NULL CLIMATE FEDERALISM: STATE FRUSTRATION OF FEDERAL RENEWABLE ENERGY ENTITLEMENTS

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I. CLIMATE CHANGE, RENEWABLE ENERGY, AND CONFLICT IN U.S. LAW

Several states now refuse to follow federal renewable energy and climate change law twice upheld by the U.S. Supreme Court. This challenges a century of enforcement of the Constitution's Supremacy Clause. The First, Second, and Ninth Circuit Courts of Appeals recently issued successive conflicting decisions construing the same federal renewable energy law preempting state law under the Supremacy Clause. Moreover, each case in each circuit was brought by the same solar energy-development plaintiff under the same federal statute, with substantially disparate results. These state actions and conflicting decisions disconnect U.S. law from Congressional intentions for renewable power and exacerbate long-term global climate consequences.

Climate change requires urgent state action. If global average temperature gains are not held to 1.5°C, rather than 2°C, the results could

be catastrophic: A 2°C increase would cause ten times more summers with no Arctic ice, expose two and a half times more people to severe heat, and roughly double the expected loss of crop yields.[1] Moreover, a decade ago, the United Nations forecast that the world was already at "tipping points that are irreversible within the time span of our current civilization."[2] Supreme Court resolution of these three conflicting and disconnected Circuit decisions is a prerequisite for the U.S. to consistently confront climate change.

In each of three similar circuit court cases, the same plaintiff challenged three states' refusals to follow federal renewable energy requirements that address climate change. This article traces and contrasts federal preemption of allegedly impermissible state action and analyzes how:

- These new disconnected federal decisions are contrary to applicable Supreme Court precedent, including the Court's most recent unanimous establishment of a "bright line" supremacy of federal over state authority on interstate energy commerce;
- Each of the three states sued was previously admonished by multiple courts regarding its past and ongoing noncompliance with the same federal preemptive statute addressing the U.S. response to climate change;
- Connecticut, after prevailing in court by avoiding the merits on procedural lack of "standing" grounds, later admitted that its noncompliance violated the Supremacy Clause;
- After losing in litigation, Massachusetts never implemented the remedy ordered and required by the trial court and First Circuit Court of Appeals in 2016; and
- By 2019, California had lost in major litigation for conduct regarding renewable energy that already had been previously admonished three times in federal adjudications.

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[1] *See* Kelly Levin, *Half a Degree and a World Apart: The Difference in Climate Impacts Between 1.5˚C and 2˚C of Warming*, WORLD RES. INST. (Oct. 7, 2018), https://www.wri.org/blog/2018/10/half-degree-and-world-apart-difference-climate-impacts-between-15-c-and-2-c-warming [https://perma.cc/6KBM-9XKZ].

[2] U.N. ENV'T PROGRAMME, UNEP YEAR BOOK: NEW SCIENCE AND DEVELOPMENTS IN OUR CHANGING ENVIRONMENT 53 (2009), http://wedocs.unep.org/bitstream/handle/20.500.11822/7759/840%20-%20english.pdf?sequence=8&isAllowed=y.

The applicable federal law is the Public Utility Regulatory Policies Act (PURPA). PURPA was enacted as the U.S. response to what was called "the moral equivalent of war."[3] PURPA was upheld twice by the U.S. Supreme Court,[4] and is the foundation of the long-term U.S. response to climate change. That early "war" has now become the worldwide challenge of climate change, and it has been complicated by contrary results in challenges to state refusal to follow federal PURPA renewable energy requirements:

- The Second Circuit dismissed all of plaintiff's claims on procedural grounds;
- The First Circuit found standing of, injury to, and entitlement of, the renewable energy plaintiff, but denied a private right of action; and
- The Ninth Circuit, pursuant to the same statute, found injury to renewable energy developers.

Each of these three inconsistent circuit court decisions finds very different rights of the identical private party plaintiff pursuant to the same federal preemptive sustainability statute. The stakes for future world climate are high: The electric power sector of the U.S. economy is now targeted to shoulder a substantially disproportionate (well over fifty percent) load[5] to remediate climate warming in relation to its less than 30% responsibility for climate change emissions,[6] as shown in Figure 1.

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[3] President Jimmy Carter used this phrase in his address to the United States on April 18, 1977. *See Moral Equivalent of War*, N.Y. TIMES (Apr. 20, 1977), https://www.nytimes.com/1977/04/20/archives/moral-equivalent-of-war.html.

[4] FERC v. Mississippi, 456 U.S. 742 (1982) (upholding PURPA); Am. Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983) (upholding PURPA price tariffs).

[5] BLOOMBERG PHILANTHROPIES, FULFILLING AMERICA'S PLEDGE 19 (2018), https://www.bbhub.io/dotorg/sites/28/2018/09/Fulfilling-Americas-Pledge-2018.pdf.

[6] Sources of Greenhouse Gas Emissions, EPA (Dec. 4, 2020), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions.

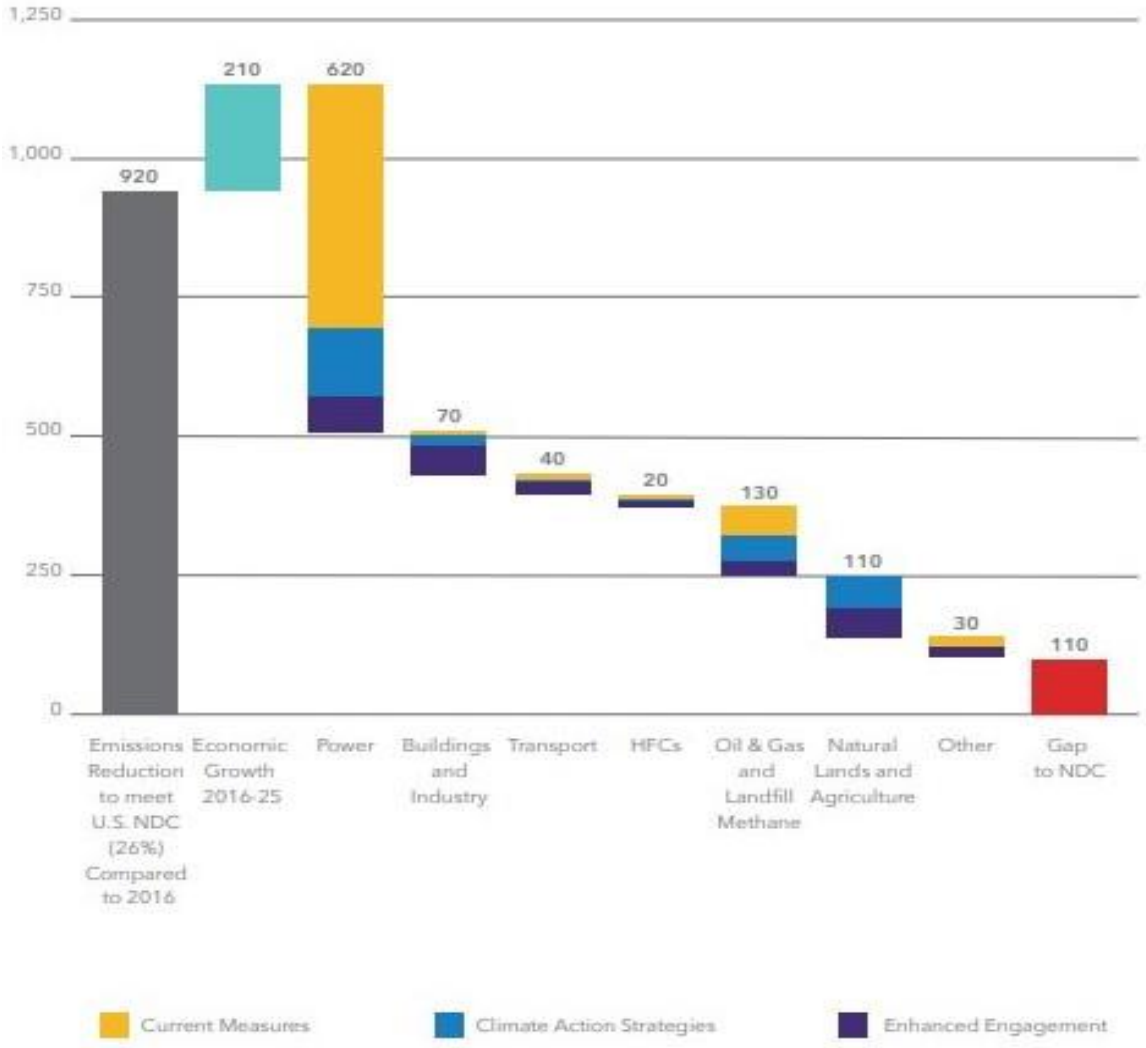

Figure 1: California-Bloomberg Fall 2018 Carbon Plan—Actions Across Major Economic Sectors[7]

This article analyzes these three conflicting federal cases in light of the Supreme Court's most recent (and unanimous) decision preempting state

[7] Bloomberg Philanthropies, *supra* note 5, at 19.

regulation of interstate energy, examines the effects of these decisions on U.S. efforts to effectively confront climate change, and charts importance of Supreme Court resolution of this three-circuit conflict in a case of first impression. Section II showcases the legal requirements of the now-challenged PURPA amendments to the Federal Power Act,[8] which govern these disputes, and highlights declining legal support provided by the U.S. tax code for sustainable renewable energy development.

Sections III – V analyze in detail three federal Circuit Courts' decisions regarding the same plaintiff, the identical solar energy technology, and the same federal PURPA statute. Section III dissects the Second Circuit Court of Appeals decision finding that plaintiff Allco, a solar energy developer, had no procedural rights to file a claim against the state of Connecticut despite suffering substantial private injury as a result of alleged unconstitutional state regulations. Section III then traces cases construing Connecticut's violations of PURPA in prior years, as well as the prior federal admonition to the state that its violation of this federal statute would render its actions *void ab initio.*[9]

Section IV moves to Massachusetts, where, at the same time, a Massachusetts renewable energy regulation injured Allco's solar project pursuant to the same federal PURPA statute. The First Circuit Court of Appeals found substantial injury to Allco resulting from impermissible state action, in a finding contrary to that of the Second Circuit. Similar to Connecticut, Massachusetts was previously declared by its Supreme Judicial Court to have violated the same PURPA statute affecting another renewable energy project,[10] yet failed to implement what was ordered by the Court in subsequent years.

Section V transitions to California, analyzing the Ninth Circuit Court of Appeals' 2019 decision holding that California also violated the same federal law. California, like Connecticut and Massachusetts, knew that the Supremacy Clause mandated its compliance with federal renewable energy law from its involvement in a case in the U.S. Supreme Court in 2008,[11] as well as in earlier federal decisions in 1994,[12] 1995,[13] and 2010.[14]

There is a state/federal legal face-off on climate and renewable power. Section VI concludes by examining in full the suppression of legal mechanisms for the vindication of private rights on environmental and

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[8] 16 U.S.C. § 824 et seq.

[9] Conn. Light & Power Co., 70 F.E.R.C. ¶ 61,012, 61,029–30 (1995).

[10] *See* Plymouth Rock Energy Assocs. v. Dep't. of Pub. Utils., 648 N.E.2d 752, 756 (1995).

[11] Pub. Util. Dist. No. 1 v. FERC, 471 F.3d 1053, 1058 (9th Cir. 2006), *aff'd in part, rev'd in part sub nom.* Morgan Stanley Cap. Grp., Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527 (2008).

[12] Indep. Energy Producers Ass'n v. Cal. Pub. Util. Comm'n, 36 F.3d 848 (9th Cir. 1994).

[13] S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215, 61,676–77 (1995).

[14] Cal. Pub. Util. Comm'n,132 F.E.R.C. ¶ 61,047, 61,337 (2010).

climate issues. It examines how states employ procedural defenses when they are defendants to avoid decisions on the merits, and how these states respond when they are the plaintiffs in similar litigation. These decisions fundamentally affect the long-term future of world climate.

Next, Section II discusses PURPA, the legal foundation of U.S. climate and renewable energy law, to elucidate how it operates and why it matters in an era of rapid climate change.

II. THE LEGAL FOUNDATION OF U.S. SUSTAINABLE ENERGY LAW

A. PURPA

Since 1978, particularly after the Supreme Court enjoined the Clean Power Plan meant to address climate change,[15] the primary incentive for competitive renewable power development has been the Public Utility Regulatory Policies Act of 1978 (PURPA),[16] which is "designed to combat the nationwide energy crisis."[17] PURPA freed new renewable power generation projects from state utility monopolies as well as any "utility regulation" by the states, and required utilities to purchase all of the renewable power produced by these projects at a favorable "avoided cost" price.[18] Under PURPA, if a power generation project satisfies specified legal requirements, it receives certain regulatory benefits.[19] A Qualifying Facility (QF) "produces electric energy solely by the use of biomass, waste, renewable resources, geothermal resources or any combination thereof, and is not greater in gross capacity than eighty megawatts [(MW)],"[20] which size limit is eliminated if it also cogenerates two sources of energy.[21]

There were tremendous economic and legal benefits accompanying federally-determined Qualifying Facility status, although slightly diluted by 2005 congressional amendments. QF status is available to two types

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15 West Virginia v. EPA, 136 S. Ct. 1000, 1000 (2016).

16 16 U.S.C. §§ 824a–w.

17 FERC v. Mississippi, 456 U.S. 742, 745 (1982).

18 Amer. Paper Inst. v. Amer. Elec. Power Serv. Corp., 461 U.S. 402 (1983).

19 Steven Ferrey, *Exit Strategy: State Legal Discretion to Environmentally Sculpt the Deregulating Electric Environment*, 26 HARV. ENVTL. L. REV. 109, 136–42 (2002).

20 Steven Ferrey, Chad Laurent & Cameron Ferrey, *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. & POL'Y F. 125, 141 (2010).

21 16 U.S.C. § 796 (2015).

of generation technologies, cogenerators[22] and small power producers.[23] The benefits of QF status principally apply to projects that sell their power to other utilities or persons. These numerous benefits of QF status are listed in Table 1.

Table 1: Benefits of QF Status

Benefit	**Description**
Federal exemption	The QF is exempt from regulation under the Federal Power Act.
Local exemption	The QF is exempt from any state or local regulation of entities as utilities or energy producers—i.e., no "utility-type" regulation.
Power sale	The QF can sell any or all of its power output to the local electric utility or to any other utility it can reach with its electric power
Avoided cost	The price that the utility must pay for power purchased from a QF is equal to the utility's full avoided cost of generating or purchasing an equivalent amount of energy and capacity.
Interconnection	Utilities must interconnect their transmission grids with the QF to facilitate purchases and sales.
Backup power	The utility must supply necessary backup and supplemental power to the QF at nondiscriminatory and fair prices.

[22] 1 STEVEN FERREY, L. OF INDEP. POWER § 4:10 (Thomson Reuters 54th ed. 2021). A cogenerator sequentially produces at least two useful forms of energy—electric and thermal. *Id.* at § 4.13. Typically, the thermal energy, in the form of steam or hot water that the power generating equipment otherwise would exhaust as thermal or water pollution, is harnessed to heat a building or use in industrial processes. A cogenerator, as defined by federal law, can be of any size and can use any fuel to produce power, as long as it meets certain minimum efficiency criteria and as long as at least five percent of the total energy output of the facility is in the form of "useful" thermal energy. *Id.*

[23] *Id.* at §§ 4:17–4:19. A small power producer is not a cogenerator; it produces only electricity (not useful thermal energy), and employs waste or a renewable resource as its fuel for power generation. A small power producer is limited in size, typically to a maximum of 80 MW, except for certain types of waste fuel projects that may be no more than 30 MW in size. *Id.* A waste fuel is defined as any by-product fuel source that is "unessential and subordinate to the overall goal of an economic process and currently of little or no commercial value." *Id.* at § 4:18.

Despite its potential to incentivize renewable energy development through this impressive list of benefits, PURPA has its detractors. The state of Mississippi, for example, challenged the constitutionality of PURPA, and a federal district court in Mississippi held that the PURPA scheme was an impermissible transgression on states' rights. On appeal, PURPA was narrowly upheld, 5-4, by the U.S. Supreme Court.[24]

This federal statute was challenged in the Supreme Court not only for interfering with state rights over retail power sales, but also for the federal agency exceeding its administrative discretion. PURPA specifies that the rates established by FERC for purchases of power from QFs may not exceed the "incremental cost" to the utility of purchasing alternative electric energy.[25] The incremental or "avoided cost" is defined as "'the cost to the electric utility of the electric energy which, but for the purchase from such QF, such utility would generate or purchase from another source.'"[26] Pursuant to PURPA, FERC issued Orders Numbers 69 and 70, which establish rules requiring electric utilities to offer to purchase electric energy and capacity from Qualifying Facilities at a rate equal to the utility's "full-avoided costs." FERC adopted PURPA's language in defining "full-avoided costs" as incremental costs of alternative electric energy.[27] State public utility commissions were delegated by FERC the responsibility to calculate and implement full-avoided costs for the utilities that they regulate in their states.[28] In doing so, state utility

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[24] FERC v. Mississippi, 456 U.S. 742 (1982).

[25] 16 U.S.C. § 824a-3.

[26] Plymouth Rock Energy Assocs. v. Dep't. of Pub. Utils., 648 N.E.2d 752, 754 (1995) (quoting 16 U.S.C. § 824a-3(d)).

[27] 18 C.F.R. § 292. Avoided costs are defined as the costs to an electric utility of energy or capacity or both which, but for the purchase from a qualifying facility, the electric utility would generate or construct itself or purchase from another source. *Id.* at § 292.101(b)(6). This definition is derived from the concept of "the incremental cost to the electric utility of alternative electric energy" set forth in section 210(d) of PURPA, which includes both the fixed and the running costs of an electric utility system, which can be avoided by obtaining energy or capacity from qualifying facilities. Energy costs are the variable costs associated with the production of electric energy (kilowatt-hours), which represent the cost of fuel and some operating and maintenance expenses. *See Plymouth Rock*, 648 N.E.2d at 754 n.3. Capacity costs are the costs associated with providing the capability to deliver, consisting primarily of the capital costs of facilities. *See id.*

[28] 18 C.F.R. § 292.401 (1983); FERREY, *supra* note 22, at § 7:31. Under § 210(f)(1) of PURPA the state public utility commissions are the primary enforcement power: "[E]ach State regulatory authority shall . . . implement such rule (or revised rule) for each electric utility for which it has ratemaking authority." 16. U.S.C. § 824a-3(f)(1) (1982). To guide state public utility commissions, FERC's regulations list several factors that states should, to the extent practicable, take into account when calculating avoided costs, including: the expected or demonstrated reliability of the qualifying facility, the duration of the contract, the availability of capacity or energy from a qualifying facility during the system daily and seasonal peak periods, and line losses. 18 C.F.R. § 292.304(e) (2020).

regulatory commissions act pursuant to federal, not state, law[29] and have no power to require that prices diverge from full-avoided cost, as noted by the Massachusetts Supreme Judicial Court:

> PURPA requires that the Federal Energy Regulatory Commission (FERC) establish regulations that obligate public utilities to sell electric energy to and purchase power from QFs [at nondiscriminatory prices]. PURPA also specifies that the rates established by FERC for these purchases may not exceed the "incremental cost" to the utility of purchasing alternative electric energy.[30]

The requirement to pay full-avoided cost for QF power and to interconnect with all QFs was unanimously upheld by the Supreme Court in 1983.[31] Electric utilities also must offer to sell necessary backup,[32] interruptible,[33] maintenance,[34] or supplemental[35] power to QFs, and such power sales must be nondiscriminatory, as well as "just and reasonable and in the public interest."[36]

Some modest exceptions to PURPA were made in 2005 amendments, causing QFs to sell power into deregulated wholesale markets where those were available on a nondiscriminatory basis in certain areas of the country on a competitive basis. The Energy Policy Act (EPAct) of 2005[37] added Section 210(m) to PURPA, allowing the termination of all electric utilities' obligations to purchase all energy output from QFs where FERC determines that the QF has nondiscriminatory access to wholesale electric markets into which it can sell all power at the prevailing wholesale rate, rather than sell power output to the utility.[38] FERC issued Order No. 688

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29 *See* FERREY, *supra* note 22, at § 10:139.

