16-2946, 16-2949

THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

ALLCO FINANCE LTD.,
Plaintiff-Appellant,

v.

ROBERT KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection,
Defendant-Appellee,

and

ARTHUR HOUSE, JOHN W. BETKOSKI, III, and MICHAEL CARON, in their Official Capacities as Commissioners of the Connecticut Public Utilities Regulatory Authority,
Defendants-Appellees.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

AMENDED BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, CONSERVATION LAW FOUNDATION, AND ACADIA CENTER IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENTS

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for amici make the following disclosures:

Acadia Center is a non-profit, research and advocacy organization committed to advancing the clean energy future. Acadia Center has no parent corporations and no publicly issued stock shares or other securities. No publicly held corporation owns any stock in Acadia Center.

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The Conservation Law Foundation (CLF) is a non-profit environmental advocacy organization dedicated to protecting New England's environment for the benefit of all people. CLF has no parent

corporation. Nor is it a corporation in which any person or entity owns stock.

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GLOSSARY

"The Act"	Federal Power Act, 16 U.S.C. § 824 *et seq.*
JA	Page number in the Joint Appendix filed in Docket No. 16-2946 (ECF No. 40)
FERC	Federal Energy Regulatory Commission
ISO-NE	New England Independent System Operator, a Regional Transmission Organization that serves Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and most of Maine
PJM	PJM Interconnection, LLC, a Regional Transmission Organization that serves the mid-Atlantic region
PURPA	Public Utility Regulatory Policies Act, 16 U.S.C. § 824a-3
REC	Renewable energy credit
RPS	Renewable Portfolio Standard
RTO or "grid operator"	Regional Transmission Organization, as defined at 18 C.F.R. § 35.34.

RULE 29 STATEMENT[1]

I. Amici's Identities and Interest in This Case

Amici are environmental public interest organizations committed to reducing air pollution, combating climate change, and securing environmentally sustainable energy policies in Connecticut, New England, and nationwide.

Acadia Center is a non-profit research and advocacy organization committed to advancing the clean energy future. Acadia Center is at the forefront of efforts to build clean, low carbon, and consumer friendly economies. Acadia Center's work focuses on climate and energy policy in the Northeast and the organization has offices in Connecticut, Maine, Massachusetts, New York, and Rhode Island. Acadia Center advocates for increased renewable energy procurements in the region and supports states' efforts to solicit and obtain additional clean energy

[1] In accordance with Local Rule 29.1(b), the undersigned counsel affirm that no party's counsel authored this brief in whole or in part, and that no person other than the undersigned amici, their members, or their counsel contributed money intended to fund preparing or submitting the brief.

supply to help meet their public policy goals, including mandatory greenhouse gas emissions targets.

Conservation Law Foundation (CLF) is a non-profit environmental advocacy organization dedicated to protecting New England's environment. CLF's Clean Energy & Climate Change Program advocates for policies that curb our region's climate-warming greenhouse gas emissions and for policies and projects that spur low cost clean energy, save families and businesses money, and create jobs.

Environmental Defense Fund (EDF) is a national non-profit organization representing more than 350,000 members nationwide. Protecting public health and the environment from harmful airborne contaminants, including greenhouse gases, is a core organizational mission, as is protecting land, soil, and forestry resources. EDF regularly participates in regulatory and judicial proceedings on air pollution policy at the federal and state level and actively advocates for policies to protect land, soil, and forestry resources.

Natural Resources Defense Council (NRDC) is a national non-profit membership organization committed to the preservation and protection of the environment, public health, and natural resources. In

service of its mission to fight climate change, curb air pollution, and protect human health, NRDC works at the local, state, and federal levels to reduce greenhouse gas emissions and foster the use of clean and renewable energy resources. NRDC has many years of expertise in advocating before FERC, regional transmission planning entities, state siting and regulatory authorities, and the federal courts to encourage the adoption of clean energy policies.

Sierra Club is a national organization founded in 1892 with more than sixty chapters and over a million members and supporters. Sierra Club works to address the environmental and public health problems associated with energy generation, and actively advocates for increased use of low-cost renewable energy resources at the local, state, and national levels. Sierra Club actively supported the Connecticut energy legislation and participated in the renewable energy procurement process giving rise to this case.

II. Authority to File

Counsel for Defendants-Appellees Klee, House, Betkoski, and Caron consent to the filing of this brief, and counsel for Plaintiff-Appellant Allco does not oppose.

SUMMARY OF ARGUMENT

Allco's challenge to Connecticut's Renewable Portfolio Standard and procurement program rests on a fundamental mischaracterization of the Federal Power Act and the nature of states' authority to adopt renewable energy policies. Connecticut has established a well-functioning state program to address climate change, reduce pollution, and enhance fuel diversity and the price stability and reliability of the electric system serving Connecticut residents. Its Renewable Portfolio Standard and procurement program are lawful exercises of Connecticut's long-recognized state authority over utility procurement and resource planning, and they are well within statutory and constitutional bounds. Because neither the Federal Power Act nor the dormant Commerce Clause prohibits Connecticut from enacting such policies, the Court should affirm the dismissal of Allco's complaints.

BACKGROUND

Connecticut's Renewable Portfolio Standard, as modified by the Legislature in 2013, requires that each electric supplier or distribution company in the state obtain an increasing percentage of its electricity output from qualifying renewable sources. *See* Conn. Gen. Stat.

