significant events are the Second Circuit's decision in *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 91 (2d Cir. 2015), as amended (Dec. 1, 2015) ("*Allco I*"), and the issuance of a Notice of Intent Not to Act by the Federal Energy Regulatory Commission ("FERC") subsequent to the ruling in *Allco I*.

The Second Circuit's Ruling in *Allco I* is Dispositive as to Counts I and III.

The Memorandum and Order asks what effect, if any, the Second Circuit's opinion in *Allco I* may have upon the defendants' pending motions to dismiss Allco's complaint in the instant case. The Second Circuit's reasoning in the 2013 proposals case is fully dispositive as to Counts I and III.

Count I purports to be a federal preemption claim, but is in reality an action to compel Connecticut to implement § 824a-3(a) of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). It is precisely the same claim raised by plaintiff in *Allco I*, and is subject to the same administrative exhaustion requirement set forth in § 824a-3(h)(2)(B) of PURPA. The Second Circuit dismissed plaintiff's purported preemption claim in *Allco I* for failure to exhaust administrative remedies, and this court should now dismiss accordingly.

Paragraph 5 of the Complaint in this case demonstrates that plaintiff constructed its preemption theory entirely upon PURPA. Specifically, ¶5 alleges:

> In the Federal Power Act, Congress has occupied the field of wholesale sales of electricity. 16 U.S.C. § 824(b)(1). Thus, States may not enter that field of regulation. In Section 210 of [PURPA], Congress … carved out a role for States to regulate wholesale sales by Qualifying Facilities (or "QFs"); but, with respect to wholesale sales by other generators … States are not permitted to regulate. Here, the Defendants intend to [regulate wholesale sales] by compelling wholesale transactions between Connecticut's utilities and counterparties of the Defendants' choosing. Compelling a specific wholesale transaction … plainly involves the regulation of wholesale sales, and thus falls squarely within the field that Congress has occupied.

(footnote omitted) Complaint, ¶5. Allco plainly asserts in this case that PURPA constrains Connecticut, and the state cannot solicit, evaluate and select renewable energy proposals unless it acts under PURPA. Complaint, ¶45. It is the same claim raised by plaintiff in *Allco I*. *Allco I* at 96 ("[U]nder Allco's theory, the only way in which [Connecticut] can issue a Section 6 contract that is not preempted by the Federal Power Act is if that contract meets the requirements of the PURPA exception."). Just as in *Allco I*, plaintiff's purported preemption theory is in reality an action to enforce PURPA's § 824a-3(f), and is subject to the same administrative exhaustion requirements that compelled dismissal of *Allco I*. See *Allco I* at 97.

Notably, the Second Circuit wholly rejected plaintiff's attempt to frame its claim as a straightforward preemption claim. *Allco I* at 96-98. Allco could not "characterize[e] its cause of action 'under a different heading' [and] transform its claim into something other than what it is: an action to compel a state to implement § 824a-3(a)." *Allco I* at 97, citing *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1270 (2d Cir. 2002). The Second Circuit's reasoning in both *Allco I* and *Niagara Mohawk* are entirely dispositive of plaintiff's Count I, which should be dismissed for failure to exhaust PURPA's administrative remedies.

Similarly, Count III is fully resolved by the Second Circuit's opinion in *Allco I*. Plaintiff brought a claim for money damages and attorneys' fees under §§ 1983 and 1988 in *Allco I*. However, in *Allco I* the Second Circuit found that Congress already provided plaintiff with a private right of action under PURPA, and did not intend to leave open a more expansive remedy under § 1983. *Allco I* at 95. Thus, the Second Circuit found (again consistent with *Niagara Mohawk*) that plaintiff was foreclosed from bringing its §§ 1983 and 1988 claims. *Id*.

Plaintiff brings the same claim here for money damages and fees under §§ 1983 and 1988. Here, as with *Allco I*, plaintiff is foreclosed from bringing its §§ 1983 and 1988 claims because PURPA provides a private right of action.

Does Allco Intend to Petition FERC to Initiate Enforcement, and Bring an Action Against Connecticut if FERC Declines?

While this question is directed at plaintiff Allco, we note that FERC must be given the opportunity to determine whether it will initiate enforcement, and that FERC has discretion to use this opportunity as it sees fit. FERC may issue a *pro forma* Notice of Intent Not to Act as it did with Allco's petition submitted to FERC after *Allco I*. Alternatively, it may issue a Notice of Intent Not to Act and Declaratory Order that provides its view of the merits notwithstanding its decision not to initiate enforcement (an example may be found at http://www.ferc.gov/EventCalendar/Files/20111004173200-EL11-59-000.pdf). The variety of FERC's potential responses demonstrates the importance of FERC's statutory role in PURPA enforcement.

Moreover, Allco's future intentions cannot bestow subject matter jurisdiction upon this Court for Count I of the complaint at bar. Because Allco has failed to exhaust its administrative remedies, Allco cannot pursue its claim against Connecticut until and unless it pursues those statutory, administrative remedies. Count I of this complaint must be dismissed, as directed by the Second Circuit's holding in *Allco I*.

What Should Happen Next in This Case?

The court should dismiss Counts I, II and III of plaintiff's lawsuit. Count I should be dismissed because of plaintiff's failure to exhaust administrative remedies in accordance with the Second Circuit's opinions in both *Allco I* and *Niagara Mohawk*. As set forth in the Memoranda in Support of the Motions to Dismiss and associated briefing, plaintiff's Count II dormant Commerce Clause claims fail as a matter of law. Plaintiff's Count III is indistinguishable from its §1983 and §1988 claims presented in *Allco I*, and thus Count III is required to be dismissed under the Second Circuit's holding in *Allco I*.

Very truly yours,

/s/ Seth A. Hollander

Seth A. Hollander
Assistant Attorney General
Representing PURA Commissioners
Arthur H. House, John W. Betkoski III and
Michael A. Caron

Cc: Thomas Melone, Esq.
Robert Snook, Esq.