30 *Plymouth Rock*, 648 N.E.2d at 754 (quoting 16 U.S.C. § 824a-3(d)) (citations omitted).

31 Am. Paper Inst. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983).

32 *See* 18 C.F.R. § 292.101(b)(9) (2015) (stating that back-up power is electric energy or capacity during an unscheduled outage to supply power and is generally self-generated).

33 *See id.* § 292.101(b)(10) (2015) (stating that interruptible power is power or capacity supplied by an electric utility to a QF subject to interruption under specific conditions).

34 *See id.* § 292.101(b)(11) (2015) (stating that maintenance power is power or capacity supplied by an electric utility to a QF during periods of scheduled outages).

35 *See id.* § 292.101(b)(8) (2015) (stating that supplementary power is power or capacity supplied by an electric utility to a WF to augment self-generated electricity).

36 *Id.* § 292.305(a).

37 Pub. L. No. 109-58, § 1253, 119 Stat. 594 (codified at 16 U.S.C. § 824a-3 (2006)).

38 PURPA § 210(m)(1) sets out the following criteria for non-discriminatory markets:

(A)

(i) Independently administered, auction-based day ahead and real time wholesale markets for the sale of electric energy; and

(ii) wholesale markets for long-term sales of capacity and electric energy; or

(B)

to implement Section 210(m),[39] determining that several Regional Transmission Organizations (RTOs)—MISO , ISO-New England (ISO-NE), PJM, and NYISO—provide such non-discriminatory market access to QFs because each has been found to offer transparent "spot" markets into which these renewable producers can sell their power.[40] Smaller QFs having a nameplate capacity less than 20 MW may elect to sell power to the utility rather than to the regional wholesale ISO or RTO.[41]

(i) Transmission and interconnection services that are provided by a Commission-approved regional transmission entity and administered pursuant to an open access transmission tariff that affords nondiscriminatory treatment to all customers; and

(ii) competitive wholesale markets that provide a meaningful opportunity to sell capacity, including long-term and short-term sales, and electric energy, including long-term, short-term and real-time sales, to buyers other than the utility to which the qualifying facility is interconnected. In determining whether a meaningful opportunity to sell exists, the Commission shall consider, among other factors, evidence of transactions within the relevant market; or

(C) wholesale markets for the sale of capacity and electric energy that are, at a minimum, of comparable competitive quality as markets described in subparagraphs (A) and (B).

16 U.S.C. § 824a-3 (m)(1). This provides that in "Day 2" markets there is a rebuttable presumption for analysis that a QF with a capacity above 20 MW has non-discriminatory and transparent access to choose to sell its power into a functionally operational wholesale market. 18 C.F.R. § 292.309(e).

[39] New PURPA 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities, 71 Fed. Reg. 64,342 (final rule) (issued Oct. 20, 2006) (to be codified at 18 C.F.R. § 292), *aff'd on appeal*, Am. Forest & Paper Ass'n v. FERC, 550 F.3d 1179 (D.C. Cir. 2008). PURPA Section 210(m) and FERC Order No. 688 do not modify the "rights or remedies of any party under any contract or obligation, in effect or pending approval before the appropriate State regulatory authority on non-regulated electric utility on or before August 8, 2005." 18 C.F.R. § 292.314 (2009).

[40] 18 C.F.R. § 292.309(e) (2009) ("Midcontinent Independent Transmission System Operator, Inc, (MISO), PJM Interconnection, L.L.C. (PJM), ISO New England Inc. (ISO-NE), and New York Independent System Operator, Inc. (NYISO) qualify as markets [with non-discriminatory access] described in [§ 292.309(a)(1)(i) and (ii)], and there is a rebuttable presumption that small power production facilities with a capacity greater than 5 megawatts and cogeneration facilities with a capacity greater than 20 megawatts have nondiscriminatory access to those markets through Commission-approved open access transmission tariffs and interconnection rules, and that electric utilities that are members of such regional transmission organizations or independent system operators [(RTO/ISOs)] should be relieved of the obligation to purchase electric energy from the qualifying facilities."). FERC also found that the California Independent System Operator and the Southwest Power Pool satisfy the criteria for transmission and interconnection services provided by an approved RTO and administered pursuant to open-access transmission tariff affording nondiscriminatory treatment. 18 C.F.R. § 292.309(g) (2009). FERC also found that the Electric Reliability Council of Texas (ERCOT) is a market of comparable competitive quality to Midwest ISO, PJM, ISO-NE and NYISO. 18 C.F.R. § 292.309(f) (2009).

[41] 18 C.F.R. § 292.309(e)(2) (2009).

B. Federal Tax Incentives Reduced, While Solar Ascends

1. U.S. Federal Tax Incentives for Renewable Power Reduced

U.S. tax credits provided robust incentives for renewable power generation, but their prevalence has waned over time. The federal Investment Tax Credit (ITC) once provided a 30% non-refundable credit that was calculated on the total capital investment made by the solar project developer, and was disbursed on completion of the renewable energy project investment.[42] Now, the ITC was extended in COVID-19 legislation in 2020 at a 26% level for an additional year before thereafter regressing to a 10% credit, and will continue to phase out over time.[43] For ten years, the federal Production Tax Credit (PTC) provided a non-refundable tax subsidy based on renewable energy production output sold to an unaffiliated entity.[44] It was to be phased out in 2020.[45] Moreover, even further damage was done to tax incentives with The Tax Reform Act of 2017, which did not further change or eliminate existing PTC and ITC energy tax credits, but did diminish the value of such credits for corporations by dramatically cutting federal corporate income tax rates from 35% to 21%.[46]

Nonetheless, a countervailing factor is that both wind and solar technologies are continuing to decline in their capital cost[47] and are becoming competitive with other power generation options for corporations.[48] Solar electric energy is now cost-competitive with

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[42] I.R.C. § 48(a)(1)–(2) (2012).

[43] H.R. 133, 116th Cong. (2020) (Energy Act of 2020 within the Consolidated Appropriations Act, 2021; applies to new wind power facilities for which construction begins before 2022); FERREY, *supra* note 22, at §§ 3:59.10, 3:59.40.

[44] *See* NAT'L RSCH. COUNCIL ET AL., ELECTRICITY FROM RENEWABLE RESOURCES: STATUS, PROSPECTS, AND IMPEDIMENTS 147–49 (2010), https://doi.org/10.17226/12619 (explaining the applicability of PTC and the effectiveness of PTC and ITC).

[45] John Larson & Whitney Herndon, *Renewable Tax Extenders: The Bridge to the Clean Power Plan*, RHODIUM GRP. (Jan. 27, 2016), http://rhg.com/notes/renewable-tax-extenders-the-bridge-to-the-clean-power-plan. Before Congress revitalized and extended these programs, the PTC had expired at the end tax of 2014 and the ITC was set to drop to a credit of 10% of project costs at the end of 2016. *Id.* However, the coronavirus relief package passed in December 2020 froze the ITC at 26% for two years and allowed qualifying wind projects started in 2021 to receive the PTC treatment as projects started in 2020. H.R. 133, 116th Cong. (2020) (Energy Act of 2020 within the Consolidated Appropriations Act, 2021).

[46] Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11001(a), 131 Stat. 2054, 2054 (2017).

[47] *See* Megan Mahajan, *Plunging Prices Mean Building New Renewable Energy Is Cheaper Than Running Existing Coal*, FORBES, Dec. 3, 2018, https://www.forbes.com/sites/energyinnovation/2018/12/03/plunging-prices-mean-building-new- renewable-energy-is-cheaper-than-running-existing-coal/#30ae4f5431f3.

[48] *See* Chris Martin, *Solar Has Overtaken Gas and Wind as Biggest Source of New U.S. Power*,

traditional fossil fuels due to substantial subsidies[49] and will expand in use in the next decade.[50] Wind power is forecast by the U.S. Department of Energy to be cheaper than electricity produced from natural gas by 2025, even without a continuing federal production tax credit incentive.[51] Wind projects in the U.S. cost, on average, $45/ megawatt-hour (MWh) for capacity and energy without other subsidies.[52] Comparatively, the average cost for solar is $58/MWh.[53] By 2040, as solar panels become more efficient and manufacturing costs continue to decline, solar could operate at an identical cost to wind.[54]

2. Solar Ascendance

Renewable electric energy has been supplanting traditional coal-fired power generation relatively rapidly in the last five years. The cost of wind power for electricity generation is now comparable with the price of traditional fossil fuel resources.[55] Wind and natural gas have served as the most utilized new sources of electric energy during the most recent

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BLOOMBERG, June 12, 2018, https://www.bloomberg.com/news/articles/2018-06-12/solar-surpasses-gas-and-wind-as-biggest-source-of-new-u-s-power (stating that solar has become a common-sense option for U.S. homeowners and businesses).

[49] Zachary Shahan, *Low Costs of Solar Power & Wind Power Crush Coal, Crush Nuclear, & Beat Natural Gas*, CLEANTECHNICA, Dec. 25, 2016, https://cleantechnica.com/2016/12/25/cost-of-solar-power-vs-cost-of-wind-power-coal-nuclear-natural-gas/.

[50] *Solar Investment Tax Credit (ITC)*, SOLAR ENERGY INDUS. ASS'N, https://www.seia.org/initiatives/solar-investment-tax-credit-itc (last visited Apr. 18, 2021).

[51] Christopher Martin & Justin Doom, *Wind Power Without U.S. Subsidy to Become Cheaper Than Gas*, BLOOMBERG, Mar. 12, 2015, https://www.bloomberg.com/news/articles/2015-03-12/wind-energy-without-subsidy-will-be-cheaper-than-gas-in-a-decade.

[52] Jim Efstathiou, Jr. & Brian K. Sullivan, *Smarter Wind Turbines Try to Squeeze More Power on Each Rotation*, BLOOMBERG, May 9, 2018, https://www.bloomberg.com/news/articles/2018-05-09/smarter-wind-turbines-try-to-squeeze-more-power-on-each-rotation.

[53] *Id.*

[54] *Id.*

[55] Tara Patel, *Fossil Fuels Losing Cost Advantage Over Solar, Wind, IEA Says*, BLOOMBERG, Aug. 31, 2015, http://www.bloomberg.com/news/articles/2015-08-31/solar-wind-power-costs-drop-as-fossil-fuels-increase-iea-says; *see also* Elizabeth Weise, *On World Environment Day, Everything You Know About Energy in the US Might Be Wrong*, USA TODAY, June 4, 2019, https://www.usatoday.com/story/news/2019/06/04/climate-change-coal-now-more-expensive-than-wind-solar-energy/1277637001/ ("Prices per megawatt hour from electricity for coal-fired power plants range from a low of $60 to a high of $143, according to Lazard, a financial advisory firm that publishes annual estimates of the total cost of producing electricity. This is the levelized cost, which includes the cost to build, operate, fuel and maintain a power plant. Wind is significantly cheaper: Unsubsidized, levelized prices per megawatt hour of electricity from wind range from $29 to $56, according to Lazard's most recent figures. In contrast, a decade ago, wind costs topped out at $70 per megawatt hour, according to the U.S. Department of Energy's most recent report on the wind technologies market."); *see generally* U.S. DEP'T OF ENERGY, OFFICE OF ENERGY EFFICIENCY & RENEWABLE ENERGY, 2017 WIND TECHNOLOGIES MARKET REPORT (2017), https://emp.lbl.gov/sites/default/files/2017_wind_technologies_market_report.pdf.

decade.[56] In 2012, wind turbines to produce electricity were the dominant new U.S. electricity generation source, comprising 43% of all new electric generation capacity deployed that year,[57] and constituting 4.5% of total U.S. power generation in 2013.[58]

Solar power is now positioned to eclipse wind, going forward. Since 2010, U.S. solar generation has increased 30-fold.[59] The cost of photovoltaic (PV) solar energy fell by approximately 82%: the levelized cost of energy for large scale solar fell from $0.378/kWh to $0.068/kWh.[60] Between 2000 and 2013, the solar photovoltaic market grew at a rate greater than 40% each year since.[61] Solar energy was forecast to be cost-competitive in forty-seven U.S. states by 2016, as long as current federal and state subsidies and legal rights under PURPA were maintained.[62]

New solar power surpassed new wind and new gas power plant construction in the fourth quarter of 2017, as well as in the first quarter

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[56] *Energy Dept. Reports: U.S. Wind Energy Production and Manufacturing Reaches Record Highs*, U.S. DEP'T OF ENERGY, (Aug. 6, 2013), http://energy.gov/articles/energy-dept-reports-us-wind-energy-production-and-manufacturing-reaches-record-highs; *see also Wind Explained: Electricity Generation from Wind*, U.S. ENERGY INFO. ADMIN. (Mar. 24, 2020), https://www.eia.gov/energyexplained/wind/electricity-generation-from-wind.php#:~:text=U.S.%20total%20annual%20Electricity%20generation,U.S.%20utility%2Dscale%20electricity%20generation.

[57] U.S. DEP'T OF ENERGY, *supra* note 56.

[58] U.S. ENERGY INFO. ADMIN., *supra* note 56.

[59] Tony Dutzik et al., *Renewables on the Rise*, ENV'T AM., https://environmentamerica.org/feature/ame/renewables-rise-2020 (last visited Apr. 26, 2020); *see also Solar Market Insight Report 2020 Q4*, SEIA (Dec. 15, 2020), https://www.seia.org/research-resources/solar-market-insight-report-2020-q4.

[60] Catherine Rollet, *Solar Costs Have Fallen 82% Since 2010*, PV MAG. (June 3, 2020), https://www.pv-magazine.com/2020/06/03/solar-costs-have-fallen-82-since-2010/#:~:text=The%20levelized%20cost%20of%20energy,the%20International%20Renewable%20Energy%20Agency; *see also* Wilson Rickerson et al., *Residential Prosumers - Drivers and Policy Options*, INT'L ENERGY AGENCY – RENEWABLE ENERGY TECH. DEPLOYMENT 9 (June 2014). Solar power module prices rapidly declined by more than 60% between 2009 and 2013, falling from around $1.90/watt to $0.70/watt; similarly, inverter prices fell from $0.60-$1.00+/watt in 2005 to under $0.20/watt in 2013. *Id.* The cost of solar has fallen over 20% over the past five years alone. *See How Much Does a Solar Panel Installation Cost?*, ENERGYSAGE, https://news.energysage.com/how-much-does-the-average-solar-panel-installation-cost-in-the-u-s/ (last visited Mar. 11, 2021).

[61] Rickerson et al., *supra* note 60, at 10; *see also Solar PV*, INT'L ENERGY AGENCY, https://www.iea.org/reports/solar-pv (last visited Apr. 26, 2021).

[62] Ari Natter, *Solar Energy to Reach 'Grid Parity' in Nearly All States by 2016, Deutsche Bank Predicts*, BLOOMBERG (Oct. 28, 2014). This is based on the assumption that the cost of solar systems will decline by about 20% more, from less than $3 per watt installed to less than $2.50 per watt installed, resulting in a net price from 9–14 cents/Kwh, and lowered financing cost for solar projects. The average cost of residential electricity in the U.S. in 2013 was 12.12 cents/Kwh, and was 8.95 cents/Kwh in 2004.

of 2018.[63] Wind projects in the U.S. cost an average $45/MWh for capacity and energy without other subsidies and $58/MWh for solar.[64] By 2040, as solar panels become more efficient and manufacturing costs continue to decline, solar could operate at an identical cost to wind.[65] Renewable energy technologies are expected to claim almost two-thirds of the spending on new power plants over the next quarter century, driven by solar energy occupying a dominant position for new power generation technology.[66]

The success of the solar industry is augmented by federal and state tax credits (despite the overall decline in support for renewable energy tax credits), falling installation prices,[67] and the proliferation of net metering programs in 40 states plus the District of Columbia.[68] Solar electric energy is now cost-competitive with traditional fossil fuels due to substantial subsidies,[69] and will expand in use in the next decade.[70] Wind power is forecast by the Department of Energy to be cheaper than electricity produced from natural gas by 2025, even without a continuing federal production tax credit incentive.[71]

III. THE SECOND CIRCUIT: CONSTITUTIONAL VIOLATION; SUBSTANTIAL PRIVATE INJURY; NO PRIVATE STANDING

This and the next three sections will analyze in detail the three decisions, rendered by the Second (*Allco I*), First (*Allco II*), and Ninth Circuits (*Allco III*), which conflict with each other and the Supreme Court's unanimous decision in *Hughes*.[72] The Supremacy Clause of the Constitution working in tandem with the Federal Power Act treats electric power differently than everything else that is regulated by government.[73]

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63 Martin, *supra* note 48.

64 Efstathiou & Sullivan, *supra* note 52.

65 *Id.*

66 Ehren Goossens, *Renewables to Beat Fossil Fuels with $3.7 Trillion Solar Boom*, BLOOMBERG, June 23, 2015, https://www.bloomberg.com/news/articles/2015-06-23/renewables-to- beat-fossil-fuels-with-3-7-trillion-solar-boom.

67 *See Solar Industry Growing at a Record Pace*, SOLAR ENERGY INDUS. ASS'N, http://www.seia.org/research-resources/solar-industry-data (last visited Jan. 9, 2018).

68 *See State Net Metering Policies*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 20, 2017), http://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx; Sean Paul, *The Solar Industry in a Period of Transition*, GEO. PUB. POL. REV. (Nov. 15, 2016), http://gppreview.com/2016/11/15/solar-industry-period-transition/.

69 INT'L RENEWABLE ENERGY AGENCY, RENEWABLE POWER IS COST-COMPETITIVE (Fact Sheet 07), *available at* https://web.archive.org/web/20141225163447/https://www.irena.org/remap/REmap-FactSheet-7-Cost%20Competitive.pdf.