§ 16-245a(a); *see also* Conn. Gen. Stat. § 16-1(a)(20)-(21) (defining qualifying renewable energy sources). A supplier or distribution company may satisfy this requirement by purchasing renewable energy credits from a renewable generator, provided *either* (A) "the generating unit is located in the jurisdiction of" the New England Independent System Operator (ISO-NE), which is the regional grid operator that serves Connecticut and five other northeastern states,[2] *or* (B) the generating unit's "energy [is] imported into" ISO-NE pursuant to the operating rules of the New England Power Pool Generation Information System, which is an independent regional authority that tracks such credits. *Id.* § 16-245a(b).

The Legislature also enacted a renewable energy procurement program, which allows the Commissioner of Connecticut's Department of Energy and Environmental Protection to solicit proposals from renewable generators to supply up to four percent of the state's total

[2] ISO-NE is a "regional transmission organization" (RTO), a federally regulated entity that coordinates the buying, selling, and transmission of wholesale electricity in interstate commerce. *See* 18 C.F.R. § 35.34. This brief uses the term "grid operator" to refer to ISO-NE and other RTOs.

electricity demand. *See* An Act Concerning Connecticut's Clean Energy Goals, Public Act No. 13-303, § 6 (codified at Conn. Gen. Stat. § 16a-3f). The procurement program authorizes the Commissioner to issue requests for proposals, to select winning projects, and, if the Commissioner "finds such proposals to be in the interest of ratepayers," to direct state-regulated utilities[3] in Connecticut to negotiate long-term contracts to purchase electricity or renewable energy credits from those projects. *Id.* The Commissioner does not dictate or otherwise set the price to be established through these contracts, which is determined by arms-length negotiations between utility and generator.

The Legislature expressed multiple purposes for enacting these programs. One was "to reduce greenhouse gas emissions" and combat climate change. Conn. Gen. Stat. § 16a-3f; *see also id.* § 22a-200a. The Legislature also expressed more localized "policy goals," however, as "outlined in the [state's] Comprehensive Energy Strategy, adopted pursuant to section 16a-3d" of the general statutes. *Id.* § 16a-3f. The

[3] Connecticut's statute uses the term "electric distribution companies" to describe state-regulated companies that purchase electricity and sell it to retail customers. Conn. Gen. Stat. § 16a-3f. This brief uses the term "utilities" instead.

state's Comprehensive Energy Strategy describes in particular its commitment to combatting regional "air pollution" by fostering "cleaner power generation across our entire airshed," and mitigating "price and reliability risks" by promoting "diversification" of the state's energy sources.[4]

Connecticut is just one of many states and localities that have adopted Renewable Portfolio Standards and renewable purchasing policies pursuant to their authority over utility resource planning.[5] Such policies aim to increase the diversity of the state's generation mix, promote new renewable resource development, and achieve state public health and environmental goals. According to the U.S. Department of Energy, state Renewable Portfolio Standards "have been a key driver"

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[4] Conn. Dep't of Energy & Envtl. Prot., *2013 Connecticut Comprehensive Energy Strategy for Connecticut* 70, 81 (2013), *available at* http://www.ct.gov/deep/lib/deep/energy/cep/2013_ces_final.pdf (last visited Nov. 21, 2016) (hereinafter Comprehensive Energy Strategy).

[5] *See* Galen Barbose, *U.S. Renewables Portfolio Standards: Overview of Status and Key Trends* 3 (Nov. 5, 2015), *available at* https://emp.lbl.gov/sites/all/files/2015%20National%20RPS%20Summit%20Barbose.pdf (last visited Nov. 21, 2016) (reporting that 29 states and the District of Columbia have adopted Renewable Portfolio Standards).

of innovation and growth in renewable energy in the United States, and "[r]oughly 60% of new U.S. renewable generation and capacity additions since 2000 were driven by these policies."[6] State Renewable Portfolio Standards reduced greenhouse gas emissions by 59 million metric tons in 2013 alone, and are thus helping Connecticut and other states achieve their long-term greenhouse gas emission reduction goals and combat the effects of climate change.[7]

For decades, the federal government has recognized that such laws and policies are lawful exercises of states' authority. *See, e.g.*, *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, at 62,076 (1995). In fact, in a recent amicus brief to the Supreme Court, the United States specifically identified Connecticut's renewable procurement program as an example

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[6] U.S. Dep't of Energy, *New Study: Renewable Energy for State Renewable Portfolio Standards Yield Sizable Benefits* (Jan. 7, 2016), *available at* http://energy.gov/eere/articles/new-study-renewable-energy-state-renewable-portfolio-standards-yield-sizable-benefits (last visited Nov. 21, 2016).

[7] Ryan Wiser *et al.*, *A Retrospective Analysis of the Benefits and Impacts of U.S. Renewable Portfolio Standards* 13 (Jan. 2016), *available at* https://emp.lbl.gov/sites/all/files/lbnl-1003961.pdf (last visited Nov. 21, 2016). Connecticut law mandates that by 2050, the state shall reduce greenhouse gas emissions to 80% below the level emitted in 2001. Conn. Gen. Stat. § 22a-200a.

of a "[p]ermissible," non-preempted state program. *See* Brief for the United States as Amicus Curiae, *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288 (2016) (Nos. 14-614 and 14-623), 2016 WL 344494, at *34 (hereinafter *Hughes* Amicus Brief) (explaining that "[p]ermissible state programs may include a requirement that local utilities purchase a percentage of electricity from a particular generator or from renewable resources" and pointing to Connecticut's program as one such "permissible" program).

ARGUMENT

If the Court reaches the merits of Allco's arguments,[8] it should reject them and affirm the district court's dismissal of its complaints. As explained in Section I below, Connecticut's renewable procurement program is not preempted by federal law. Rather, it is a straightforward exercise of the state's traditional authority over utility procurement and resource planning, which the Federal Power Act preserves and which the Supreme Court's recent decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), carefully and explicitly left

[8] Amici take no position on Allco's standing.

untouched. As explained in Section II, Connecticut's Renewable Portfolio Standard does not violate the dormant Commerce Clause, as it is not discriminatory and does not burden any national market.

I. Connecticut's Renewable Procurement Program Is Not Preempted

Allco's preemption argument depends on a characterization of Federal Power Act preemption that conflicts with precedent of the Supreme Court and this Court, as well as the longstanding view of the Federal Energy Regulatory Commission (FERC). Allco claims that the Federal Power Act, 16 U.S.C. § 791a *et seq.*, forbids states from directing utilities to enter into long-term bilateral contracts with generators unless they are acting within the bounds of the Public Utility Regulatory Policies Act (PURPA), 16 U.S.C. § 824a-3. *See* Opening Br. at 7. If Allco were correct, Connecticut would have a choice between soliciting proposals only from small generation facilities (like Allco's) that meet PURPA's criteria, or not soliciting proposals at all.

Allco's theory is not correct. When Connecticut solicits bids and directs utilities to enter into bilateral contracts with renewable generators, it is exercising a state's traditional authority to oversee the

mix of resources available to supply electricity in the state. Connecticut is not setting rates in the wholesale interstate market or interfering with FERC's authority to determine whether those rates are just and reasonable. To the contrary, FERC still has the final say on whether the bilateral contract price meets the Federal Power Act's "just and reasonable" standard. 16 U.S.C. § 824d. Connecticut therefore needs no affirmative grant of authority through the Federal Power Act or PURPA to carry out the procurement program at issue here.

A. The Federal Power Act Is a Collaborative Federalism Statute that Preserves States' Traditional Authority to Regulate Utilities

The Federal Power Act is a "collaborative federalism statute" that "envisions a federal-state relationship marked by interdependence." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring).

The Act authorizes the federal government, through FERC, to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Specifically, the Act directs FERC to ensure that all interstate wholesale "rate[s]" are "just and reasonable."

Id. § 824e(a).[9] FERC exercises its statutory authority in two principal ways. First, it reviews and approves the rules for multi-party competitive auctions run by independent regional grid operators like ISO-NE. FERC deems the results of such auctions to be just and reasonable when conducted in accordance with the FERC-approved rules, although it also has authority to review the auction results under 16 U.S.C. § 824e. Second, FERC has jurisdiction to review the rates negotiated in bilateral contracts between utilities and generators. If a

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[9] The Act also authorizes FERC to ensure that "any rule . . . or practice . . . *affecting* such rate" is just and reasonable. 16 U.S.C. § 824e(a) (emphasis added). The Supreme Court has "limit[ed] FERC's 'affecting' jurisdiction to rules or practices that *directly* affect the wholesale rate.'" *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774 (2016) (hereinafter *EPSA*) (internal quotation marks and brackets omitted).

While FERC's jurisdiction to determine just and reasonable *rates* is "exclusive," *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), its jurisdiction over rules and practices "*affecting*" such rates necessarily is not. The Court has recognized the desirability of some overlap with state authority in this context; the fact that federal jurisdiction extends to a given rule or practice does not necessarily displace state authority over that same rule or practice. *See EPSA*, 136 S. Ct. at 779-80 (describing wholesale demand response regulation as an instance of "cooperative federalism" where both FERC and the states play a role). Allco does not appear to argue that FERC's "affecting" jurisdiction is at issue in this case.

contract results from an arm's-length negotiation, FERC generally presumes the contract rate to be reasonable unless it would harm the public interest. *See Hughes*, 136 S. Ct. at 1292-93.[10]

Under the Act, states retain jurisdiction over "any other sale of electric energy," 16 U.S.C. § 824(b)(1), including retail sales (i.e., sales to consumers) and wholesale sales that occur entirely within the state. *See EPSA*, 136 S. Ct. at 766. States also retain control over "facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1). In addition, as the Supreme Court has long recognized, states retain jurisdiction over "the regulation of utilities," which 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). Accordingly, courts have held that the Federal Power Act does not encroach on states' control over such matters as "integrated resource planning," "utility buy-side and demand-side

[10] If the contract is an affiliate transaction, FERC's review is more searching. *See* 18 C.F.R. § 35.39(b); *see also Elec. Power Supply Ass'n v. FirstEnergy Solutions Corp.*, 155 FERC ¶ 61,101 (2016) (determining that a power sales contract was an affiliate transaction subject to case-specific reasonableness review); *Elec. Power Supply Ass'n v. AEP Generation Res., Inc.*, 155 FERC ¶ 61,102 (2016) (same).

decisions," and "utility generation and resource portfolios." *New York v. FERC*, 535 U.S. 1, 24 (2002) (quoting FERC Order No. 888, 75 FERC ¶ 61,080, at 31,782 n.544 (1996)).