70 SOLAR ENERGY INDUS. ASS'N, *supra* note 67.

71 Martin & Doom, *supra* note 51.

72 Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

73 U.S. CONST. art. VI, cl. 2.

What makes the conflicting jurisprudence analyzed in the next three sections unique is that in each of three close-in-time decisions of three different federal courts of appeals interpreting the federal PURPA statute in which the plaintiff in each case was the identical Allco solar developer (which was also an *amici* in the unanimous Supreme Court *Hughes* case), the circuit decisions were fundamentally different. The next four sections compare each of these three contrasting Court of Appeals decisions, where they are inconsistent with Supreme Court opinions on preemption, and how that now requires Supreme Court clarification of these lower court decisions.

A. The Connecticut Renewable Energy Program

This first case in time deals with the state of Connecticut's implementation of a 2013 state statute that allowed the Commissioner of Connecticut's Department of Energy and Environmental Protection (DEEP) "to solicit proposals for renewable energy, select winners of the solicitation, and direct Connecticut's utilities to enter into wholesale energy contracts with the chosen winners."[74] Additionally, a second statute required energy utilities to buy renewable energy credits or produce renewable energy themselves in order to sell energy in the State of Connecticut.[75]

DEEP had issued the state's Comprehensive Energy Strategy, which provided policy goals, including a commitment to promote diversification of energy resources and to increase renewable generation in the state.[76] Shortly after enactment, the Commissioner solicited Requests for Proposals (RFP) under § 6.[77] Allco, the plaintiff-appellant, responded with five solar project proposals, each meeting the requirements for a "Qualifying Facility" under PURPA.[78] Allco's projects were not selected, despite it being a QF for which the Connecticut utilities were required to purchase all power output at full avoided cost. Instead,

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[74] Allco Fin. Ltd. v. Klee, 805 F.3d 89, 92 (2d Cir. 2015); *see* Act Concerning Connecticut's Clean Energy Goals, 2013 Conn. Acts 13–303, § 6.

[75] Conn. Gen. Stat. § 16-245a(b) (2012). In Connecticut, RECs only satisfy the RPS requirements if the electricity that produces them is generated within the ISO-NE region or if they are generated in an adjacent region, including New York, Northern Maine, Quebec, and New Brunswick, and is transmitted to the regional ISO-NW grid. Therefore, Allco's projects were not able to earn Connecticut RECs to surrender to participate in the program.

[76] *See* 2013 CONNECTICUT COMPREHENSIVE ENERGY STRATEGY, CONNECTICUT DEP'T OF ENERGY AND ENVT. PROT. (Feb. 19, 2013), *available at* https://portal.ct.gov/-/media/DEEP/energy/CEP/2013CESFINALpdf.pdf.

[77] *Allco Fin. Ltd.*, 805 F.3d at 92.

[78] *Id.*

the Commissioner selected and contracted with another company for a fifteen-year fixed price agreement.[79]

Allco sued the DEEP Commissioner, alleging that the agency's auction program was preempted by the Federal Power Act and its amendments implemented through PURPA.[80] Allco noted that the selected company did not qualify as a QF and the Commission's selection process with a limited number of contract opportunities prevented one of Allco's QF projects from exercising its PURPA entitlements to sell its power.[81] Allco also challenged the Commissioner's instruction for the utilities to enter into a fixed-price contract with the other generation company,[82] arguing it was a violation of Federal Power Act and PURPA regulations.[83]

The Commissioner based his selections on his § 6 authority, under which one of Allco's projects had appeared in fourth position on his ranking.[84] After not receiving one of the Commissioner's § 6 contracts, Allco filed a complaint in District Court.[85] The complaint made two primary claims. First, the Commissioner unlawfully selected a company for one of the limited entitlements to a contract which was too large to be a "Qualifying Facility." Second, the Commissioner violated PURPA by choosing higher fixed-price contract terms than contained in the rejected bid that Allco had submitted.[86]

B. No 'Standing' for an Injured Plaintiff

Allco, as owner of the QF solar project company, sued the DEEP Commissioner's implementation of the 2013 state statute, contending that it had the effect of improperly fixing wholesale energy prices, a power reserved exclusively to FERC under the Federal Power Act.[87] Allco also filed an enforcement action at FERC challenging Connecticut's pricing

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79 *Id.*

80 *Id.* at 93.

81 *Id.*

82 *Id.*

83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 Allco Fin. Ltd. v. Klee, 2014 WL 7004024 (D. Conn. Dec. 10, 2014) and Allco Fin. Ltd. v. Klee, 2016 WL 4414774 (D. Conn. Aug. 18, 2016). This case challenged the ability to require utilities to purchase 4% of their load, service obligation, from renewable energy. The challenge also was made administratively at FERC, although FERC declined to act. FERC Notice of Intent Not to Act, FERC Doc. No. EL16-11-000, 154 FERC ¶ 61,007 (Jan. 8, 2016). The federal court found that this, at least, satisfied requirements to exhaust administrative remedies, but did not satisfy standing requirements. 2016 WL 4414774 at *9–10.

scheme[88] (which is similar to that of Massachusetts' discussed below),[89] urging FERC to bring a federal enforcement action. In the Connecticut litigation, the court cited *EPSA*, a Supreme Court case, to describe what FERC does and define FERC's jurisdiction.[90]

As in most private challenges to state energy regulations, the defendant Commissioner moved to dismiss the Allco complaint on procedural grounds to avoid the merits, and the motion to dismiss was granted by the district court.[91] In this first trip to the district court, Allco was found to lack standing because its injuries were not within the Federal Power Act or PURPA's zone of interests and were not redressable.[92] The district court held that Allco lacked standing because "its injuries were not within the FPA [Federal Power Act] or PURPA's 'zone of interests,' and because its injuries were not likely to be redressed by a favorable judgment."[93] Additionally, the district court "concluded that Allco failed to state a claim," both because the Commissioner's actions were not preempted and there was no right of action available to Allco under 42 U.S.C. §1983.[94]

These issues were raised successfully at the trial level in the Connecticut challenge regarding Allco's standing to bring its challenge.[95]

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88 FERC Notice of Intent Not to Act, 154 FERC ¶ 61,007 (Jan. 8, 2016). FERC declined to act. In a different state matter, FERC issued an Intent Not to Act on the New Mexico Public Regulation Commission's legally enforceable obligation standard, challenged by a QF. FERC Notice of Intent Not to Act, FERC Doc. No. EL19-25-000, 166 FERC ¶ 61,090 (Feb. 4, 2019). On appeal, the court determined that QF complainant Great Divide had made an "as applied" claim rather than a PURPA implementation claim because it expressly challenged a commission Rule 570 and the commission's interpretation of that rule. *See* Great Divide Wind Farm 2 LLC v. Becenti Aguilar, 405 F. Supp.3d 1071, 1079–81, 1097-1100 (D.N.M. 2019). The bases for concluding that the claim brought was "as-applied" included the following:

- Great Divide introduced its Complaint by explaining generally that it was seeking an order of this court declaring that the NMPRC order, violated federal law.
- Great Divide argued the order imposed improper obligations on *it*.
- Great Divide sought a declaration that the NMPRC Order violated PURPA and FERC regulations insofar as it placed improper obligations *on Plaintiffs*.
- The Great Divide complaint to the NMPRC did not challenge Rule 570's lawfulness or the lawfulness of the NMPRC's interpretation of Rule 570.

89 *See infra* Part IV.

90 This litigation addressing standing included multiple trial court decisions and corresponding reviews by the Second Circuit. Due to the complicated procedural history, this subsection sometimes treats the litigation as one case with several iterations.

91 Allco Fin. Ltd. v. Klee, 805 F.3d 89, 93 (2d Cir. 2015).

92 *Id.*

93 *Id.* (citing Allco Fin. Ltd. v. Klee, 2014 WL 7004024, at *3–6 (D. Conn. Dec. 10, 2014)).

94 *Id.*

95 *Allco Fin. Ltd.*, 2014 WL 7004024 *1 2014 WL 7004024 (D. Conn. Dec.10, 2014) (granting the Connecticut Commissioner's motion to dismiss Allco's complaint for lack of standing and the fact that its claim failed on the merits).

Allco appealed its lack of procedural standing. In this initial appeal, the Second Circuit affirmed the procedural dismissal of Allco's complaint, on different procedural grounds that still included standing: (1) PURPA's private right of action foreclosed Allco's claims under 42 U.S.C. §§ 1983 and 1988 to vindicate any rights conferred by PURPA; (2) Allco failed to exhaust its administrative remedies, a prerequisite for its equitable action seeking to vindicate specific rights conferred by PURPA; and (3) Allco lacked standing to bring a preemption action seeking solely to void the contracts awarded to the successful 2013 RFP bidders.[96]

In Allco's appeal of the first district court decision, the Second Circuit noted possible unauthorized actions of the state suppressing its obligations under PURPA to pay full-avoided cost (the exact issues subsequently raised and prevailed upon by Allco in its subsequent Massachusetts litigation), but of course it didn't reach this substantive issue.[97] In a subsequent second district court decision on the same underlying controversy, the court did opine, however, that it was not yet clear whether Allco's injury would be concrete enough or imminent enough to maintain standing.[98] Additionally, the court was concerned that if it struck the Connecticut RFP renewable energy auction results, it had no method to compel Connecticut to undertake another auction in which plaintiff Allco would be allowed to participate, or even if it did participate, it was not clear that a court order could compel Connecticut's Commissioner to select Allco to win. In other words, because Connecticut was the arbiter of the auction bids, it would be difficult to determine whether plaintiff Allco could demonstrate redressability.[99] The court ultimately found:

> Removing this language would still leave a fully operative law. The remaining question is: would the elimination of this language eviscerate the legislative intent of the law? This question must wait for another day, as all that is required to meet the redressability benchmark is that it must be likely that the injury will be redressed by a favorable decision. If the Court were to go the route that Plaintiff proposes, its RECs would be recognized

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[96] *Allco Fin. Ltd.*, 805 F.3d at 91; *see also id.* at 98 ("To the extent that these claims seek only to invalidate the results of the prior procurement . . . Allco lacks standing because that requested relief does not redress its injury, *i.e.*, its not being selected for a Section 6 contract . . . [because the forms of relief] do not make it 'likely, as opposed to merely speculative,' that Allco will eventually receive a Section 6 contract."). The court cited *Friends of the Earth, Inc. v. Laidlaw Envt. Serv. (TOC), Inc.*, 528 U.S. 167, 181 (2000). This remedy, the court noted, "would simply deny Allco's competitors a contractual benefit without redressing Allco's injury—its not being selected for a Section 6 contract." *Allco Fin. Ltd.*, 805 F.3d at 98. Certiorari was not sought.

[97] *Allco Fin. Ltd.*, 805 F.3d at 97; *see infra* Part IV.

[98] *Allco Fin. Ltd.*, 2016 WL 4414774 at *16.

[99] *Id.* at *18.

> by the state of Connecticut, and his injury would be redressed. That is sufficient to defeat Defendant's standing argument.[100]

The district court dismissed both of Allco's Complaints, with prejudice, in a single ruling.[101] Therefore, with regard to Allco's preemption claims, the district court dismissed them for lack of Article III standing because Allco failed to demonstrate injury-in-fact or redressability.[102] With regard to Allco's dormant Commerce Clause claim, the district court found standing to challenge Connecticut's Renewable Portfolio Standard (RPS) program,[103] but dismissed the claim on the grounds that:

> [T]he dormant Commerce Clause does not apply . . . because the RPS [program] creates a market for RECs, rather than impeding on a previously existing national market. Furthermore, Connecticut is not obligated to pass the benefits of its subsidy program without restriction to those producing clean energy in Georgia.[104]

C. Second Circuit — Sustainability Law, No Private Rights

1. The Standing Decision

Applying the principles and holdings from the 2016 Supreme Court decisions in the *EPSA* and *Hughes* cases, the United States Court of Appeals for the Second Circuit reviewed the second Allco appeal[105] regarding its challenge to Connecticut's renewable energy procurement program.[106] Decided before the somewhat similar Allco litigation in California and Massachusetts, this was the first instance where a federal court had to consider whether a state's solicitation of renewable wholesale power represented an unlawful interference with interstate electricity markets and was preempted. Allco's reply brief addressed the state of Connecticut's claim that the court in *Hughes* "whiffed on the issue of whether generators can challenge State intrusion into exclusive federal jurisdiction under the FPA,"[107] arguing that the Supreme Court simply did not question whether a cause of action existed and claims that

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100 *Id.* at *22.

101 *Allco Fin. Ltd.*, 2016 WL 4414774 at *25.

102 *Id*. at *19.

103 *Id.* at *22.

104 *Id*. at *25.

105 Allco was an *amicus* in the Hughes case, and also brought the litigation in California in the Winding Creek matter examined in Section V, and the Massachusetts case examined in Section IV.

106 Allco Fin. Ltd. v. Klee, 861 F.3d 82, 86 (2d Cir. 2017).

107 Reply Brief of Plaintiff-Appellant at 7, *Allco Fin. Ltd.*, 861 F.3d at 92 (2d Cir. 2017) (Nos. 16-2946, 16-2949).

"as a threshold jurisdictional issue would have been one the Supreme Court would have raised *sua sponte* if it thought there was an issue."[108]

The Second Circuit rationalized that the contracts resulting from the Connecticut renewable energy RFP did not suffer "the 'fatal defect' of having the state 'condition payment of funds on capacity clearing the [FERC-approved interstate] auction,'" as was the case in *Hughes.*[109] The court found that the clean energy RFP was "a permissible exercise of the power that the [Federal Power Act] grants to Connecticut to regulate its LSEs [(load serving entities)]" and any impact on wholesale markets is incidental and not a function of the regulatory action.[110] This determination developed by the court sidesteps recent applicable precedent and relies on other decisions inapposite to the actual facts of Connecticut not owning the electric resources it is regulating.[111] Connecticut, as well as Maryland in the *Hughes* case, participates in the same PJM-ISO energy and capacity wholesale markets, in which neither state is allowed to influence the ultimate exclusively federally-jurisdictional price received for the wholesale sale of power. Ultimately, the Second Circuit affirmed the district court's holdings, but for different reasons. On appeal, appellant Allco chose not to raise a claim under PURPA's "private right of action" clause.[112] Rather, Allco alleged a claim under 42 U.S.C. §1983 and "a straightforward pre-emption claim from regulating wholesale sales."[113]

In its review of the first district court opinion, the Second Circuit first examined the viability of the §1983 claim for money damages due to suffering a loss that is fairly traceable to the challenged conduct and would be redressable through a monetary judgment.[114] The Second Circuit decided that in order to receive lost contract money damages, Allco was essentially attempting to enforce QF rights under PURPA rather than a different claim.[115] The Appellate Court reasoned, that since

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[108] *Id.*

[109] *Allco Fin. Ltd*., 861 F.3d at 100.

[110] *Id.* at 101.

[111] *See infra*, Part III.D.

[112] *See Allco Fin. Ltd.*, 861 F.3d. at 86; *Allco Fin. Ltd.*, 2016 WL 4414774 *18-19 (D. Conn. Aug. 18, 2016) (citing 16 U.S.C. § 824a-3(h)(2)(B) and stating that Allco did not clearly rely on the "private right of action" contained therein).

[113] Allco Fin. Ltd. v. Klee, 805 F.3d 89, 94 (2d Cir. 2015). Notably, however, the slightly later Allco claim in the First Circuit—after finding that the state of Massachusetts had violated the law in denying Allco its rights to a tariff for its solar project, which a half dozen years before caused it not to be financed or built, costing the company a significant private loss—was procedurally avoided by finding no PURPA private rights of action to compensate for the injury. *See infra* Section IV.

[114] *Id.* at 94–95; *see, e.g.*, Steel Co. v. Citizens for Better Envt., 523 U.S. 83, 96 (1998).

[115] *Allco Fin. Ltd*., 805 F.3d at 95.

Congress did create a separate private right of action (which subsequently the First Circuit would find to the contrary), its intent was to foreclose a remedy under §1983. This precluded the ability of Allco to use a § 1988 attorney fees claim, linked to PURPA non-compliance.

Thus, the Second Circuit recognized that Congress did create a private right of action for injured solar project developers under PURPA, but found that redressability and other procedural claims did not allow the plaintiff to proceed to the merits. Second, regarding Allco's preemption claim to prohibit the state from regulating it in a way affecting wholesale power sales, the court held that Allco failed to exhaust administrative remedies, and cannot simply just choose to bring an action "under a different heading" to circumvent these requirements.[116] This second procedural step by the court of appeals resulted in dismissal of plaintiff's claims.

The court found that the injury that Allco alleged of being excluded from participation, even if the court invalidated the other prior contracts it had selected instead of Allco's project, would not necessarily redress the injury of Allco not being chosen to participate since that decision would again be up to the defendant agency and such selection could not be compelled by the court. Consequently, Allco lacked standing to bring a claim for equitable relief. Ultimately, the Appeals Court affirmed the district court's decision, without the court expressing any view on Allco's preemption theory that "the only way in which it may obtain a Section 6 contract is for the Commissioner to conduct a PURPA-compliant bidding process."[117] The court held that Allco did not have standing to bring forth its claims and dismissed the complaints.[118]

In Allco's second appeal to the Second Circuit, it also challenged the ability of Connecticut to award state RPS RECs only to generators of renewable energy geographically sited in Connecticut or the other five New England states, regardless of where the solar power that they generated was exported to or used in the state.[119] The Second Circuit ruled that the state's limitation on what power generation was eligible for the program or limitation on what locations for projects were eligible for renewable energy credits was permissible, notwithstanding the Commerce Clause of the Constitution which prohibits most geographic discrimination against the source of commerce.[120] However, this is controversial, contrasts with what other circuits have held, and may not

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116 *Id.* at 97.
117 *Id.* at 94.
118 *Id.* at 98.
119 *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 93–94 (2d Cir. 2017).
120 *Id.* at 107, *cert. denied*, 138 S. Ct. 926 (2018).

be consistent with Supreme Court precedent with regard to either constitutional matter it decided.[121]

Language matters: Allco characterized the state regulation as one which "compels" Connecticut utilities to enter into wholesale purchases of renewable power based on geographic discrimination and to then apply a state REC subsidy only to certain favored renewable generation based on the additional factor of local siting.[122] Connecticut lodged a defense that had been stricken in a prior attempt, as with California in a contemporaneous challenge.[123] California argued that in setting a mandatory feed-in tariff for private utilities to pay certain in-state cogeneration facilities favored by state law, it was not actually imposing a legal obligation. California further argued that compelling utilities to "offer" to purchase certain wholesale power at inflated out-of-market prices did not bind utilities to an enforceable contract. However, as every first-year law student learns, by the offeree/developer responding to the offer "I accept," there is a legally complete contract that will be enforced. It is also of note that there also was a slightly later California case regarding state enforcement of PURPA requirements, brought by the same Allco parent plaintiff, which found the Connecticut decision unconvincing.[124]

The plaintiff in the Connecticut matter argued that the state compelling private utilities by regulation in this manner intrudes on FERC's exclusive jurisdiction over wholesale sales and is therefore preempted by the Federal Power Act, which creates a "bright line" barring any direct or indirect state interference with, or adders to, wholesale power market transactions.[125] The Second Circuit panel did not find there to be preemption for several reasons. First, it found that the plaintiff did not satisfy its burden of proof to allege enough facts to support its claim that the Connecticut program "entails the kind of 'compulsion' that might sustain a preemption claim of this sort."[126] Second, the circuit court declined to apply the recent Supreme Court *Hughes* decision, which struck a Maryland energy program that applied only to similar in-region energy generation facilities.[127] Third, the circuit panel found Connecticut

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121 STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS 167–73 (8th ed. 2019).