Recent Supreme Court cases affirm the importance and outright necessity of collaborative and concurrent regulation by state and federal entities. Because "[i]t is a fact of economic life that the wholesale and retail markets in electricity . . . are not hermetically sealed from each other," a ""Platonic ideal' of strict separation between federal and state realms cannot exist.'" *EPSA*, 136 S. Ct. at 776 (quoting *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1601 (2015)). Inevitably, decisions that states make in their own sphere of authority will have incidental impacts on interstate wholesale sales and rates, just as FERC's wholesale sales and ratemaking actions will have incidental impacts on retail sales and rates. As the electric grid itself is interconnected and not "hermetically sealed" from state to state, *id.*, such impacts are not only possible but expected and necessary.

Therefore, when determining whether a state law is preempted by the Act, the Supreme Court has instructed courts to take a functional approach and consider "the *target* at which [a] law *aims*," and not

invalidate laws aimed at matters within states' control merely because they "might . . . affect[]" interstate wholesale rates. *Oneok*, 135 S. Ct. at 1599, 1600.[11] "States, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes*, 132 S. Ct. at 1298 (citing *Oneok*, 135 S. Ct. at 1599). The Supreme Court has "repeatedly stressed" that the Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok*, 135 S. Ct. at 1599 (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517-18 (1947)).

Taken collectively, the Supreme Court's cases have repeatedly and recently rejected a "hermetically sealed" jurisdictional division between federal and state authority, *EPSA*, 136 S. Ct. at 776, and instead counseled a functional approach to preemption inquiries focused on "the *target* at which [a] law *aims*." *Oneok*, 135 S. Ct. at 1599. As Justice Sotomayor explained in her concurrence in *Hughes*, the Act's

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[11] Although *Oneok* involved the Natural Gas Act, not the Federal Power Act, "the relevant provisions of the two statutes are analogous," and courts have "routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 136 S. Ct. at 1298 n.10.

"collaborative" nature means that courts "must be careful not to confuse the congressionally designed interplay between state and federal regulation . . . for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 136 S. Ct. at 1300 (Sotomayor, J., concurring) (internal quotation marks and citation omitted).

B. Connecticut's Renewable Procurement Program Is a Permissible Exercise of Its Authority over Utility Procurement and Resource Planning

Parsing federal and state authority may present difficult questions in some cases, but this is not one of them. In enacting its renewable procurement program, Connecticut was exercising its well established authority over "utility generation and resource portfolios." *New York*, 535 U.S. at 24. As this Court has held, that authority includes the power "to direct the planning and resource decisions of utilities under [its] jurisdiction," such as by "order[ing] utilities to purchase renewable generation." *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (internal quotation marks omitted). That is precisely what Connecticut's renewable procurement program does.

FERC itself—the agency charged with interpreting the Federal Power Act—has long acknowledged "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." *S. Cal. Edison Co.*, 71 FERC ¶ 61,269, at 62,076 (1995). For example, states may "require a utility . . . to purchase power from the supplier of a particular type of resource," as Connecticut does here. *Id.*; *see also Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067, at 61,246 (1997) (Iowa statute was not preempted "to the extent that [it] require[s] [state] utilities . . . to purchase from certain types of generating facilities"). Or states may require a utility to purchase renewable energy credits, which represent a variety of state-defined environmental attributes that can be valued and traded separately from the electricity itself. *See WSPP, Inc.*, 139 FERC ¶ 61,061, at 61,426 (2012).

FERC has long viewed such laws and policies as permissible exercises of states' traditional authority that the Federal Power Act does not preempt. Therefore, Allco's complaint that Connecticut solicits bids outside the bounds of PURPA is beside the point. Connecticut need

not rely on PURPA—which carves out an exception to the Act's commitment of interstate wholesale rate-making authority to FERC—as the basis for Connecticut's authority to implement its renewable procurement procedure. In soliciting bids and directing utilities to negotiate contracts with the winning generators, Connecticut is not setting or regulating wholesale rates, but simply exercising its traditional state authority over "utility generation and resource portfolios." *New York*, 535 U.S. at 24.

C. The Supreme Court's Decision in *Hughes* Does Not Call into Question Connecticut's Authority to Implement Its Renewable Procurement Procedure

Allco mistakenly characterizes the Supreme Court's recent decision in *Hughes v. Talen Energy Marketing* as holding that states have no authority to "compel wholesale sales with State-selected generators." Opening Br. at 6. *Hughes* said no such thing. A self-avowedly "limited" decision, *Hughes* emphasized that its holding did not extend to state requirements that utilities enter into bilateral contracts for electricity. 136 S. Ct. at 1299. *Hughes* narrowly and specifically invalidated Maryland's contracts-for-differences program "only because it disregard[ed] an interstate wholesale rate required by FERC," *id.*,

replacing that rate after the fact with a different rate of the state's own choosing. Connecticut's renewable procurement program does not suffer from that "fatal defect." *Id.*

1. Maryland's contracts-for-differences program

Hughes involved a Maryland scheme to encourage the construction of a new gas-fired power plant. The state solicited bids from developers, selected a winning bid, and then ordered utilities within the state to enter into twenty-year "contracts for differences" with CPV, the winning bidder, to ensure that CPV had a fixed revenue stream for its new plant. These contracts effectively guaranteed CPV fixed revenues for the capacity it sold into the regional grid operator's capacity auction each year. *Hughes*, 136 S. Ct. at 1295.

It is worth taking a moment to explain the capacity auction in *Hughes*, because understanding it helps to illuminate why the Supreme Court held Maryland's program to be preempted. Each year, the grid operator PJM—ISO-NE's counterpart in the mid-Atlantic region—conducts auctions to secure generators' commitments to provide the electricity that the grid operator predicts will be needed three years in the future. *See id.* at 1293. Generators offer a specific amount of

capacity at a specific price, and those with the lowest-priced offers "clear" the auction first. The grid operator continues to accept offers until it has satisfied its projected future demand. The last, highest-priced offer that the grid operator accepts sets the rate of compensation—the "clearing price"—for all generators whose offers are selected. The grid operator then sells the capacity it has purchased to utilities in proportion to their share of the projected demand. *Id.*

This entire process is subject to comprehensive regulation by FERC, which reviews the grid operator's auction rules to ensure that they "efficiently balance[] supply and demand, producing a just and reasonable clearing price." *Id.* at 1294. As long as the auction is conducted according to those FERC-approved rules, FERC generally "deem[s]" the resulting clearing price to be "*per se* just and reasonable." *See id.* at 1297.

Maryland designed its "contract for differences" program to operate within this FERC-approved auction mechanism, but to expressly override its results *after the fact* in order to guarantee a specific annual revenue amount for CPV. As a condition of payment, Maryland required CPV to offer its capacity into the grid operator's

auction each year. If CPV's offer cleared, and if CPV received a clearing price that was lower than Maryland's guaranteed price, Maryland utilities would pay CPV the difference. Conversely, if CPV received an auction clearing price that was higher than Maryland's guaranteed price, CPV would pay the utilities the difference. Either way, the contract-for-differences arrangement ensured that CPV would receive a wholly different rate from the one that FERC had determined was just and reasonable. And because CPV and the utilities engaged in a purely financial transaction—they did not "transfer ownership" of energy or capacity—Maryland's program denied FERC the ability to review the contract rate. *See id.* at 1295; *see also id.* at 1299 (noting that FERC's contract-review jurisdiction is limited to "contracts for '*the sale of electric energy* at wholesale in interstate commerce,'" not to other contracts (quoting 16 U.S.C. § 824(b)(1))).

2. The Supreme Court's "limited" decision

The Supreme Court concluded that Maryland's program was preempted by the Federal Power Act. It took care, however, to emphasize the "limited" nature of its holding: "Our holding is limited: We reject Maryland's program *only* because it disregards an interstate

wholesale rate required by FERC," adjusting that rate after the fact. *Hughes*, 136 S. Ct. at 1299 (emphasis added). In contrast, the Court emphasized that its holding did *not* reach the validity of "traditional bilateral contracts" for electricity, "which FERC has long accommodated." *Id.*

Thus, contrary to Allco's argument, *Hughes* does not stand for the broad proposition that states cannot "compel" utilities to enter into contracts with generators. Opening Br. at 6, 54. *Hughes* specifically declined to make such a statement, observing that "[s]o 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." 136 S. Ct. at 1299. The state's involvement in selecting winning bids and directing utilities to enter into long-term contracts was not the problem that doomed Maryland's program. *Id.* Rather, the problem was that Maryland's program was a purely financial transaction that directly disregarded and replaced a FERC-required rate after the fact.

A "traditional bilateral contract[]," in contrast, does not suffer from this infirmity. *See id.* A contract between two parties that operates

entirely "outside the auction" proposes a negotiated rate that FERC has not yet reviewed. *Id.* at 1292-93, 1299. FERC still has full authority to determine whether the rate is just and reasonable. *See id.* at 1292 ("After the parties have agreed to contract terms, FERC may review the rate for reasonableness."); *see also supra* at 10 n.10 and accompanying text. In directing its utilities to enter into such traditional bilateral contracts, a state does not impermissibly "disregard[]" a rate approved by FERC, as Maryland's program did. *See Hughes*, 136 S. Ct. at 1299.

3. Connecticut's program is not preempted under *Hughes*

Connecticut's renewable procurement program involves precisely the sort of "traditional bilateral contracts" that "FERC has long accommodated," and that the Supreme Court's decision in *Hughes* specifically left untouched. *Hughes*, 136 S. Ct. at 1299. Although Allco characterizes Connecticut's program as "economically identical" to Maryland's, Opening Br. at 52, they differ in every relevant respect.

Allco wrongly claims that the Commissioner of the Department of Energy and Environmental Protection "compel[s]" a specific contract wholesale rate. Opening Br. at 6, 54. This claim is incorrect. Generators

are free to offer whatever prices they think the market will bear; the state does not dictate what rates they may include in their proposals or place a thumb on the wholesale rate scale. Once the Commissioner selects a generator's proposal, that generator and the utility negotiate a final contract rate between themselves. Connecticut's 2015 solicitation (attached to Allco's complaint, *see* JA 25) makes clear that the utilities retain "discretion" when engaging in these bilateral negotiations. *See* JA 49 (once their proposals are selected by the state, "[t]he Eligible Bidders will enter into separate contracts with one or more [utilities] *at the discretion of the [utilities]*." (emphasis added)). These are not purely financial transactions; energy, capacity, and renewable energy credits all have independent tradeable value. Once the utilities and generators agree upon a negotiated rate, that rate is still subject to FERC's review.