122 *Allco Fin. Ltd.*, 861 F.3d at 92, 107.

123 *See infra* Part V.C-2.

124 *See infra* Part V.

125 Allco Fin. Ltd. v. Klee, 805 F.3d 89, 91 (2d Cir. 2015).

126 Allco Fin. Ltd. v. Klee, 861 F.3d 82, 97 (2d Cir. 2017).

127 *Id.* at 97-98. In *Hughes*, Maryland required utilities to sign contracts with a selected power generator. Under the contracts, utilities would pay the generator any shortfall between PJM

RFP's "incidental" effects on the interstate ISO New England wholesale power market to not be excessive.[128]

On the issue of compulsion of state utilities to affect ultimate wholesale contracts and pricing, the panel found that the RFP that the utilities were required to issue does not obligate utilities to actually sign contracts with a winning bidder. However, the RFP specified that utilities "will be responsible for negotiation and execution of any final Power Purchase Agreement."[129] The circuit held that the fact that the Connecticut energy statutes "directed" electric distribution companies to "enter into" contracts did not mean the utilities were "compelled" to do so.[130]

It is noteworthy that FERC Commissioners found a similar argument unconvincing by a state when California made it in a 2010 challenge to its feed-in tariff favoring only in-state wholesale power which FERC struck as violative of the Federal Power Act's "bright line" that states are not allowed to cross.[131] Of note, the Supreme Court has held that directing a regulated entity compels adherence: "[A] statute that directs . . . compel[s] . . . findings or results . . . ."[132] The motion for dismissal was successful in the district court,[133] even though the Second Circuit found that stakeholders in the energy sector generally have standing to contest state regulation that discriminates on who is entitled to certain preferences or rates.[134]

Furthermore, the Second Circuit panel found that Connecticut had not "sought essentially to override the terms set by the FERC-approved [] auction."[135] However, what the Circuit did not discuss is that the Connecticut program sought to reward only certain geographically-situated electric energy producers with a financial adder to what they received for power, while denying that to other producers of identical

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wholesale capacity auction prices and a price agreed by the state regulator and the power producer. Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

128 *Allco*, 861 F.3d at 103, 107.

129 *Id.* at 98. The court's opinion does not speculate whether or not an RFP could be preempted if it did, in fact, compel a utility to sign a contract with a specific generator, or whether the program resulted in signed contracts.

130 *Id.*

131 *See infra*, Part V.C.2.

132 Bank Markazi v. Peterson, 136 S. Ct. 1310, 1326 (2016) (internal citations and quotations omitted).

133 *Allco*, 805 F.3d at 93.

134 *Allco*, 861 F.3d at 96. The court noted the holdings in *Alvin Lou Media Inc. v. FCC*, 571 F.3d 1, 6 (D.C. Cir. 2009) (explaining that a "disappointed bidder" may establish standing by showing that it is "ready, willing, and able to participate in a new auction should it prevail") and *U.S. Airwaves, Inc. v. FCC*, 232 F.3d 227, 232 (D.C. Cir. 2000) (identifying standing where a party demonstrated its willingness to participate "in a future reauction" of radio-wave spectrum).

135 *Allco*, 861 F.3d at 99.

power which was or could be purchased in interstate commerce by Connecticut consumers.[136] Allco raised a separate claim under the Commerce Clause about Connecticut's renewable portfolio standard. Connecticut law requires that RECs used for compliance be from a resource that is located within the ISO-NE region or is in an adjacent region and delivers energy into New England.[137] The plaintiff asserted that these geographic restrictions on eligible RECs amounted to impermissible discrimination under the dormant Commerce Clause against interstate commerce actually occurring in fact.

The only way that the court could reach each of these conclusions was by sidestepping the normally required "strict scrutiny" test that the Supreme Court applies to cases of state discrimination against different geographic sources of commerce. The Second Circuit Court of Appeals ruled that Connecticut's program was lawful. And this conflicts with similar findings of other circuit courts. For example, Minnesota enacted a statute to bar certain types of power use in the state or electric power that is created outside the state with coal fuel and transmitted into the state.[138] Three concurring opinions of each of the three judges on the Eighth Circuit panel found an entire panoply of constitutional preemption and dormant Commerce Clause violations in the state law:

- Violation of the dormant Commerce Clause consistent with the finding of the trial court, including the award of attorneys' fees for plaintiffs to be paid by the state.[139]
- Preemption by the Federal Power Act's exclusive authority over all wholesale sales of power.[140]
- Full preemption by the federal Clean Air Act to the extent that the state statute is not totally preempted by the Federal Power Act.[141]

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136 *Id.*

137 *Id.* at 102.

138 Minnesota-based utilities operate power plants in west-central North Dakota's coal-producing region. The power stations are fueled by nearby lignite mines. The law made exceptions for Minnesota coal projects. Minn. Stat. § 216H.03 (2008). Minnesota banned the import of foreign coal or coal-produced power into Minnesota for power generation. The law bans Minnesota utilities from importing power from new coal plants outside the state, and raises the cost of future purchases of coal power by assigning environmental costs to use of the fuel. Minn. Stat. § 216C (2007). The act prohibits construction of new coal plants in the state and restricts utilities from creating any more long-term power-purchase agreements for coal-derived energy from other states. *Id*. Minn. Stat. § 216B.1694, subd. 1 (2008); In re Application of Otter Tail Power Co., 2009 Minn. PUC LEXIS 6 (Minn. PUC 2009); In re Great River Energy's 2008 Resource Plan, 2010 Minn. PUC LEXIS 458 (Minn. PUC 2010).

139 North Dakota v. Heydinger, 825 F.3d 912, 919-20 (8th Cir. 2016).

140 *Id.* at 923 (Murphey, J., concurring)

141 *Id.* at 927-28 (Colloton, J., concurring).

2. Epilogue

As analyzed in Sections IV and V, of three circuit courts adjudicating similar Allco sustainable energy disputes, the Second Circuit was the only one to deny an injured solar developer standing when a state did not follow federal PURPA law. A federal district court in the Second Circuit followed this denial of standing for plaintiff Allco. In 2020, a Vermont federal district court again dismissed a challenge by the same solar project developer Allco on purely procedural grounds.[142]

Interestingly, had defendant Vermont not succeeded in its argument that Allco lacked standing, the state would have maneuvered itself into an awkward legal position. Vermont's lawyers had taken the substantive position before the court that its state "Standard Offer Program" would otherwise be outside the jurisdiction of FERC because wholesale sales under the program are made in *intrastate* commerce.[143] In doing so, the Vermont Public Utility Commission (PUC) relied on a prior case that it claimed held that the facilities in the program, as the original source of the power they sell to Vermont utilities, do no commingle with other sources, and by statute must connect to the "subtransmission or distribution system of the applicable retail electricity provider."[144]

However, the FERC case on which defendant Vermont relied for this argument, while holding that an electric utility can agree to rates for PURPA purchases that differ from avoided cost, did not establish that a state energy regulatory authority can *compel* its utilities to purchase QF power at a price greater than the avoided-cost rate by branding the sale as in *intrastate* commerce.[145] As discussed below,[146] California had tried this argument a decade before in an adjudicatory proceeding and FERC then clearly articulated that all of such intrastate wholesale sales *are* in interstate commerce and therefore exclusively subject to FERC, rather than state, jurisdiction pursuant to the Federal Power Act and several Supreme Court decisions.[147]

There is no support for a different jurisdictional conclusion in a 2012 Second Circuit opinion out of Vermont discussed below.[148] And subsequent and recent decisions have reiterated that all wholesale sales

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142 Allco Fin. Ltd. v. Roisman, 2020 U.S. Dist. LEXIS 194269 *45 (D. Vt. Oct. 20, 2020) (dismissed for lack of subject matter jurisdiction).

143 *Id.* at *10.

144 *Id.*

145 Otter Creek Solar LLC, 143 F.E.R.C. ¶ 61,282 (2013).

146 *See infra*, Section V.

147 Cal. Pub. Util. Comm'n v. S. Cal. Edison Co., 132 F.E.R.C. ¶ 61,047, 61,339 (2010); *see infra.*, Section V.

148 *See infra* text accompanying notes 163-166.

are subject to exclusive federal, rather than state, jurisdiction: New Hampshire was told only one year before the Vermont dispute that states have no jurisdiction pursuant to well-settled law to set a rate for QF wholesale power purchases sales different from FERC's stipulated avoided cost rate.[149] Vermont, New Hampshire, and all New England states are members of, and transact all wholesale power through, the FERC-regulated ISO-New England Tariff, which specifies that *all* end-use customers use the "regional" ISO-NE transmission system.[150] These basic jurisdictional issues on the merits were never reached in this most recent Vermont matter due to the court's procedural dismissal on lack of standing.

D. Jurisprudence Inconsistent with Supreme Court Precedent

1. The 2016 Hughes Decision, Preemption, the Filed Rate Doctrine

The Supreme Court precedent set by *Hughes v. Talen Energy* would have guided the Second Circuit's decision in *Allco I*, but the Circuit panel sidestepped any analysis of federal preemption issues by summarily concluding that Connecticut's bilateral wholesale contracts, subject to FERC's exclusive review, are "precisely what the *Hughes* court placed outside its limited holding."[151] Although the *Hughes* decision recognized that utilities may engage in bilateral contracts, the *Hughes* decision does not exempt from full constitutional review these bilateral contracts, even if compelled by state regulation.[152]

This creates a double-edged sword. Yes, state RPS RECs programs are generally permissible incentives notwithstanding the Federal Power Act; the Supreme Court acknowledged this in the *Hughes* decision.[153] However, this constitutes only an initial statutory analysis, and omits the always necessary second-level constitutional analysis of the Supremacy Clause and the "bright line" separating state and federal jurisdiction. When the Second Circuit panel states that the Connecticut program and its RFP will not "produce contracts that violate the bright line laid out in *Hughes*: the RFPs do not, for instance, require bids that are 'tethered to a

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149 New Eng. Ratepayers Ass'n, 168 F.E.R.C. ¶ 61,169, 61,897 (2019) (state may not compel by regulation private utilities to purchase power at prices that do not comply with PURPA avoided cost rates).

150 ISO-NE Tariff 1. Regional Network Load is defined to "include[s] all load designated by the Network Customer (including losses) and shall not be credited or reduced for any behind-the-meter generation." This FERC-approved ISO-New England Tariff presumes commingling of all power moved on its interstate transmission system.

151 Allco Fin. Ltd. v. Klee, 861 F.3d 82, 99 (2d. Cir. 2017).

152 Hughes v. Talen Energy Mktg., LLC 136 S. Ct. 1288, 1299 (2016).

153 *Hughes*, 136 S. Ct. at 1299.

generator's wholesale market participation' or that 'condition payment of funds on capacity clearing the auction,'"[154] it is looking at the wrong provision of the Constitution. While *Hughes* was not primarily a Commerce Clause case—it was primarily a Supremacy Clause case—the constitutional analysis does not stop there, as detailed in the next subsection.

"[T]he laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[155] FERC case law establishes exclusive jurisdiction over the "transmission of electric energy in interstate commerce," over the "sale of electric energy at wholesale in interstate commerce," and over "all facilities for such transmission or sale of electric energy."[156] The Supreme Court established a "bright line" separating state and federal authority and not requiring case-by-case analysis.[157] State regulation is wholly preempted from any aspects of wholesale power sales as a matter of federal law and the Supremacy Clause, but courts must still analyze the Dormant Commerce Clause.[158]

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154 *Allco Fin. Ltd.*, 861 F.3d at 102 (quoting *Hughes*, 136 S. Ct. at 1299).

155 U.S. CONST. art. VI, § 2.

156 16 U.S.C. §824(b) (1982); *see e.g.*, Penn. Power & Light Co., 23 F.E.R.C. ¶ 61,006 (1983); S. Co. Servs., 37 F.E.R.C. ¶ 61,256 (1986); Fla. Power & Light Co., 40 F.E.R.C. ¶ 61,045 (1987); Houlton Water Co., Van Buren Light & Power Dist., & E. Me. Elec. Coop., Inc., 60 F.E.R.C. ¶ 61,141 (1992); N. Ind. Pub. Serv. Co., 66 F.E.R.C. ¶ 61,213 (1994); Conn. Light & Power Co., 70 F.E.R.C. ¶ 61,012 (1995); Cent. Vt. Pub. Serv. Corp., 84 F.E.R.C. ¶ 61,194 (1998); Bruder, Gentile & Marcoux, L.L.P., 97 F.E.R.C. ¶ 61,141 (2001); Bruder, Gentile & Marcoux, L.L.P., 99 F.E.R.C. ¶ 61,024 (2002); Niagara Mohawk Power Corp., 100 F.E.R.C. ¶ 61,019 (2002); Barton Vill., Inc., Vill. of Enosburg Falls Water & Light Dep't, Vill. of Orleans, & Vill. of Swanton Vill., Vermont, 100 F.E.R.C. ¶ 61,244 (2002); Bruder, Gentile & Marcoux, L.L.P., 103 F.E.R.C. ¶ 61,109 (2003); S. Cal. Edison Co.,106 F.E.R.C. ¶ 61,183 (2004); Midwest Indep. Transmission Sys. Operator, Inc., 106 F.E.R.C. ¶ 61,337 (2004); Entergy Servs., Inc., 120 F.E.R.C. ¶ 61,020 (2007); Aquila Merch. Servs., Inc. 125 F.E.R.C. ¶ 61,175 (2008); *see also*, *Pub. Util. Dist. No. 1 of Snohomish Cnty. Wash. v. F.E.R.C.*, 471 F.3d 1053 (9th Cir. 2006), aff'd and remanded sub nom. *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 128 S. Ct. 2733 (2008), and vacated, 547 F.3d 1081 (9th Cir. 2008).

157 Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215-16 (1964).

158 New Eng. Power Co. v. New Hampshire, 455 U.S. 331 (1982). The Supreme Court overturned an order of the New Hampshire Public Utilities Commission which restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state: "Our cases consistently have held that the Commerce Clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id.* at 338 (citations omitted); *see also* Montana-Dakota Utils. Co. v. Pub. Serv. Comm'n, 341 U.S. 246, 251 (1951); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Miss. Power & Light Co. v. Mississippi, 487 U.S. 354 (1988); Entergy La., Inc. v. La. Pub. Ser. Comm'n, 539 U.S. 39 (2003).

"FERC has exclusive authority to determine the reasonableness of wholesale rates."[159] Wholesale rates for power sales are beyond any state authority.[160] "It is common ground that if FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject."[161] The Federal Power Act "delegated to . . . the Federal Energy Regulatory Commission, exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production."[162]

In a case affirmed by the Second Circuit, the district court in Vermont held that a Vermont regulation attempting to condition a state regulatory permit on the affected private company selling all of its energy output to state utilities at significantly below the wholesale market price violated the Supremacy Clause in two different regards and was preempted because it interfered with exclusive federal authority over those aspects of power.[163] The plaintiffs argued that the Federal Power Act grants the Federal Energy Regulatory Commission "exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce."[164] Though the court relied on other grounds to strike down the regulation, the Vermont federal trial court decision stated:

Under the Federal Power Act, 16 U.S.C. § 791a et seq.:

> 'Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable.' . . . [A] state 'must . . . give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.' . . . Under the 'filed-rate doctrine,' state courts and regulatory agencies are

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159 *Miss. Power & Light Co.*, 487 U.S. at 371; *accord Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 471 F.3d at 1066; aff'd in part and rev'd in part sub nom. *Morgan Stanley Capital Group, Inc.*, 554 U.S. 527 (2008).

160 Indep. Energy Producers Assoc. v. Cal. Pub. Utils. Comm'n, 36 F.3d 848 (9th Cir. 1994); Federal Power Commission, 376 U.S. at 214; S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215 (1995).

161 *Miss. Power & Light Co*, 487 U.S. at 377 (Scalia, J., concurring).

162 *New Eng. Power Co.*, 455 U.S. at 340 (citing *United States v. Pub. Utils. Comm'n of Ca.*, 345 U.S. 295, 311 (1953)); *see also Nantahala Power & Light Co.*, 476 U.S. at 956 (1986) (Commission "has exclusive jurisdiction over interstate wholesale power rates").

163 Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 838 F. Supp. 2d 183, 244 (D. Vt. 2012).

164 *Id*. slip op. at 233; *see also New Eng. Power Co.*, 455 U.S. at 340; 16 U.S.C. §824(b)(1).

> preempted by federal law from requiring the payment of rates other than the federal filed rate.[165]

On appeal, the Second Circuit concurred that one of the preemption claims was ripe and the Vermont statute was in fact preempted by federal law. The state statute was therefore struck as unconstitutional.[166]

2. RECs Renewable Energy Discrimination

Allco raised claims of geographic discrimination, alleging Vermont was discriminating against power produced out of state or region. Allco's solar projects were located outside of the New England region and therefore disqualified by the DEEP Commissioner, even though solar power produced by Allco in New York (and other project locations) could flow over the interstate transmission intertie to Connecticut consumers.[167] After stating that RPS programs are not prohibited by the Federal Power Act, the Second Circuit never undertook the Dormant Commerce Clause analysis that also must be applied to any potentially discriminatory state regulation involving interstate wholesale power sales.[168] The Dormant Commerce Clause, as interpreted by the Supreme Court, does not allow a state statute to unnecessarily burden or geographically discriminate against interstate commerce. Where there is alleged potential discrimination based on the origin of the commerce being regulated, the state's actions are review with strict scrutiny.

The Second Circuit panel emphatically rejected the plaintiff's Commerce Clause claim.[169] Importantly, the court concluded that for purposes of the Dormant Commerce Clause, Connecticut-eligible RECs are a different product related only to in-Connecticut/in-region solar power regardless of whether the plaintiff's solar projects supplied power to Connecticut from locations in Georgia, New York, or elsewhere: "RECs are inventions of state property law . . . and Connecticut has invented a class of RECs that differs from" RECs produced in Georgia or

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165 *Entergy Nuclear Vermont Yankee*, 838 F. Supp. 2d at 233-34 (internal citations omitted) (quoting *Miss. Power & Light Co.*, 487 U.S. at 374, and *Nantahala Power & Light Co*., 476 U.S. 953 at 962); *see* Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39, 47 (2003) ("The filed rate doctrine requires 'that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates.").