Connecticut's program therefore does not "disregard[]" or "adjust[]" after the fact an existing rate that FERC has deemed just and reasonable, and it does not "interfere[] with FERC's authority" to determine just and reasonable rates. *Hughes*, 136 S. Ct. at 1297, 1299. It also does not "condition payment" on the generators bidding into and clearing any FERC-approved auction structure in ISO-NE, as

Maryland's contracts-for-differences program did, but rather directs utilities and generators to negotiate bilateral contracts "outside the auction." *Id.* Because Connecticut's program involves traditional bilateral contracts, operates outside the ISO-NE auction, and does not tread on FERC's authority to determine what a just and reasonable wholesale rate is, it does "not suffer from the fatal defect that render[ed] Maryland's program unacceptable." *Id.*

Nor does Connecticut's procurement program conflict with FERC's ability to regulate wholesale markets and ensure that the resulting rates are just and reasonable. Just like other permissible actions within states' traditional sphere of authority—such as promoting the construction of new generation through "tax incentives, land grants, [or] direct subsidies," *id.*—a state program mandating that utilities enter into bilateral contracts with generators is simply one more market input operating outside the auction. *See also S. Cal. Edison Co.*, 71 FERC at 62,080 (recognizing that "[s]tates . . . may seek to encourage renewable or other types of resources through their tax structure, or by giving direct subsidies"). It presents no obstacle to FERC's ability to determine just and reasonable rates.

The United States (through FERC) submitted an amicus brief to the Supreme Court in *Hughes* making exactly this point. It explained that state programs requiring "that local utilities purchase a percentage of electricity from a particular generator or from renewable resources, or the creation of renewable energy certificates to be independently used by utilities in compliance with state requirements," are "[p]ermissible" and non-preempted because they do not "directly distort" a FERC-regulated auction. *Hughes* Amicus Brief, 2016 WL 344494, at *34.

FERC's amicus brief went on to highlight Connecticut's renewable procurement program—the very program at issue here—as an example of such a "[p]ermissible state program," in contrast to Maryland's:

> In *Allco Finance Ltd. v. Klee*, No. 13-cv-1874, 2014 WL 7004024 (D. Conn. Dec. 10, 2014), aff'd on other grounds, 805 F.3d 89 (2d Cir. 2015), for example, a district court considered a Connecticut program that compelled electric distribution companies to enter into bilateral contracts to purchase up to four percent of Connecticut's electricity needs for a term of up to 20 years from in-state state-selected renewable projects. . . . The Connecticut law did not directly distort the wholesale market because Connecticut required the electric distribution companies to purchase renewable energy directly from the selected generators, rather than requiring the generators to sell their capacity to a FERC-approved wholesale-market operator through its auction.

Id. at *34-35. Thus, FERC has already made clear its view that Connecticut's program poses no preemption problem.

* * *

The structure of the Act and the relevant case law—including, and especially, the Supreme Court's recent ruling in *Hughes*—leave no doubt that Connecticut's program is a permissible exercise of traditional state authority to oversee utilities' resource mix. Connecticut is not alone: numerous other states also employ a contracting or "power purchase agreement" mechanism to incentivize the development of specific energy resources.[12] Other state utility regulators exercise oversight of

[12] *See, e.g.*, Neb. Rev. Stat. § 70-1904(1) (authorizing the developer of a new wind energy project—termed a community-based energy development project—and the electric supplier to negotiate power purchase agreement terms); 2016 Mass. Legis. Serv. Ch. 188 Sec. 12 (H.B. 4568) (2016) (requiring distribution utilities to solicit proposals for offshore wind generation and, separately, for clean energy generation, and, if reasonable proposals are received, to enter into cost-effective long-term contracts with the owners of those generation resources); 20 Ill. Comp. Stat. 3855/1-5(1), (A) & 1-75(b)-(c) (authorizing the Illinois Power Agency to implement the state's renewable portfolio standard by conducting competitive procurements for contracts between utilities and suppliers to ensure "adequate, reliable, affordable,

procurement processes without dictating the resulting contract terms, similar to Connecticut's law.[13]

This approach is consistent with the Federal Power Act and, indeed, necessary, as wholesale and retail markets are not "hermetically sealed." *EPSA*, 136 S. Ct. at 776. Allco's overbroad reading of *Hughes* is plainly inconsistent with the Supreme Court's carefully "limited" holding, 136 S. Ct. at 1299, with decades of case law before it, and with FERC's own view. The Court should reject Allco's preemption argument and preserve the traditional balance of federal and state authority.

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efficient, and environmentally sustainable electric service at the lowest total cost").

[13] *See, e.g.*, Minn. Pub. Util. Comm'n, Order Approving Power Purchase Agreement with Calpine, Approving Power Purchase Agreement with Geronimo, and Approving Price Terms With Xcel, at 3-4, 23 (Docket No. E-002/CN-12-1240) (Feb. 5, 2015), *available at* http://mn.gov/commerce/energyfacilities/documents/33228/Order%20approving%20PPA.pdf (last visited Nov. 21, 2016) (approving negotiated power purchase agreements following supervised competitive resource acquisition process).