166 *Entergy Nuclear Vermont Yankee*, 838 F. Supp. 2d at 244. The difference between the federal trial court and the Second Circuit opinions is one of slight distinction on the procedural ripeness of one issue presented prior to that issue being handled first by FERC, rather than of substance. *See generally* Entergy Nuclear Vt. Yankee, LLC v. Shumlin, 733 F.3d 393 (2d. Cir. 2013).

167 Allco Fin., Ltd. v. Klee, 861 F.3d 82, 93-94, 107 (2d Cir. 2017).

168 *See* FERREY, *supra* note 121, at 167-73; STEVEN FERREY, UNLOCKING THE GLOBAL WARMING TOOLBOX 172-73 (2010).

169 *Allco*, 861 F.3d 82, 108 (2d. Cir. 2017).

elsewhere.[170] The panel held that the two types of RECS—those recognized in Connecticut and those recognized in other states—are not "similarly situated" under the Supreme Court's 1997 opinion in *General Motors v. Tracy*.[171] However, the analysis correctly should focus on the electricity in interstate commerce that directly creates the RECS, rather than the RECs themselves, which are merely an accounting concept used to keep track of the amount of renewable power generation.

Since it was harnessed over a century ago, electricity has not changed as a uniform thing in American commerce.[172] Electric power is the energized electrical-magnetic force transmitted through a nationwide transmission and distribution system. It is an identical electro-magnetic force in every state at every moment: An energy field transmitted as alternating current at 60 Hz and cycles per second.[173] While its voltage may be transformed when transmitted on different lines, its essential status and movement are constant in every state, in every transaction, and at every moment in time in the United States. It is never different; it is a constant commodity and service. State RECs have no separate identity; they are an exact function of the amount of electricity generated. And that electricity is in interstate commerce within the continental United States.[174] According to the Supreme Court, "it is difficult to conceive of a more basic element of interstate commerce than electric energy, a product used in virtually every home and every commercial or manufacturing facility. No State relies solely on its own resources in this respect."[175] The solar power produced by Allco's solar projects is technically identical and uses the same types of photovoltaic panels as the solar projects which received RECs from Connecticut. Virtually every REC in Connecticut and New England is created by the generation of wholesale power, which is later sold to a retail utility or other retail supplier. Wholesale power prices are exclusively federal matters of law.[176]

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170 *Id.* at 93.

171 *Id.* at 105.

172 For a history of electric power, see STEVEN FERREY, THE NEW RULES: A GUIDE TO ELECTRIC MARKET REGULATION 259-75 (2000) (Appendix A). Until the early twentieth century, electricity was supplied at different voltages ranging from 100–600 volts and 40–133 cycles per second, by different suppliers. For the past century, it is standardized throughout the United States at a set frequency of alternating current. *Id.*

173 WORLD ELECTRICITY STANDARDS, http://www.quantumbalancing.com/worldelectricity/electricityif.htm [https://perma.cc/Z6QA-FKKH] (last visited Feb. 13, 2021).

174 *See id.*; *see also* New York v. FERC, 535 U.S. 1, 16 (2002) (transmission on the interconnected national grids constitute transmissions in interstate commerce).

175 FERC v. Mississippi, 456 U.S. 742, 757 (1982).

176 *See supra* notes and text accompanying notes 156-165.

Each megawatt-hour (MWh) of renewable energy generated equals one Connecticut REC.[177] Connecticut consumes and trades in interstate commerce significant amounts of renewable energy generated both in state and out of state. The district court in Connecticut focused on the accounting notation—the virtual certificate memorializing the subsidy, and not the wholesale electricity accounted for by the RECs. Though the district court found that "[w]hereas a shrimp in Louisiana is the same creature as a shrimp in Wyoming (with identical physical and emotional strengths and weaknesses, hopes and fears), an REC in Connecticut is not necessarily an REC in Colorado; instead, the market exists only within Connecticut."[178]

However, the electricity in interstate commerce entering Connecticut from other states, as an energy field vibrating at 60 Hertz and cycles per second,[179] is even more identical than the shrimp which the trial court uses to draw its threshold as to when to apply the dormant Commerce Clause. The trial court in Connecticut focused on the tag attached to the product—the virtual certificate memorializing the subsidy, and not the wholesale electricity accounted for by the RECs. This appropriate focus dictates that analysis under the Dormant Commerce Clause always is required. That was not done in the *Allco* matter.

If the trial court opinion were correct, this would mean that any state could discriminate against any out-of-state product by arguing that the market for that product was created differently by using an alternative name for the identical product than the producing state. Of note, the trial court held "that the dormant Commerce Clause does not apply to Connecticut because the RPS creates a market for RECs, rather than impeding on a previously existing national market."[180] Here, it is the electricity that is in interstate commerce, and each MWh of electricity from renewable generation creates one REC credit. Connecticut and its utility voluntarily joined the ISO-NE interstate market in electricity, which sales of power are exclusively federally regulated: State regulation of power can simultaneously violate both the dormant Commerce Clause and the Supremacy Clause in New England according to the Supreme Court.[181]

The Second Circuit panel decision also endorsed Connecticut's *purposes* behind the state's REC requirement, although there is no legally

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177 *See* FERREY, *supra* note 22, at § 10:115.20.

178 Allco Fin. Ltd. v. Klee, 2016 WL 4414774 *74 (D. Conn. Aug. 18, 2016).

179 WORLD ELECTRICITY STANDARDS, http://www.quantumbalancing.com/worldelectricity/electricityif.htm [https://perma.cc/Z6QA-FKKH] (last visited Feb. 13, 2021).

180 *Allco Fin. Ltd.*, 2016 WL 4414774 at *78.

181 New Eng. Power Co. v. New Hampshire, 455 U.S. 331 (1982).

recognized exception for not complying with the Dormant Commerce Clause based on a state's *stated purpose*. The Circuit found that "Connecticut consumers' need for a more diversified and renewable energy supply . . . would not be served by RECs" from Georgia or elsewhere.[182] In addition, the court declared that the program serves the state's "legitimate interest in promoting increased production of renewable power generation in the region, thereby protecting its citizens' health, safety, and reliable access to power."[183]

It is inapposite, for both legal and technical reasons, for a court to rely on Connecticut's stated purpose in creating incentives for solar power as contributing to citizen's "reliable access to power." Technically, solar energy is uncontrollably intermittent and the one of the least reliable or predictable sources of electric power to promote "reliable power." The first solar PV project to earn capacity payments in ISO-NE in 2016, earned a capacity factor rating (the generator's actual output as a share of maximum possible output for a given period of time) of less than 14%, lower than any other technology generating electricity in New England.[184] Fixed tilt solar does not contribute to system reliability; without substantial energy storage capacity, it undercuts reliability for the system.[185]

This Second Circuit holding also appears to be contrary to other Supreme Court decisions in 1992[186] and 2019[187] that found that the *real* purpose, not the professed purpose, of an agency regulation must be examined and discerned by the court. Accepting without question the stated purpose and not determining the state's *real* purpose, the Circuit panel found that Connecticut could discriminate against identical solar power coming in to state consumers from outside Connecticut.[188] The panel concluded it would not serve the pro-competitive purposes that underlie the Dormant Commerce Clause to eliminate Connecticut's geographic requirement.[189] The analysis was about state *purposes*, which

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182 *Allco Fin. Ltd.*, 861 F.3d at 105.

183 *Id.* at 106.

184 This was the East Brookfield 6 MW solar project in Massachusetts. Facts are from author's experience regarding this project.

185 FERREY, *supra* note 22, at § 2:12.10, 2:21.

186 Gade v. Nat'l Solid Waste Mgmt. Ass'n, 505 U.S. 88, 107-108 (1992) (the court must search out true purpose and not state-professed purpose of state law, especially when there is a conflict between state and federal law).

187 DOC v. New York, 139 S. Ct. 2551, 2576 (2019) ("Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.").

188 *Allco Fin. Ltd.*, 861 F.3d at 107 (2d Cir. 2017).

189 *Id.* at 106.

are not a recognized nor relevant exception to constitutional Commerce Clause requirements.

This state discrimination regarding renewable energy contrasts with FERC's aggressive promotion of nondiscriminatory competition in New England, and nationwide, over the last two decades:

- FERC Order 888 (1996)—Open Access Non-Discriminatory Transmission Services; Recovery of Stranded Costs[190]
- FERC Order 2000 (1999)—Regional Transmission Organizations[191]
- FERC Order 890 (2007)—Undue Discrimination and Preference in Transmission Service[192]
- FERC Order 719 (2008)—Wholesale Competition in Organized Electric Markets[193]
- FERC Order 745 (2011) – Wholesale Demand Response Compensation[194]
- FERC Order 1000 (2011): Transmission Rights of First Refusal[195]

Such a "reliability" justification for constitutional violations by a state was declared invalid by the Supreme Court in *Hughes* in 2016, where

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190 Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 (May 10, 1996), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996) and 76 F.E.R.C. ¶ 61,347 (1996), *reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, 62 Fed. Reg. 12,274 (Mar. 14, 1997), *clarified*, 79 F.E.R.C. ¶ 61,182 (1997), *reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248, 62 Fed. Reg. 64,688 (Dec. 9, 1997), *reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd*, Transmission Access Pol'y Study Grp. v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd*, New York v. FERC, 535 U.S. 1 (2002).

191 Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000).

192 Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12266 (Mar. 15, 2007) (to be codified at 18 C.F.R. pts. 35 and 37), *reh'g*, Order No. 890-A, 73 Fed. Reg. 2984 (Jan. 16, 2008), *reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *reh'g*, Order No. 890-C, 126 FERC ¶ 61,228 (2009).

193 Wholesale Competition in Regions with Organized Electric Markets, Order No. 719, 125 F.E.R.C. ¶ 61,071 (October 17, 2008).

194 Demand Response Compensation in Organized Wholesale Energy Markets, Order on Rehearing and Clarification Order No. 745-A, 137 F.E.R.C. ¶ 61, 215 (December 15, 2011).

195 Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000, 136 F.E.R.C. ¶ 61,051 (2011); *see also* RISHI GARG, NAT'L REGUL. RSCH INST., BRIEFING PAPER NO. 13–04, WHAT'S BEST FOR THE STATES: A FEDERALLY IMPOSED COMPETITIVE SOLICITATION MODEL OR A PREFERENCE FOR THE INCUMBENT? STATE ADOPTION OF RIGHT OF FIRST REFUSAL STATUTES IN RESPONSE TO FERC ORDER 1000 AND THE DORMANT COMMERCE CLAUSE (Apr. 2013) *available at* https://pubs.naruc.org/pub/FA86B912-F8B8-74F6-AA34-4E7BCE42A234.

Maryland used this argument to attempt to justify providing added incentives for in-state power generation.[196] While the courts in the *Allco* matter dismissed the application of *Hughes,* they did not identify a distinction from the Supreme Court's unanimous dismissal in *Hughes* of reliability as a defensible state rationale for violating constitutional requirements of nondiscrimination.[197]

3. No Proprietary Market Participant Exception to 'Strict Scrutiny' Applies

The district court in Connecticut would appear to have applied the wrong standard on the merits to a Dormant Commerce Clause challenge. The trial court first found that discrimination against commerce must be based on favoring *in-state* commerce while disfavoring interstate commerce, with *state* boundaries becoming the significant factor: "a state statute violates the dormant Commerce Clause only if it . . . 'clearly discriminates against interstate commerce in favor of intrastate commerce.'"[198] In fact, any geographic discrimination against commerce, whether based on state boundaries or any other geographic areas affecting the origin of commerce, is a violation of the Dormant Commerce Clause and is subject to strict scrutiny review by a court.[199] The Supreme Court held that statutes which establish any regional barriers (not necessarily only one-state barriers) and discriminate only against some states rather than all states, violate the Commerce Clause.[200]

Second, as to the Constitution, the district court injected a "materiality" versus incidental factor into the strict scrutiny test for geographic discrimination, stating no violation occurs where the state statute:

> is 'directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, 550 U.S. 330 (2007) (*citing Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). A statute that clearly discriminates against interstate commerce in favor of intrastate commerce is "virtually invalid *per se*.' *United Haulers*, 550 U.S.

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196 Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288, 1298 (2016).

197 *Allco Fin. Ltd.*, 861 F.3d at 98.

198 Allco Fin. Ltd. v. Klee, 2016 WL 4414774 *70 (D. Conn. Aug. 18, 2016) (quoting Freedom Holdings, Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir. 2004)).

199 Rocky Mt. Farmers Union v. Corey, 730 F.3d. 1070, 1108 (9th Cir. 2013) (dissenting); Or. Waste Sys. v. Dep't of Envtl. Quality, 511 U.S. 93, 100 ("In making [the] geographic distinction, the [regulation] patently discriminates against interstate commerce.").

200 *See* Chem. Waste Mgmt. v. Hunt, 504 U.S. 334, 343 (1992) (invalidating Alabama's imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama).

> at 331 (*citing Philadelphia v. New Jersey*, 437 U.S. at 624). It can "survive only if the discrimination is 'demonstrably justified by a valid factor unrelated to economic protectionism.'" *Id.* However, a statute that just incidentally burdens interstate commerce is still valid under the test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), 'unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.'[201]

However, that "materiality" versus incidental factor only applies if the state "regulates evenhandedly" without any geographic discrimination.[202]

In addition, the district court relied on inapposite precedents: the trial court cited the Supreme Court precedents of both *Hughes v. Alexandria Scrap Corporation*[203] and *United Haulers Association v. Oneida-Herkimer Solid Waste Management Authority*,[204] neither of which was applicable to this case.[205] Use of either of these decisions, and certainly both, appears misapplied in two regards. First, neither of these precedents is applicable in any way unless the state of Connecticut is operating as a proprietor, rather than a regulator.[206] Here, Connecticut is clearly not operating as a proprietor; the state does not own Allco, a private company, or the other solar PV projects or any of their electricity output.[207]

In *Alexandria Scrap Corp.*, more stringent requirements for receiving state cash incentive payments were placed on out-of-state car hulk processors than on in-state processors.[208] The plaintiff, a Virginia

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201 *Allco Fin. Ltd.*, 2016 WL 4414774 at *70-71.

202 Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

203 426 U.S. 794 (1976).

204 550 U.S. 330 (2007).

205 *Allco Fin. Ltd.*, 2016 WL 4414774 at *71.

206 FERREY, *supra* note 121, at 178-79.

207 *Cf. id.* ("When a state participates directly in the market as a purchaser, seller, or producer of articles of commerce, its activities will not be subject to the usual commerce clause restrictions . . . .").

208 *Alexandria Scrap Corp.*, 426 U.S. at 800-801. A Maryland statute provided that anyone who had an inoperable motor vehicle ("hulk") could transfer it to a licensed scrap processor who in turn could claim a financial bounty (payment) from the state of Maryland without any proof of title. In 1974 Maryland introduced geographic discrimination in dealing with these articles of commerce, the hulks. A Maryland processor, under the new ordinance, needed to have only an "indemnity agreement" whereby any unlicensed hulk provider certified his or her right to the hulk and indemnified the licensed processor for any potential claims that might arise from the destruction of the vehicle. This made the hulk provider, not the processor, responsible for obtaining clear title. By comparison, non-Maryland processors had to submit a certificate of title, a police certificate that vested title in the processor, or a bill of sale from a police auction. In *Alexandria Scrap Corp.*, that

processor, claimed that the provision violated the Dormant Commerce Clause.[209] The court expressly distinguished the use of incentives in *Alexandria Scrap Corp.* from other cases where states used *regulation* to affect private parties engaged in interstate commerce.[210] If the state owns a resource, a state can choose to place it in, or withhold it from, interstate commerce. Thus, where a state controls an article as the owner, such as cash payments, the state can discriminate in way it cannot if it acts as a regulator of private commerce.

Similarly, in *United Haulers,* the resource, a waste processing facility, was owned by a multi-county government agency through a special-purpose solid waste management authority.[211] Only because the state was acting through government ownership of the resource as a proprietor rather than as a regulator could Chief Justice Roberts' plurality opinion apply the *Pike* balancing test instead of strict scrutiny. Using the *Pike* test, the Court found no imbalance that violated the Dormant Commerce Clause, holding that there is "constitutional significance" to the public/private distinction for ownership under the market participant exception to this constitutional doctrine.[212]

Of note, the most heavily cited Supreme Court cases in *Allco I* are *Alexandria Scrap Corp.*[213] and *Reeves, Inc. v. Stake*.[214] *Reeves* involved the state confining the sale of cement produced at the state-owned facility to state residents only, a proper application of the proprietary market participant exception that is not judged under the "strict scrutiny" test. In fact, the Supreme Court cautioned in *Reeve*s that the market participant exception only applied so long as the State does not also impose "taxes and regulatory measures impeding free private trade in the national marketplace."[215] The proprietary market participant exception to the Dormant Commerce Clause does not apply in the *Allco* matter, and such

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article was the potential state cash payment —state property. This choice by the state, acting in a market participant in a proprietary mode, rather than in a state regulatory mode regulating private industry, is permissible. This concept also applies to environmental resources, such as landfill space or energy resources, for which the state acts in a proprietary capacity.

209 *Id.* at 802.

210 *Id.* at 806.

211 *United Haulers Assn.*, 550 U.S. at 335. The Court noted that in-state and out-of-state interests were equally disadvantaged. *Id.* at 334.

212 *Id*. at 334. The four Justices dissenting in Oneida noted that the Court majority conceded that the only factual difference with the Carbone case was local ordinance discrimination in favor of a public entity, which distinction was stated to be "both illusory and without precedent" because in Carbone the facility was only nominally owned by a private entity which was required to sell it a few years later to the town for $1.

213 Hughes v. Alexandria Scrap Corp., 426 U.S. 794 (1976).

214 447 U.S. 429 (1980).

215 *Id.* at 436-37.

precedent should not be applied by a court where the state acts through regulation rather than ownership of the asset.[216]

4. Applying the Correct Legal Standard to Sustainability Law

Key to Dormant Commerce Clause analysis is whether the standard of review will be the *Pike* balancing test[217] or the strict scrutiny test.[218] The legal distinction is whether the government is acting as a regulator or a proprietor. When the government is acting as a regulator, geographic distinctions in the regulation are judged by the court under a very demanding "strict scrutiny" analysis, and always fail unless there is a market participant/proprietary exception when the state itself owns the asset (such as solar panel electricity) that it can place or withhold from interstate commerce.[219] Where the government owns the specific solar energy resource and thereby acts as a market participant, the *Pike*[220] balancing test is applied and the regulation can be upheld by the court.

The choice of test significantly determines the outcome of the case on the merits: government agencies lose when strict scrutiny is applied by courts; states often win when reviewed under the balancing test.[221] The first critical question before even determining whether one can apply the balancing test is whether the state energy legislation or regulation serves a legitimate state interest, pursuant to *Pike*.[222] Moreover, discrimination by a regulation need not be facially against geographically-based commercial interests; the ultimate impact is enough to make the regulation unconstitutional.[223] Even where a statute is facially neutral, a

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216 The Allco court ignores that Connecticut acted by regulation to create RECs and does not look at the electricity which is the commodity being sold: "Connecticut created a market for RECs, and is not obligated to spread the benefit of that market to states that do not also bear the burden of the cost of the subsidy, which is ultimately paid by Connecticut ratepayers. While Plaintiff alleges that this is protectionist, the RPS statute is 'protectionist only in the sense that it limits benefits generated by a state program to those who fund the state treasury and whom the State was created to serve.' Reeves, 447 U.S. at 442." Allco Fin. Ltd. v. Klee, *Allco Fin. Ltd.*, 2016 WL 4414774 *76-77 (D. Conn. Aug. 18, 2016).

217 *See* Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

218 *See supra* text accompanying note 201.

219 *See infra* text accompanying notes 229-235.

220 *Pike*, 397 U.S. at 142 ("Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."). The Supreme Court ruled in favor of Bruce Church, invalidating the Arizona law as a violation of the dormant Commerce Clause. *Id.* at 146.

221 *See* FERREY, *supra* note 121, at 174-78.

222 *See Pike*, 397 U.S. at 142.

223 C. & A. Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 423-424 (1994); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 352 (1977).

court still applies the "strict scrutiny" standard if the law has a discriminatory effect.[224]

A state cannot regulate to favor, or require use of, its own in-state energy resources.[225] A state cannot by regulation isolate private industry energy-related resources originating in the state.[226] They must be allowed to be traded in interstate commerce. Subsidizing in-state businesses, even when taxes to raise the subsidies are imposed on all commerce, can be stricken under strict scrutiny.[227] The Supreme Court held that an agency cannot discriminate against interstate commerce "if reasonable nondiscriminatory alternatives, adequate to conserve legitimate local interests, are available."[228]

While this critical legal distinction is analyzed by the Supreme Court in its Dormant Commerce Clause cases,[229] it is not analyzed or distinguished by the courts in the *Allco* cases. This is not unusual; in many of the Dormant Commerce Clause challenges involving environment or energy issues, the lower courts supported state Commerce Clause discrimination before being ultimately reversed by the U.S. Supreme Court.[230]

In the Connecticut matter involving Allco, the utilities compelled to purchase solar photovoltaic power by the Connecticut regulation were solely private companies and state-regulated, rather than government-owned companies. The state was *not* acting as an owner of the solar

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224 *C. & A. Carbone, Inc.*, 511 U.S. at 391 (1994) ("ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Hunt*, 432 U.S., at 352–53; *see also* Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 361 (1992).

225 Wyoming v. Oklahoma, 502 U.S. 437, 454-56 (1992); All. for Clean Coal v. Craig, 840 F. Supp. 554, 560 (N.D. Ill. 1993).

226 New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982).

227 West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194 (1994); All. for Clean Coal v. Miller, 44 F.3d 591, 595 (7th Cir. 1995) ("the Illinois Coal Act, like the . . . order in West Lynn, has the same effect as a tariff or customs duty—neutralizing the advantage possessed by lower cost out-of-state producers . . . .") (internal quotations omitted).

228 Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951).

229 *See* FERREY, *supra* note 121, at 167-173.

230 *See e.g.*, Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353 (1992). The 6th Circuit and U.S. district court found no interstate discrimination where the state statute did not treat differently out-of-county waste and out-of-state waste. *Id.* at 357-58. The Supreme Court reversed holding finding a dormant Commerce Clause violation and applied avoid strict. *Id.* at 358. In *C. & A. Carbone*, the New York Court of Appeals held that town ordinance did not discriminate against interstate commerce because it applied evenhandedly to all waste processed in the town despite its point of origin. 511 U.S. 383, 388 (1994). The Supreme Court reversed finding that the ordinance discriminated against interstate commerce by "squelch[ing] competition in the waste-processing service altogether." *Id.* at 384. In *West Lynn Creamery*, the Supreme Judicial Court of Massachusetts upheld the state milk pricing order and its reallocation of proceeds in-state, because it did not discriminate *de jure*. 512 U.S. 186, 191-92 (1994). The U.S. Supreme Court reversed and held that the order discriminated *de facto* in linking the interstate tax to in-state disbursement to discourage out-of-state competitors. *Id.* at 192.

panels or the electricity produced for purposes of taking advantage of the proprietary exception to the Dormant Commerce Clause. Connecticut exercised authority exclusively as a regulator commanding what the Connecticut private utilities must do in its RPS program.

In the *Allco* decision, the Second Circuit cited both *United Haulers*[231] and *Alexandria Scrap*,[232] the former of which in turn cited *Philadelphia v. New Jersey*.[233] However, as discussed above, the *Philadelphia* precedent actually was never followed in *United Haulers* because in it the government agency was the owner of the affected instruments of commerce and could invoke the proprietary market participant exception. The *United Haulers* and *Alexandria Scrap* operative legal facts are contrary to the facts in the Connecticut *Allco* matter, and are not applicable precedent. Rather, *Philadelphia v. New Jersey*, [234] which is foundational and applicable to *Allco I*, comes to the opposite Commerce Clause conclusion as the *Allco* court, to wit, there was an unconstitutional geographically discriminatory regulation of private industry which was evaluated under strict scrutiny rather than the *Pike* balancing test.[235]

The Connecticut court applied the *Pike*[236] balancing test, which is inapplicable unless (1) there is no significant geographic discrimination in favor of Connecticut solar projects and against plaintiff Allco's out-of-state projects generating identical solar energy, and (2) the impact of the Connecticut discrimination on interstate commerce is truly incidental rather than significant. There is no *Allco* court analysis leading to a finding that the impact on interstate commerce in electricity is incidental, and a comparison to precedent would indicate that with electricity flowing in interstate commerce into Connecticut through the federally regulated ISO-NE market, impacts are not incidental. Moreover, the *Pike* test is not the test applied to the flow of electric power in interstate

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231 United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330 (2007).

232 Hughes v. Alexandria Scrap, 426 U.S. 794 (1976).

233 City of Philadelphia v. New Jersey, 437 U.S. 617 (1978). The Court applied *strict* scrutiny. *Id.* at 626-27. It stated that it need not determine the legislative purpose of the statute because "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626. The Court reasoned that whatever its purpose, New Jersey cannot discriminate against articles of commerce originating in other states "unless there is some reason, apart from their *origin*, to treat them differently." *Id.* at 627 (emphasis added). In fact, out-of-state waste was no more harmful than waste generated in New Jersey. *Id.* at 629.

234 *Id.* at 626-27.

235 Steven Ferrey, *Can the Ninth Circuit Overrule the Supreme Court on the Constitution?*, 93 NEB. L. REV. 807, 830, 833 (2015).

236 *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").

commerce by unanimous decisions in the Eighth[237] and Seventh Circuits,[238] or in the Second Circuit.[239] Geographic discrimination regarding commerce is evaluated under the strict scrutiny Commerce Clause test.[240]

Defendant Connecticut argued that the Class I RECs it creates are a state-created subsidy, and thus do not trigger the Dormant Commerce Clause. This is not the complete story; Connecticut by regulatory action and not by spending any of its own dollars, and not as a proprietor owning the solar-produced electricity, creates these RECs by regulations it imposes on its private regulated utilities to purchase them from private REC sellers. Defendants also argued that the subsidy does not reflect an in-state preference,[241] which is true. However, it does reflect a geographic preference for renewable power from the six New England states, and any geographic preference, not just in-state preferences, imposed on private industry by regulation, is subject to the Dormant Commerce Clause.[242]

Connecticut favors Connecticut and in-region solar electric facilities by awarding them valuable RECs and denying them to other out-of-region solar electric facilities which send power through ISO-NE into the Connecticut electric grid, where it is sold and consumed by Connecticut customers. The trial court mentioned, but then proceeded to not apply, what many might argue is the applicable Supreme Court precedent:

> Rather, it is distinguishable from the foundational dormant Commerce Clause cases, which found that various state laws imposed a burden on interstate commerce. *See, e.g.*, *West Lynn*

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237 North Dakota v. Heydinger, 825 F.3d 912 (8th Cir. 2016) (pursuant to both the dormant Commerce Clause and the Supremacy Clause of the Constitution, a state cannot regulate directly or indirectly the movement of electricity or fuels in interstate commerce or restrain the flow of power generated in another state).

238 Ill. Com. Comm'n, v. Fed. Regul. Comm'n, 721 F.3d 764, 776 (7th Cir. 2013) (Judge Richard Posner, speaking for the Seventh Circuit Court of Appeals in a unanimous Circuit decision, citing Steven Ferrey, *Threading the Constitutional Needle with Care: The Commerce Clause Threat to the New Infrastructure of Renewable Power*, 7 UNIV. OF TEX. J. OIL, GAS & ENERGY L. 59 (2012)).

239 Entergy Nuclear Vt. Yankee v. Shumlin, 838 F.Supp.2d 183, 235 (2012).

240 *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 617, 626–27 (1978) (state cannot discriminate against articles of commerce originating in other states "unless there is some reason, apart from their origin, to treat them differently"); Chemical Waste Mgmt. v. Hunt, 504 U.S. 334 (1992) (invalidating Alabama's imposition of an additional disposal fee on hazardous waste generated outside the state but disposed of within Alabama); Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353 (1992) (invalidating the provisions of Michigan's Solid Waste Management Act that restricted landfill's ability to accept out-of-state waste); Or. Waste Systems, Inc. v. Or. Dep't of Envtl. Quality, 511 U.S. 93 (1994) (invalidating Oregon's increased per-ton surcharge on waste generated in other states).

241 Allco Finance Limited v. Klee, 2016 WL 4414774 *23 (D. Conn. Aug. 18, 2016).

242 Ferrey, *supra* note 235, at 85.

> *Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Massachusetts pricing order subjects all milk sold by dealers to Massachusetts retailers to an assessment that is distributed only to Massachusetts farmers)*; Hughes v. Oklahoma*, 441 U.S. 322 (1979) (Oklahoma prohibition on transporting or shipping minnows procured in Oklahoma out of state)*; Pike*, 397 U.S. at 145 (Arizona requirement that fresh fruit grown in state be packaged in state prior to interstate shipment); *H.P. Hood & Sons v. Du Mond*, 336 U.S. 525 (1949) (license denial for out-of-state milk distributor with plans to process raw milk from New York for shipment to Boston); *Toomer v. Witsell*, 334 U.S. 385 (1948) (South Carolina requirement that shrimp boats pack and pay taxes on catches before transporting the shrimp out of state); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (Louisiana requirement that shrimp be shelled and beheaded before transporting them interstate). Unlike these cases involving state action limiting access to commerce with a wide national distribution, Connecticut created the commerce in RECs. There is not an interstate market for RECs that comply with Connecticut requirements. Though other states use RECs created by NEPOOL, and as Plaintiff notes, there are other less geographically restrictive REC programs in Connecticut.[243]

Looking only at the most recent Supreme Court precedent cited by the court in *Allco I* (and perhaps the most applicable), in *West Lynn Creamery, Inc. v. Healy*,[244] the Supreme Court confronted a situation where Massachusetts distributed subsidies only to in-state competitors in an interstate market in milk, which were collected evenhandedly through taxes on both interstate and intrastate wholesale commerce pursuant to a Massachusetts state regulation.[245] This treated in-state and external milk competitors differently, based on the place of origin of the interstate commerce in milk, and was a violation of the Dormant Commerce Clause.[246]

In *Allco I*, it was not in dispute that the electricity under discussion included out-of-state renewable electricity in interstate commerce, sold across state borders in to Connecticut and consumed there. As a unanimous Seventh Circuit pointed out, any state allocating RECs in a discriminatory fashion based on the geographic origin of the electricity, not the RECs themselves, is violating the Dormant Commerce Clause of

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243 *Allco*, 2016 WL 4414774 at *23.
244 512 U.S. 186 (1994).
245 *Id.* at 188-91.
246 *Id.* at 194.

the Constitution.[247] When discrimination based on the geographic origin of the commerce is done by state regulation affecting private industry for electric products sold in the state, it is potentially unconstitutional.[248] The Connecticut REC program, as well as those of several other states, does discriminate based on origin of the electricity commerce.[249]

The Connecticut trial court articulated an incomplete conceptualization of the Dormant Commerce Clause as applying only to a truly national marketplace, stating "'the Commerce Clause responds principally to state taxes and regulatory measures impeding free private trade in the national marketplace.' *Reeves, Inc. v. State*, 447 U.S. 429, 436–37 (1980). In this case, there is no national marketplace for RECs."[250]

According to the *Allco I* court, the Dormant Commerce Clause applies only where there is a national marketplace, which it found did not describe Connecticut. This is inconsistent with Supreme Court decisions: many of the Dormant Commerce Clause decisions of the Supreme Court striking geographically discriminatory state regulation applied to factual situations where the commerce was only flowing to a few states, not in a national market. For example, the milk affected by regulation in Massachusetts in *West Lynn* came into Massachusetts only from a handful of other states, not from a truly national market.[251] There, the Supreme Court found even such geographic discrimination in a non-national market to be unconstitutional as a violation of the Dormant Commerce Clause.[252]

This decision of the Second Circuit is inconsistent with a prior decision of the same circuit related to state electric regulation where a similar plaintiff sought to assert private rights. In *Nichols v. Markell*, plaintiff FuelCell alleged that state action regarding a 30 MW small alternative electric generation project "created a change in market conditions" causing it competitive injury in the deregulated northeast U.S. electric energy market.[253] The Second Circuit applied the doctrine of "competitor standing," which permits a plaintiff to satisfy the "injury in fact part of the standing test when they are 'likely to suffer economic injury as a result

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247 Ill. Commerce Comm'n v. FERC, 721 F.3d 764 (7th Cir. 2013).

248 *Id.*; *see also C. & A. Carbone*, 511 U.S. at 394; *West Lynn Creamery*, 512 U.S. at 192; Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Nat. Res., 504 U.S. 353, 359-60 (1992).

249 Ferrey, *supra* note 235, at 75, 87.

250 *Allco*, 2016 WL 4414774 at *24.

251 *West Lynn Creamery*, 512 U.S. 186.

252 *Id.* at 192

253 Nichols v. Markell, 2014 WL 1509780 at *12 (D. Del. Apr. 17, 2014).

of [governmental action] that changes market conditions'" and such injury is imminent.[254]

Plaintiff FuelCell asserted that as an out-of-state electric energy manufacturer, similar to Allco, it suffered "present and continuing" harm because the state regulation reduced the need for fuel cells from out-of-state companies and negatively impacted its competitive position in the market.[255] The court found that FuelCell sufficiently demonstrated "injury in fact" under the doctrine of "competitor standing"[256] and had demonstrated the requisite causal connection between its alleged competitive injury and the challenged state subsidy to only certain competitors.[257] The Second Circuit agreed that it could void the challenged state government regulation to redress the injury through a favorable decision.[258] The court found that plaintiff's claim of potential future competitive injury made the claim ripe.[259]

Having examined in detail the Connecticut federal district court and Second Circuit decisions regarding Allco, next this article contrasts the very different decisions involving the same plaintiff's solar projects under the Massachusetts and California implementations of the same key federal sustainable energy statute.

IV. THE FIRST CIRCUIT: CONSTITUTIONAL VIOLATION; SUBSTANTIAL PRIVATE INJURY; NO PRIVATE RIGHT OF ACTION

A. Massachusetts: Constitutional Violation of Federal Sustainability Law Causing Significant Private Injury

As the same plaintiff then sequentially brought similar complaints against two other states in other federal circuit courts, we can address these concisely relying on the above extensive foundation parsing all the constitutional issues in Section III. Allco sued Massachusetts regarding that state's noncompliant regulatory treatment and pricing of power from Qualifying Facilities (QF) renewable energy projects under PURPA.

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254 *Id.* (quoting 3 K. DAVIS & R. PEIRCE, ADMINISTRATIVE LAW TREATISE 13-14 (3d. ed. 1994)).

255 *Id.* at *13-14.

256 *Id.* at *14-15.

257 *Id.* at *16. The court relied on the First Circuit opinion in *Adams v. Watson*, 10 F.3d 915 (1st Cir. 1993), noting that "[i]n *Adams*, the plaintiffs were out-of-state milk producers who supplied milk in Massachusetts, and they challenged a Massachusetts milk pricing order requiring all state-licensed milk distributors to pay assessments that were later shared only with in-state producers." *Id.* The plaintiffs in *Adams* alleged the pricing order would result in a subsidy to in-state farmers. *Adams*, 10 F.3d at 917 n.6.

258 Nichols v. Markell, 2014 WL 1509780 *17 (D. Del. Apr. 17, 2014).

259 *Id.* at *22.

Under PURPA, QFs are granted the right to sell their excess energy and capacity to utilities at the utilities' avoided cost of that power.[260]

In administering the PURPA program, the Massachusetts Department of Public Utilities ("DPU") initially set rates as required by federal law. Subsequently,[261] the DPU changed state law to set a rate for all QFs larger than 1 MW in nameplate capacity equal to the price the utility paid for power from the "ISO power exchange," which for New England and Massachusetts is ISO-NE.[262] ISO-NE sets that price based on a short-term locational marginal price (LMP) daily auction rate, rather than based on the utility's longer term avoided cost.

There is a significance difference between the actual daily LMP auction rate and the calculated long-term avoided cost estimation for the same utility. Allco offered to sell power from several of its eleven solar QFs in Massachusetts to the utility National Grid under 25-year contracts with two pricing options, both of which National Grid rejected.[263] Instead, National Grid offered only to purchase Allco's solar power at its 'P' Tariff, which was set at the ISO-NE spot market rate changing on an hourly basis every day.[264]

The plaintiff challenged the then-current Massachusetts avoided cost regulations that established avoided cost tariffs for QFs only at the short-term daily spot market price for wholesale energy determined by ISO-NE as a violation of federal PURPA QF regulations.[265] Allco's complaint argued that this DPU rate conflicted directly with FERC's rule that QFs are entitled to a long-term rate calculated at the time an enforceable obligation is incurred, and thus, the state regulation was preempted.[266] Allco argued that because the daily ISO-NE spot market rate fluctuates hourly and never can be determined in advance of the daily auction, the

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260 18 C.F.R. § 292.304(d)(1)(i).

261 Plymouth Rock Energy Assoc. v. Dep't of Pub. Util., 648 N.E.2d 752, 754-55 (Mass. 1995) (quoting 16 U.S.C. § 824a-3(d)).

262 Sale of Electricity by Qualifying Facilities and On-Site Generating Facilities to Distribution Companies, and Sales of Electricity by Distribution Companies to Qualifying Facilities and On-Site Generating Facilities, 220 MASS. CODE REGS. § 8.05(2)(a) (2009).