II. Connecticut's Renewable Portfolio Standard Does Not Violate the Dormant Commerce Clause

Allco's dormant Commerce Clause argument, too, should be rejected. Connecticut's Renewable Portfolio Standard is a non-discriminatory program that imposes no burden on any national market. Connecticut has created a product—renewable energy credits—that reflects the attributes of specific types of renewable energy generation that the state deems valuable, above and beyond the production of electricity itself. *See* Conn. Gen. Stat. §§ 16-1(a)(20)-(21), 16-245a. Among other things, Connecticut's renewable energy credits reflect the benefits of improved grid reliability and price stability that come when renewable generation is added to the mix in ISO-NE. Other generators that do *not* deliver their power into ISO-NE—such as Allco's New York and Georgia facilities—do not offer Connecticut consumers the same set of attributes, and the dormant Commerce Clause does not require Connecticut to treat them alike.

Because Allco has not alleged the existence of similarly situated products that are disadvantaged by Connecticut's Renewable Portfolio

Standard, its complaint fails to state a claim under the dormant Commerce Clause.

A. Connecticut's Standard Requires that Renewable Generation Be Verifiable and Actually Delivered into ISO-NE to Qualify for Renewable Energy Credits

Connecticut's Renewable Portfolio Standard requires that utilities procure a certain percentage of their electricity each year from "renewable energy sources." Conn. Gen. Stat. § 16-245a(a). One way they can meet this mandate is by purchasing "certificates," commonly called renewable energy credits. *Id.* § 16-245a(b). The statute specifies what types of renewable generation technologies qualify for certificates, *see id.* § 16-1(a)(20)-(21), and further specifies that generators need not be located in Connecticut to qualify. Rather, generators must either (1) be "located in the jurisdiction of [ISO-NE]" or (2) be located outside ISO-NE but "import[] [energy] into the control area of [ISO-NE] pursuant to New England Power Pool Generation Information System Rule 2.7(c)." *Id.* § 16-245a(b)(1).

The first category (generators located in the jurisdiction of ISO-NE) encompasses generators in a six-state area covering Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and southern

Maine. The second category (generators that import energy into ISO-NE) incorporates by reference the operating rules of the New England Power Pool Generation Information System, and thus encompasses generators in states and provinces adjacent to ISO-NE—New York, northern Maine, Quebec, and New Brunswick—provided they actually deliver their power into ISO-NE.[14]

The New England Power Pool Generation Information System is an independent regional entity that tracks power generation for ISO-NE and issues renewable energy credits for each megawatt-hour of renewable generation.[15] By incorporating the New England Power Pool's preexisting credit-tracking system into its Renewable Portfolio Standard, Connecticut ensures that the certificates used to satisfy its mandate will be verified, tracked, and not double-counted, and that the

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[14] *See* New England Power Pool Generation Information System Operating Rules § 2.7(c)(i)(w), *available at* http://www.nepoolgis.com/wp-content/uploads/sites/3/2014/07/GIS-Operating-Rules-to-be-effective-7_1_14.doc (last visited Nov. 21, 2016) (discussing imports of energy from generators "in an adjacent Control Area").

[15] *Id.* § 2.1 (detailing the procedures for creating and tracking renewable energy credits).

associated renewable energy will actually be delivered into ISO-NE, where it will benefit Connecticut consumers.

B. Connecticut's RPS Does Not Discriminate Among Comparable Products and Does Not Burden Any National Market for Renewable Energy Credits

The "threshold question" in any dormant Commerce Clause analysis is whether the products between which the state is allegedly discriminating are "similarly situated" to one another. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). If they are not, there can be no "discrimination" under the dormant Commerce Clause. *Id.* In *Tracy*, for example, the Supreme Court held that a state-defined "product consisting of gas bundled with . . . [state-mandated] services and protections" was a "different [product] from the unbundled" natural gas. *Id.* at 299, 310. Because these two types of products did not reflect the same attributes, they were not truly competitors, and "the dormant Commerce Clause ha[d] no job to do." *Id.* at 303.

The same result applies here. Allco contends that Connecticut's Renewable Portfolio Standard is discriminatory because it treats "RECs from other states" outside ISO-NE and the adjacent control areas differently "on the basis of their state of origin." Opening Br. at 64. Yet

Allco's complaint fails to allege the existence of any out-of-region renewable energy facilities that would reflect "substantially similar" attributes as renewable generators that do deliver energy into ISO-NE. *Tracy*, 519 U.S. at 298-99.

In fact, there is no single national market for renewable energy credits that is burdened by Connecticut's law. Renewable energy credits are "inventions of state property law." *Wheelabrator Lisbon, Inc. v. Conn. Dep't of Pub. Util. Control*, 531 F.3d 183, 186 (2d Cir. 2008). They reflect various desirable "attributes" of renewable energy generation, separate from the value of the electricity itself, that the state selects based on its policy goals. *Id.*; *see also WSPP*, 139 FERC at 61,426. A renewable energy credit in one state is not necessarily interchangeable with a renewable energy credit in another. *Compare* Conn. Gen. Stat. § 16-245a(a)(20)(vii) (defining "ocean thermal power" as a Class I renewable resource) *with* 73 Pa. Stat. § 1648.2 (defining "[c]oal mine methane" as a Tier I renewable resource).

For Connecticut, the attributes reflected in a renewable energy credit include not only a reduction in greenhouse gas emissions (which is valuable for combatting climate change no matter where the

reductions originate), *see* Conn. Gen. Stat. § 22a-200a, but also more localized attributes that depend on where the power is generated and delivered. Those more localized attributes are described in the state's Comprehensive Energy Strategy. *See id.* § 16a-3d(a)(D).

For example, Connecticut's Comprehensive Energy Strategy describes the state's goal of ensuring a "divers[e]" and "reliab[le]" mix of resources in order to mitigate "price and reliability risks" for Connecticut ratepayers. Comprehensive Energy Strategy at 81-82; *see also* Conn Gen. Stat. § 16a-35k(3)-(4) (describing state goals of "develop[ing] and utiliz[ing] renewable energy resources, such as solar and wind energy," and "diversify[ing] the state's energy supply mix"). ISO-NE currently depends heavily on natural gas, which accounts for 41% of electricity used in New England.[16] An over-reliance on a single energy source "subjects Connecticut to potential electricity rate

[16] *See* ISO-NE, "Sources of Electricity Used in 2015," at https://www.iso-ne.com/about/key-stats/resource-mix (last visited Nov. 21, 2016) (reporting that natural gas accounted for 41.3% of all electricity production in 2015, while "renewables" represented 7.7%). The state's ultimate goal is to obtain 20% of its electricity from Class I and II renewable sources by 2020. *See* Conn. Gen. Stat. § 16-245a(a)(15).

increases and reliability risks if natural gas-fueled generation costs spike." Comprehensive Energy Strategy at 81. Connecticut's Renewable Portfolio Standard seeks to mitigate this danger by encouraging more "diverse sources of supply [and] a higher use of renewable energy," which "would enhance both reliability and rate stability." *Id.* at 82.

To meet these goals, Connecticut needs renewable facilities to deliver their power into ISO-NE. Renewable facilities outside the region whose power is never delivered into ISO-NE offer no value whatsoever in terms of diversifying Connecticut's resource mix, improving reliability, avoiding price volatility, and meeting Connecticut's statutory mandate. Thus, their ineligibility for Connecticut renewable energy credits is not discriminatory or protectionist, but simply reflective of the reality that they do not possess the same attributes as in-region generation. Simply put, while a renewable energy resource in Georgia might provide a national low carbon benefit, it will have virtually no impact on price and reliability risk in the Northeast.

Allco alleges that it "has RECs to sell . . . from a Qualifying Facility in the State of Georgia," JA 12 ¶ 33, but it does not allege that

it could or would physically deliver that facility's power to ISO-NE.[17] Allco also alleges that it owns a renewable facility "in New York, an ISO-[NE] adjacent control area, which will generate RECs" that Connecticut would recognize under its program rules. JA 12 ¶ 34. Allco specifically states, however, that it "*will not deliver* its electricity to the ISO-[NE] control area because of the additional cost burdens of doing so." *Id.* (emphasis added). Any generator in New York seeking to deliver electricity into ISO-NE (or anywhere else) must pay the costs for the transmission rights necessary to export electricity into another region.[18]

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[17] Allco also does not allege that its renewable energy credits have been certified by any tracking authority. Apart from the New England Power Pool Generation Information System, there are several other regional renewable energy credit-tracking systems in operation around the country, all with their own operating rules, which work to ensure that renewable generation is accurately recorded and not double-counted. *See* U.S. Dep't of Energy, *Renewable Energy Certificates (RECs)*, *available at* http://apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=3 (last visited Nov. 21, 2016).

[18] *See* U.S. Energy Information Admin., *U.S. Electric System Is Made Up of Interconnections and Balancing Authorities* (July 20, 2016), *available at* http://www.eia.gov/todayinenergy/detail.php?id=27152 (last visited Nov. 21, 2016) (map showing balancing authorities; the costs of transmitting electricity generally increase with distance and the

This is not a cost imposed by the state of Connecticut. Allco may refuse to pay those costs, but it cannot then blame Connecticut for its failure to meet the requirements of Connecticut's program. *Cf. Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001) (a manufacturer's own decision "to abandon the state's market . . . based on . . . [its] production costs[] and what the demand in the state will bear" does not by itself give rise to a dormant Commerce Clause claim). Allco has not alleged discrimination within the meaning of the dormant Commerce Clause.

That should be the end of the inquiry. The complaint fails to allege that Connecticut's Renewable Portfolio Standard discriminates among similarly situated products. The complaint also fails to allege that the Standard places any "clearly excessive" burden on a national market, *Pike v. Bruce Church, Inc.*, 397 U.S. 137,142 (1970), because no such national market exists. For these reasons, the Court should affirm the district court's dismissal of Allco's dormant Commerce Clause claim.

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number of balancing authorities between the generator and the purchaser).

CONCLUSION

The Court should affirm the dismissal of Allco's complaints.

Respectfully submitted,

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* *Application for admission forthcoming or pending*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6,981 words (as counted by Microsoft Word), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook.

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Dated: November 23, 2016

CERTIFICATE OF SERVICE

I, Milcah Zewdie, declare as follows:

I am employed in the County of San Francisco, State of California; I am over the age of eighteen years and am not a party to this action; and my business address is 111 Sutter Street, 21st Floor, San Francisco, California 94104. On November 23, 2016, I served the foregoing

AMENDED BRIEF OF AMICI CURIAE NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, ENVIRONMENTAL DEFENSE FUND, CONSERVATION LAW FOUNDATION, AND ACADIA CENTER IN SUPPORT OF APPELLEES AND AFFIRMANCE

to all counsel of record using the CM/ECF system, in accordance with Fed. R. App. P. 25(d) and Circuit Rule 25. I certify under penalty of perjury that the foregoing is true and correct, and that this Proof of Service was executed by me on November 23, 2016, in San Francisco, CA.

Milcah A. Zewdie

Milcah Zewdie