263 Allco Renewable Energy Ltd. v. Mass. Elec. Co., 208 F.Supp. 3d 390, 394 (D. Mass. 2016).

264 *Id.*

265 *Id.* at 395. The court rejected the argument that the DPU regulations, allowing only the ISO-New England real time rate determined hour-by-hour at the time of delivery, through the back door effectuated congressional intent. *Id.* at 400. The DPU also argued that their rule accomplished another policy objective by eliminating the possibility that utilities would be locked into contracts in excess of avoided cost, the market price, to the detriment of consumers. *Id.* The court focused on FERC precedent that a fixed contract price provides a potential investor in a QF with reasonable certainty about the expected return on its investment. *Id.*

266 *Id.* at 398. That rate at time of contractual incurrence would be based on a forecast long-term price approved by the state DPU, rather than the fluctuating daily market price set through the daily six-state ISO-New England auction.

rate is "calculated at the time of delivery" of power and not at the time of contract.[267] A rate only determined and available to QFs as of the hour of delivery denies QFs the option they are entitled to pursuant to PURPA and the Federal Power Act of choosing a long-term rate calculated at the time of contracting.[268] Allco averred that this failure to continue following federal law to provide its QF a long-term PURPA contract rate violated the PURPA rights of its solar project in Massachusetts.[269] The FERC PURPA avoided cost regulations were upheld by the U.S. Supreme Court.[270] Several utilities and states subsequently tried to reset and lower compliant avoided cost rates that were incorporated in long-term QF power purchase agreements. When challenged by the injured QFs, federal courts overwhelmingly upheld the QFs' position in more than 90% of the challenges, determining that under PURPA, federal law, state energy regulatory commissions could not change long-term rates embodied in power purchase agreements when pricing changed.[271]

In Allco v. Massachusetts Electric and Massachusetts DPU, the federal district court agreed with Allco that the state did not have the authority to change or eliminate the long-term avoided cost option required to be offered to QFs pursuant to the binding PURPA amendments to the Federal Power Act.[272] The court granted summary judgment in favor of Allco, to wit, that Massachusetts did not comply with FERC PURPA requirements and declared the Massachusetts Department of Public Utilities state QF pricing rules invalid under PURPA.[273] The court in the *Allco* challenge upheld the requirement of this PURPA option for QFs, finding that the plain language of FERC PURPA regulations make clear that QFs have the option of choosing either selling their power on a short-term "as available" basis or pursuant to a legally enforceable long-term obligation, and therefore have a right to rates from the utility based on their preferred option among these two.[274] The choice of the QF must be honored by the utility and the state as an option required by federal law.[275] The district court decision was subsequently affirmed by the First

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267 *Id.*

268 *Id.*; 18 C.F.R. § 292.304(d)(2).

269 *Id.*

270 *See* Amer. Paper Inst. v. Amer. Elec. Power Serv. Corp., 461 U.S. 402 (1983).

271 FERREY, *supra* note 21, at §§ 7:25, 7:31, 10:43-10:45, 10:49, 10:156-10:159. The single exception involved a determination of the Fifth Circuit Court of Appeals regarding sales in Texas; Texas is the one state in the continental United States which with its ERCOT is isolated and most of Texas does not engage in interstate commerce in electricity and is not subject to the Federal Power Act which regulates interstate power sales.

272 *Allco Renewable Energy Ltd.*, 208 F.Supp.3d at 399.

273 *Id.* at 400.

274 *Id.* at 398-99.

275 *Id.*

Circuit,[276] reinforcing that under federal law a QF is entitled to a long-term formulaic avoided cost rate calculated and embodied in a long-term contract at the time the obligation is incurred.

B. Despite Substantial Private Injury, no Private Remedy – Deja Vu

While acknowledging, unlike Connecticut and the Second Circuit, this actual injury to Allco and standing for Allco's challenge, the trial court in Massachusetts found no express federal private right of action for the injured party to recover.[277] The First Circuit relied on precedent that private rights of action under federal law cannot be "created by mere implication, but must be unambiguously conferred" by Congress.[278] Stated another way, for the injured private solar developer whose projects were damaged or destroyed by illegal state regulations, there was no damages remedy available against either the noncomplying utility power purchaser or the noncompliant state energy regulatory agency.

Instead, there was the half-measure of a declaratory judgment ordering the state to change its law so this would not happen again for future renewable solar projects. The First Circuit Court of Appeals deferred to the trial court, finding a violation of federal law and regulation, although not affording any private recourse to the injured plaintiff party.[279] The court of appeals summarized PURPA's three options for enforcement actions: (1) by FERC in federal court challenging the implementation of PURPA by a state, (2) by QFs in state or federal court challenging state implementation of PURPA, or (3) by QFs in state court challenging how a utility has applied state-implemented PURPA regulations.[280]

The Circuit held that PURPA impliedly does not permit a QF to sue a utility in federal court to enforce the statute's avoided cost purchase obligation. Instead, the only PURPA option for a QF is for it to (1) file a complaint against the utility at the state energy regulatory commission and then challenge any adverse decision by the state commission in state court, or (2) petition FERC to bring an implementation challenge against the state and, if FERC declines, then sue the state in federal court.[281] In fact, though, Allco had exhausted every legal possible remedy sequentially. First, Allco requested that the Massachusetts Department of Public Utilities investigate the legality of its illegal regulation; the MDPU declined to investigate. Allco then asked FERC to initiate an enforcement

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276 Allco Renewable Energy Ltd. v. Mass. Elec. Co., 875 F.3d 64 (1st Cir. 2017).
277 *Id.* at 69.
278 *Id. (internal quotation marks removed).*
279 *Id.* at 67.
280 *Id.* at 69.
281 *Id.* at 71.

action against the MDPU; FERC declined to do so. Federal court litigation resulted as the final option after exhaustion.[282]

Instead of affording the complainant a private remedy, the federal district court in 2016 ordered the Massachusetts DPU to change its illegal regulations to conform with federal FERC PURPA requirements.[283] To do so expeditiously, Massachusetts could have reissued its previous regulations which were completely PURPA-compliant, providing both of the required PURPA pricing options for QFs.[284] In response to the Massachusetts District Court finding in *Allco II* that its PURPA rules were unlawful, the DPU opened a new rulemaking docket in March 2017 to take comments on proposals for complying with the court's order.[285] Comments were received, but no action was taken by the DPU in the approximately four years since. As of the time of this article, the Massachusetts DPU retains in place the court-declared illegal version of its state PURPA regulation without any change or replacement, while thousands of additional QF solar projects have been developed or tried to be developed in Massachusetts during this four-year period.[286]

This inaction by both the state and utility with regard to the *Allco II* order mirrors inaction in a similar case construing PURPA avoided cost obligations in Massachusetts two decades earlier. There, a small QF cogeneration project to be sited adjacent to an existing shopping mall, was denied a QF contract at the required long-term PURPA avoided cost rate by both the Massachusetts utility and by the Massachusetts DPU.[287] When the DPU was challenged by the QF project owner, the Supreme Judicial Court of Massachusetts held that the state had not demonstrated that its QF regulations or price provided by the utility thereunder complied with PURPA or the Federal Power Act, implicating the

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[282] *See* Holland & Knight, *Massachusetts Federal Court Ruling Helps Clarify QFs' Rights to Avoided Cost Rates*, LEXOLOGY (Jan. 10, 2017), https://www.lexology.com/library/detail.aspx?g=6f834f22-a102-4299-ab80-cc1c8e939fae.

[283] Allco Renewable Energy Ltd. v. Mass. Elec. Co., 208 F.Supp.3d 390, 400-01 (D. Mass. 2016).

[284] *See* Plymouth Rock Energy Assoc. v. Dep't of Pub. Util., 648 N.E. 2d. 752, 754 (Mass. 1995).

[285] Investigation of the Department of Public Utilities, on its own Motion, Commencing a Rulemaking Pursuant to Sections 201 and 210 of Title II of the Public Utility Regulatory Policies Act of 1978, G.L. c. 30A, §2, and 220 C.M.R. § 2.00 et seq., to Amend 220 C.M.R. § 8.00 et seq., Order Instituting Rulemaking, Mass. D.P.U. 12-54 (2017) *available at* https://eeaonline.eea.state.ma.us/DPU/Fileroom/dockets/bynumber/17-54.

[286] From the author's experience in Massachusetts with solar energy projects during this period. Massachusetts significantly filled its net metering 15% cap with solar projects, and then added its SMART program, which added another 1600 MW of solar projects. Collectively in this period, this represented thousands of solar projects ranging from roof-top scale projects to projects up to 6 MW each.

[287] Plymouth Rock Energy Assocs. v. Dep't of Pub. Utils., 648 N.E.2d 752, 755 (1995).

Supremacy Clause of the U.S. Constitution.[288] Upon declaring this illegality, the Massachusetts Supreme Judicial Court remanded the matter to the Massachusetts DPU with an order that it afford the plaintiff QF project a full avoided cost rate as required by PURPA.[289] The DPU, on remand, did nothing for two years. Meanwhile, the QF project, without a QF contract, could not secure financing and died as a result of DPU inaction.[290] This sustainable energy project that would help Massachusetts meet its renewable energy goals was thus terminated.

In its *Allco II* decision, the First Circuit also suggested that the Fifth Circuit's controversial decision in Exelon Wind v. Nelson (5th Cir. 2014) was wrongly decided or can be distinguished here to afford deference to the state DPU decision.[291] In *Exelon*, a wind company challenged Texas Public Utility Commission (PUC) rules that barred QFs from obtaining more than an "as available" short-term power sale rate if the project couldn't guarantee firm delivery of power.[292] Intermittent solar and wind projects can't guarantee firm delivery at specified times because of the intermittent nature of their weather-dependent power generation.[293] In *Exelon*, the Texas PUC had previously determined that the Texas regulations were inconsistent with federal PURPA requirements, but declined to bring an enforcement action to reform the regulations.[294]

Ignoring FERC's interpretation of federal rules, the Fifth Circuit instead chose to rely on the Texas PUC's defense of its program and found that it was not unreasonable for the Texas PUC to decide that only those QFs capable of providing reliable and predictable power may enter into such contractual arrangements for long-term tariffs under PURPA.[295] Of note, the Fifth Circuit is the only federal court in the country that allowed utilities to abrogate agreed-upon long-term QF power sale prices in-place, by later adjusting downward the long-term tariff rates specified in the PURPA QF power sale contract.[296] Other circuits and state courts have not allowed such changes in long-term PURPA QF contracts unilaterally made by the utility or the state regulatory agency.[297]

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288 *Id.* at 757.

289 *Id.*

290 From author's personal experience with this issue.

291 Allco Renewable Energy Ltd. v. Mass. Elec. Co., 208 F.Supp.3d 390, 399 (D. Mass. 2016).

292 *Id.*

293 Steven Ferrey, *Torquing the Levers of International Power*, 15 WASH. U. GLOBAL STUD. L. REV., 255, 291 (2016); Steven Ferrey, *Ring-Fencing the Power Envelope of History's Second Most Important Invention of All Time*, 40 WM. & MARY ENVTL. L & POL'Y REV. 1, 48-49 (2015).

294 *See Allco Renewable Energy Ltd.*, 208 F.Supp.3d at 399.

295 *Id.*

296 *See* sources cited *supra* note 271.

297 FERREY, *supra* note 21, at §§ 7:25, 7:31.

Aspects of this First Circuit decision in *Allco II* seem inconsistent with a decision of the First Circuit a year before in another energy matter involving the Cape Wind offshore wind project. Cape Wind planned a 130-turbine offshore wind development project in Nantucket Sound off the coast of Cape Cod, Massachusetts.[298] In 2008, Massachusetts enacted § 83 which gave Massachusetts utilities the ability to implement a renewable energy credit quota by contracting for power which was generated "within the jurisdictional boundaries of the commonwealth, including state waters, or in adjacent federal waters."[299] In 2009, pursuant to the statute, Cape Wind executed a power purchase agreement with National Grid without any competition for that National Grid entitlement and without any bidding process.[300]

The federal district court in Massachusetts dismissed a challenge to the Cape Wind project with prejudice, in footnotes commenting on a potential standing issue and doubting the underlying merits of the allegation.[301] On appeal, the First Circuit held that the district court erred in its critical finding, improperly categorizing the relief as retroactive, thereby reaching an incorrect conclusion that the *Ex Parte Young* exception could not apply to this case.[302]

Section 210(h) of the Federal Power Act provides the federal district court broad authority to craft a remedy in these matters. In the *Allco II* episode, the single judge in the Massachusetts federal district court did not craft the contract rate to which it held the injured party was entitled, even though no party in this matter disputed that the court had the power to do so. The First Circuit, on appeal, affirmed judgment for the plaintiff on an abuse of discretion standard.[303] While Massachusetts was ordered to undertake this rate revision remedy in lieu of a single district court judge attempting that with no prior experience in ratemaking,[304] now four years later, the ordered agency has not done so. A similar hesitancy, regarding the identical plaintiff and sustainable renewable energy statute, occurred subsequently in the Ninth Circuit. The Massachusetts decision and outcome in *Allco II* have long-range repercussions, since PURPA is a national requirement imposed on the states. Allco did prevail in its subsequent PURPA challenge in California.

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298 Town of Barnstable, Mass., v. O'Connor, 786 F.3d 130, 134 (1st Cir. 2015).
299 *Id.* (internal citations omitted).
300 *Id.*
301 *Id.* at 138.
302 *Id.* at 144.
303 *Allco Renewable Energy Ltd.*, 875 F.3d at 74.
304 *Allco Renewable Energy Ltd.*, 208 F.Supp.3d at 400-01

V. THE NINTH CIRCUIT: SPLITTING FEDERAL COURTS

A. Standing, State Sovereign Immunity, Private Injury

Allco did not prevail in the Connecticut PURPA matter before the Second Circuit,[305] and in contrast, while prevailing on the PURPA merits before the First Circuit in Massachusetts,[306] Allco was not afforded any private remedy to redress the injury found to have been incurred. Allco subsequently prevailed in its PURPA challenge in California and before the Ninth Circuit in 2019. Winding Creek LLC, an Allco-planned 1 MW solar facility in Lodi, California, petitioned FERC to preempt the California Public Utilities Commission (CPUC) PURPA avoided cost tariff with noncomplying bi-monthly rate adjustments set by the state; it also had a 750 MW cumulative cap on the amount of eligible QF capacity which could enroll in the California program, which cap is not contained in the federal PURPA amendments.[307]

As in the Massachusetts matter, Allco exhausted remedies as required by PURPA, initially asking FERC to exercise its discretion to handle its complaints.[308] Prior to filing a federal challenge with the court, Winding Creek first asked FERC to initiate an enforcement action to hold California's feed-in tariff program (known as the "Renewable Market Adjusting Tariff" or "Re-MAT") to be in conflict with federal PURPA entitlements for QFs.[309] FERC declined to initiate an enforcement action in response and acknowledged the ability for Winding Creek to seek federal court redress.[310] Winding Creek proceeded to federal district court.

California, as it does with most energy regulation challenges against it, argued procedural defenses that an individual solar project had no right to assert a claim, even if it was injured.[311] This matter came before the

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305 *See supra* Part III.

306 *See supra* Part IV.

307 Complaint, Winding Creek Solar LLC v. California Pub. Utils. Comm'n, 2013 WL 5810454 (N.D. Cal. Oct. 24, 2013); Winding Creek Solar LLC v. Peevey, 2015 WL 675388 *5 (N.D. Cal. Feb. 17, 2015). Allco alleged that there was a violation by lacking any factual determinations by the CPUC about any specific utility's actual avoided costs for the tariff, which needed to be a concrete, derived value reflecting the actual avoided cost of power pursuant to federal law, as opposed to an incentive rate. Petitioners also claimed that other aspects of the tariff, including the 750-megawatt cap and bimonthly adjustments to the rate, are inconsistent with PURPA.

308 *See supra* Part III.B. This is identical to the situation for Allco's Massachusetts project, where FERC declined to initiate a response to Allco's petition to FERC regarding Massachusetts' failure to keep in place the proper PURPA power purchase rate.

309 Winding Creek Solar LLC, 151 F.E.R.C. ¶ 61,103, 2015 WL 2151303 (May 8, 2015).

310 *Id.*

311 Steven Ferrey, *The Carbon Suite in the Hotel California: "We Are All Just Prisoners Here, of Our Own Device,"* 23 UNIV. OF S. CAL. INTERDISC. L.J. 451, 462-74 (2014) (detailing procedural

Northern District of California three times to address California's procedural defenses attempting to dismiss the lawsuit. The court dismissed the Winding Creek complaint on the initial two hearings, holding that Winding Creek lacked standing.[312] The third attempt was the charm in terms of standing for this PURPA challenge.[313]

1. The First Complaint

The first CPUC motion to dismiss the claim argued that Winding Creek did not have constitutional or statutory standing and asserted that California had Eleventh Amendment immunity barring any challenge.[314] The CPUC contended that Winding Creek had the burden to demonstrate standing and failed to establish it for the complaint because the Winding Creek Lodi facility had not been built yet.[315] Winding Creek alleged that its "injury in fact" was that, because of California's illegal actions, it was unable to secure necessary financing to construct its solar project.[316] The court held that Winding Creek failed to put this "injury" explicitly in its first complaint and therefore did not sufficiently show an actual or imminent injury,[317] failing to meet its plaintiff's burden for constitutional standing.[318]

The court also found that the first complaint did not establish statutory standing. It noted that "PURPA provides a private enforcement mechanism through which '[a]ny electric utility, qualifying cogenerator, or qualifying small power producer' may petition to FERC to enforce the relevant regulatory scheme."[319] The court resolved that in order to be a "qualifying small power producer," the entity must produce electricity.[320] In Winding Creek's circumstance, the frustrated Lodi facility had not yet been built and was not producing electricity yet.[321] Even though Winding Creek had already petitioned FERC, and FERC responded to deny discretionarily taking the petition without denying that Winding Creek

legal challenges raised by California challenges to its renewable energy and climate change policies).

312 *See supra* Part IV.A.1-2.

313 *See supra* Part IV.A.3.

314 Winding Creek Solar LLC v. Cal. Pub. Utils. Comm'n, 15 F.Supp.3d 965, 968 (N.D. Cal. 2014) [hereinafter *Winding Creek Solar I*, 15 F.Supp.3d 965].

315 *Id.* at 971.

316 *Id.*

317 *Id.*

318 *Id.*

319 *Id.* at 973.

320 *Id.*

321 *Id.* at 974.

was an eligible QF,[322] that alone did not create standing in the court's view.[323] Therefore, Winding Creek failed to sufficiently establish statutory standing in its first complaint.[324]

Winding Creek's second claim in this first complaint was that the Re-MAT program would amount to an unconstitutional taking.[325] However, Winding Creek never brought this claim forth in its request for declaratory relief.[326] Winding Creek's first complaint grounded its claims in the federal statutory and regulatory scheme.[327] Since Winding Creek did not include this claim in its original request for a declaratory remedy the court held the complaint would need to be amended for the issue to be considered.[328]

As to the CPUC's affirmative defense of immunity from the suit under Eleventh Amendment protection of the state,[329] Winding Creek proffered that the CPUC waived immunity because it voluntarily chose to regulate energy under PURPA.[330] The court refrained from addressing this argument directly.[331] Instead, the court examined whether the *Ex Parte Young* exception would be applicable.[332] As the complaint then stood, the CPUC was the named defendant; however, Winding Creek had moved to substitute the individual CPUC Commissioners as the named defendants.[333] The court determined that the *Ex Parte Young* exception did not apply at the time of that complaint.[334] The court also acknowledged that the Eleventh Amendment issue was suitable for a federal issue as to a state agency's law.[335] However, since Winding Creek only argued violation of federal statutory and regulatory requirements, it was not applicable in this first complaint.[336]

The CPUC also argued that Winding Creek failed to state a claim under PURPA. The court determined that both the plaintiff's and defendant's

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322 FERC often declines review of QF petitions to it for PURPA review. *See* FERREY, *supra* note 21, § 5:18.

323 *Winding Creek Solar I*, 15 F.Supp.3d 965 at 974.

324 *Id.*

325 *Id.* at 972.

326 *Id.*

327 *Id.*

328 *Id.* at 972, 976.

329 *Id.* at 972-73.

330 *Id.*

331 *Id.*

332 *Id.* at 973. The *Ex Parte Young*, 209. U.S. 123 (1908) exception to sovereign immunity is "where a complaint alleges an ongoing violation and seeks prospective relief only." *Winding Creek Solar I*, 15 F.Supp.3d 965 at 973.

333 *Id.*

334 *Id.*

335 *Id.*

336 *Id.*

brief were "underdeveloped" for this issue.[337] The CPUC neglected to sufficiently show there could be no plausible claim under the pleaded facts of the complaint.[338] For that reason, the court held the CPUC had not satisfied its burden to support its dismissal motion as to this issue.[339]

In February 2014, the court granted the defendant's first motion to dismiss based on standing.[340] The court elected to not address the alleged Supremacy Clause violation regarding the state manipulating wholesale power rates, because it had already determined the plaintiff had no Article III standing.[341] Ultimately, the court granted the defendant's motion to dismiss, due to sovereign immunity, and lack of constitutional and statutory standing; however, the court extended to Winding Creek the ability to amend its complaint.[342]

2. Second Amended Complaint

In March 2014, Winding Creek filed an amended complaint. In response, the California government defendants petitioned the court for a motion to dismiss without leave to amend, asserting the plaintiff still had not demonstrated standing.[343] In June 2014, the court reviewed the amended complaint and again expressed concern with the plaintiff's standing.[344] The court held it was appropriate to dismiss the complaint *sua sponte* with leave to amend pursuant to Fed. R. Civ. P. 8(a)(2).[345]

The court took issue with the plaintiff's ability to ground an Article III injury argument and found that the first amended complaint failed to cure the standing issues. Under Fed. R. Civ. P. 12(b)(1), the court held that Winding Creek failed to establish the court's jurisdiction over the case.[346] Because Winding Creek failed to solve the standing issues that were present in the original complaint, the court granted the defendant's

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337 *Id.* at 976.

338 *Id.* at 975.

339 *Id.*

340 *Id.* at 976.

341 *Id.* at 974.

342 *Id.* at 964-75.

343 Winding Creek Solar LLC v. Peevey, 2014 WL 2735015 *2 (N.D. Cal. June 11, 2014) [hereinafter *Winding Creek Solar II*, 2014 WL 2735015].

344 *Id.* at *2-3.

345 *Id.* at *3. The court contextualized that Winding Creek "flip-flopp[ed]" for its standing argument.

Initially, Winding Creek alleged that the Lodi location was its "small power production facility," but then went on in its opposition brief to suggest it was solely the operator of one "small power production facility," was its Bear Creek solar facility. In another brief, Winding Creek reverted to contend that it was the Lodi facility that enjoyed PURPA status. The court found this confusing, and because of this the defendants did not have "fair notice" to exactly what Winding Creek's claims were. *Id.*

346 *Id.* at *4.

motion to dismiss; however, the court again granted Winding Creek another opportunity to amend its complaint.[347]

3. Third Amended Complaint

Winding Creek amended again; California raised procedural defenses again.[348] On February 17, 2015, the court addressed the threshold standing question as to whether Winding Creek's unbuilt, still stymied Lodi facility was a "small power production facility," even though it did not yet produce electricity.[349] Acknowledging that the first motion to dismiss the order was issued by a different district court judge,[350] the 2015 judge took the opposite approach as did that first motion's judge, and held that the still-unbuilt Lodi facility could, in fact, be deemed a PURPA "qualifying small power facility."[351] The district court judge held that to the extent that this determination conflicts with what the first motion's judge determined, that first decision was reversed.[352] The court found that in a section of PURPA, Congress used "produces electricity" in a way that would extend to a proposed QF facility.[353] Consequently, the state defendant's arguments on administrative exhaustion, Article III standing, and failure to state a claim for lack of statutory standing were rejected.[354]

The court addressed whether the state program and orders violated PURPA and are therefore preempted.[355] This court found the same issue that the judge for the second motion did, that the defendants failed to adequately address the merits of this argument in their past or current briefs.[356] Accordingly, the court denied the defendant's motion to dismiss for failure to state a claim.[357] The Winding Creek Allco plaintiff conceded that its §1983 claim was not essential to its challenge.[358] The court held that Winding Creek did have Article III standing, and limited its grant of the defendants' motion to dismiss only to the allegations under the § 1983 claim.[359] However, it allowed the plaintiff's federal preemption claim

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347 *Id.* at *5.

348 Winding Creek Solar LLC v. Peevey, 2015 WL 675388 *2 (N.D. Cal. Feb. 17, 2015) [hereinafter *Winding Creek Solar III*, 2015 WL 675388].

349 *Winding Creek Solar III*, 2015 WL 675388 at *2-5.

350 *Id.* at *2.

351 *Id.*

352 *Id.*

353 *Id.* at *3.

354 *Id.* at *5.

355 *Id.*

356 *Id.*

357 *Id.*

358 *Id.* at *6.

359 *Id.* at *7.

based on the Supremacy Clause violation of the exclusive federal authority to establish wholesale power sale rates to proceed.[360]

4. The Court on the Merits

Proceeding on the merits, Winding Creek challenged a number of CPUC orders implementing the California RE-MAT program, which it alleged conflicted with federal FERC PURPA regulations: "[t]hese Orders require investor-owned electric utilities in the state, such as Pacific Gas & Electric, to enter into long-term (ten, fifteen or twenty-year), fixed-price contracts with qualifying facilities."[361] Winding Creek noted that the CPUC's program was "oversubscribed" and thus this fundamentally limited a utility's obligation to purchase power from any additional QF that produced power, which was mandated to be purchased with no limitation by federal PURPA law.[362]

The plaintiff asserted that "the Orders provided for a purchase price that is different than the utilities' avoided cost," which was the mandated price stipulated by federal law.[363] The CPUC's price-setting method was a reverse auction that selected only a subset of projects to receive power purchase agreements from the utility and rejected purchase from all other QFs. Winding Creek contended that PURPA provides the sole legal authority for the CPUC to regulate wholesale electricity sales, and because the CPUC's orders conflict with federal law, the orders are preempted and should be declared invalid.[364] PURPA requires that QF power output is covered by a so-called "must-take" obligation for utilities, because PURPA provides incentives for QF renewable power.[365]

The California federal district court agreed with the plaintiff on the merits of the claim. It determined that the CPUC's 750 MW cap imposed on the amount of QF power capacity eligible for purchase by the utility, as well as bimonthly adjustments to the rate which do not provide a determinable long-term rate at the time of contracting, were both inconsistent with PURPA, stating that "[i]t does not require significant legal analysis to conclude that CPUC's imposition of caps in the Re-MAT program violates the must-take obligation."[366] The court also found that

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360 *Id.*

361 Second Amended Complaint for Declaratory and Injunctive Relief at 3, Winding Creek Solar, LLC v. Peevey, No. C 13-04934 JD (N.D. Cal. June 25, 2014), *available at* https://statepowerproject.files.wordpress.com/2014/03/ca-winding-creek-2nd-amended-complaint.pdf.

362 *Id.* at 4.

363 *Id.*

364 *Id.* at 4-5.

365 *Id.*

366 Winding Creek Solar LLC v. Peevey, 293 F.Supp.3d 980, 989 (N.D. Cal. 2017).

the "[p]rices generated by the Re-MAT program's reverse auction procedure [did] not satisfy the definition of 'avoided costs' in FERC's regulations."[367] According to the court, the "complex auction procedure burdened with arbitrary rules . . . strays too far from basing prices on a utility's but-for cost, which the statute and regulations require."[368] The court found that the CPUC's standard offer contract does not satisfy FERC's requirements because it does not offer a rate based on a "utility's avoided costs calculated at the time of delivery," as expressly required in the PURPA regulations.[369]

B. Ninth Circuit Upholds Renewable Plaintiff Allco

On appeal of these Supremacy Clause violations by the state, before the Ninth Circuit in mid-2018, California defended its Re-MAT program, arguing that the trial court ignored broad discretion that states have to implement the law and California's long history of exceeding statutory goals by promoting energy efficiency and renewable energy.[370] However, in fact, the delegated FERC authority for states to implement PURPA requires each state to implement mandatory QF purchases at exactly full avoided cost prices, and does not create discretion for states to vary federal requirements based on discretionary state law or regulation.[371]

The CPUC claimed on appeal that the district court ruling ignored how its system is consistent with PURPA's underlying goals, Supreme Court precedent, and FERC's other regulations.[372] In point of fact, the California system was not consistent with explicit FERC regulation upheld by the Supreme Court[373] or the most recent Supreme Court unanimous decision regarding the Federal Power Act and federal supremacy superseding state regulation.[374] The CPUC also argued that even if its California Standard Contract for QFs does not comport with PURPA regulations, the Re-MAT program itself is consistent with states' "broad authority" to set rates under PURPA.[375]

However, violating only the federal legal requirement to provide to QFs a projected long-term tariff option at the time the contractual

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367 *Id.*

368 *Id.* at 990.

369 *Id.*

370 CPUC's Second Brief on Cross-Appeal at 43, Winding Creek Solar LLC v. Peterman, Nos. 17-17531 and 17-17532 (9th Cir. Jun. 1 2018), *available at* https://statepowerproject.org/california/#CATAR.

371 FERREY, *supra* note 21, at § 7:31, n.14.

372 CPUC's Second Brief on Cross-Appeal, *supra* note 370, at 4.

373 Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983).

374 Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

375 CPUC's Second Brief on Cross-Appeal, *supra* note 370.

obligation is incurred by QFs, as per the federal PURPA regulations, constitutes a violation of federal law.[376] Moreover, California is incorrect that it has "broad authority" to set PURPA rates.[377] In implementing PURPA, California is not acting pursuant to state law or precedent, but acting exclusively under federal law as a delegate of FERC.[378] The CPUC argued that the injured complainant and the lower court decision erroneously focused on "one, narrow, technical aspect of the PURPA equation: that [a QF] is entitled to a contract at an administrative determined price based on forecasts at the moment it wants it."[379] However, the Supreme Court has repeatedly ruled that this is an immutable "bright line," regarding which the state cannot invent exceptions or novel theories to transgress federal authority.[380] In the second half of 2019, the Ninth Circuit upheld the federal district court's determination that California violated the plain meaning of PURPA and the Federal Power Act by not offering plaintiff Allco's Winding Creek solar energy project the required long-term QF PURPA rate. The Ninth Circuit procedurally found that the injured plaintiff had exhausted all of its possible administrative remedies before seeking judicial relief.[381] As a cornerstone proposition, the Ninth Circuit affirmed that states have no independent authority to alter the requirements of the federal PURPA statute:

> [PURPA's] so-called "must take" provision requires utilities to purchase *all* of the energy a QF provides. The regulations mandate that "[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility . . . [d]irectly to the electric utility." 18 C.F.R. § 292.303(a)(1). Second, the pricing scheme requires utilities to pay QFs a rate derived from the utility's "avoided costs."[382]

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376 *See* Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp., 461 U.S. 402 (1983).

377 CPUC's Second Brief on Cross-Appeal, *supra* note 374, at 14.

378 *See* FERREY, *supra* note 21, at § 7:31, n.14, § 5:18, n.7.

379 CPUC's Second Brief on Cross-Appeal, *supra* note 370, at 3.

380 *See supra* notes and text accompanying notes 157-162.

381 Winding Creek Solar LLC v. Peterman, 932 F.3d 861, 865 (9th Cir. 2019) [hereinafter *Winding Creek Solar IV*, 932 F.3d] ("Winding Creek initially challenged the Re-MAT program before FERC. After various orders and notices of intent not to act, Winding Creek filed suit in district court. Following a one-day bench trial, the district court granted summary judgment in favor of Winding Creek but declined to grant Winding Creek its preferred remedy: a contract with PG&E at the initial $89.23/MWh price." (citations omitted)).

382 *Id.* at 863-64 (emphasis in original) (noting "California's three investor-owned utilities are obligated to purchase only 750 MW through Re-MAT statewide . . . Winding Creek was accepted into the Re-MAT program, but because it was not placed near the top of the queue, the company did not receive a contract offer at the initial $89.23/MWh price. By the time Winding Creek received a contract offer in March 2014, the price had dropped to $77.23/MWh. Winding Creek

As to California's so-called Re-MAT price for QF power sales, the Ninth Circuit declared that this price, "which is arbitrarily adjusted every two months according to the QFs' willingness to supply energy at the pre-defined price, strays too far afield from a utility's but-for costs to satisfy PURPA."[383] The Ninth Circuit concluded that California's changing-over-time formulaic rate (similar to that in Massachusetts) for QFs could not satisfy the requirement of the FERC rules[384] requiring a price set at the time when a legally enforceable obligation is formed: California's "Standard Contract provides only one formula for calculating avoided cost, and that formula relies on variables that are unknown at the time of contracting." [385]

Moreover, the Ninth Circuit did not find its plain meaning interpretation of the federal PURPA regulations as substantively complex as the Second and First Circuits had found regarding Allco's other solar energy projects under PURPA interfacing with Connecticut and Massachusetts state PURPA regulations:

> Like the district court, we believe the conclusion to be drawn from this web of regulations is not complicated: California's Re-MAT program violates, and is therefore preempted by, PURPA . . . .The Standard Contract violates PURPA because it fails to give QFs the option to calculate avoided cost at the time of contracting. This infirmity is plain from the face of the regulations, so we do not defer to FERC's unreasoned conclusion to the contrary.[386]

However, despite finding that California violated the law, the Ninth Circuit held that the district court did not abuse its discretion to fashion equitable relief when it declined to award plaintiff Allco its preferred remedy. The court declared that since California at that point had not re-promulgated a valid law or formula for the court to uphold: "it would be inappropriate to order a non-party [utility] to contract with Winding Creek under a modified version of the very [Re-MAT] program the court

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rejected this offer and later, lower offers because it could not develop a facility at such a low price.").

383 *Id.* at 865.

384 18 C.F.R. § 292.304(d)(1)(ii).

385 *Winding Creek Solar IV*, 932 F.3d at 865.

386 *Id.* (internal citations and quotation marks omitted); *see also* Auer v. Robbins, 519 U.S. 452 (1997) (extending Chevron deference from the interpretation of an agency's enabling statute to the interpretation of the agency's own rules and regulations); Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2166-67 (2012) (limit to Auer deference when the agency's interpretation does not reflect the agency's fair and considered judgment on the matter in question and may cause unfair surprise); City of Arlington, Tex. v. F.C.C., 569 U.S. _ (2013). 133 S. Ct. 1863 (2013) (agency is entitled to deference in determining the extent of its own jurisdiction).

had just determined to be preempted by federal regulation."[387] However, the Ninth Circuit court would not have needed to calculate a rate itself, because the California PUC already had such a rate that could have been extended to the injured plaintiff.

The Ninth Circuit relied on the prior First Circuit decision involving the same plaintiff Allco's solar project on the East Coast, to find that rate setting by the judiciary was not within a district judge's competence, declaring "[i]t is not the court's job to fashion a new contract to Winding Creek's liking."[388] However, the hesitancy of the California federal court to set a rate remedy in lieu of the energy regulatory agency is of interest compared against the federal court holding in the still ongoing case of the California utility Pacific Gas & Electric Company bankruptcy. There, the federal court held that FERC did not have concurrent jurisdiction with the federal court and that agency actions had no binding effect.[389]

C. California's Precedent of Unconstitutional PURPA Actions

California was admonished previously by the Ninth Circuit Court of Appeals, by FERC and by the Supreme Court, in prior PURPA Federal Power Act adjudications where it had attempted setting PURPA rates to variously promote and restrict renewable energy development in California.

1. Legal Redux: Supreme Court, Ninth Circuit and FERC Precedents

Three decades before the California *Allco* decision, the U.S. Supreme Court held that Congress meant to draw a "bright line," easily ascertained and not requiring case-by-case analysis, between California and federal jurisdiction over electricity.[390] Since every wholesale power transaction is subject to exclusive federal FERC jurisdiction, state regulation is preempted as a matter of federal law and the U.S. Constitution's Supremacy Clause, under consistent rulings by the U.S. Supreme

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387 *Winding Creek Solar IV*, 932 F.3d at 866.

388 *Id.* (citing Allco Renewable Energy Ltd. v. Mass. Elec. Co., 875 F.3d 64, 74 (1st Cir. 2017)) (noting that federal courts are neither statutorily authorized nor competent to set avoided-cost rates).

389 In re PG&E Corp., 603 B.R. 471, 488 (Bankr. N.D. Cal. 2019), *order vacated, appeal dismissed sub nom*. Pac. Gas & Elec. Co. v. Fed. Energy Regulatory Comm'n, 829 F. App'x 751 (9th Cir. 2020).

390 Fed. Power Comm'n v. S. Cal. Edison Co., 376 U.S. 205, 215–16 (1964).

Court.[391] In 1986,[392] 1988,[393] 2003,[394] and 2008,[395] the Supreme Court reiterated the impassable "bright line" of authority separating state from federal jurisdiction over the electric power sector. The most recent 2008 Supreme Court decision[396] litigated California's attempted regulation of wholesale electric market sales to benefit California.[397] Where states do not respect these constitutional limitations, state taxpayers may have to pay challengers' legal fees which in some cases, have exceeded $4 million just at the trial stage.[398]

In *Independent Energy Producers Association*, California attempted to lower rates its utilities paid to several QFs to less than the avoided cost price.[399] The California state utility commission authorized utilities to suspend payments and substitute a 20% lower power purchase rate to QFs if the utility found that the QF did not comply with federal standards.[400] The Ninth Circuit declared that California must follow federal PURPA and pay exactly the full avoided cost rate, without adjustment.[401]

At approximately the same time, California was admonished in an adjudicatory proceeding by FERC that it could not go the other direction

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391 *See, e.g.*, New Eng. Power Co. v. New Hampshire, 455 U.S. 331 (1982). (overturning an order of the New Hampshire Public Utilities Commission that restrained within the state, for the financial advantage of in-state ratepayers, low-cost hydroelectric energy produced within the state. It held this to be an impermissible violation of the dormant Commerce Clause of the U.S. Constitution and the Federal Power Act: "Our cases consistently have held that the Commerce Clause of the Constitution precludes a state from mandating that its residents be given a preferred right of access, over out-of-state consumers, to natural resources located within its borders or to the products derived therefrom." *Id.* at 338.). *See also* Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953 (1986); Miss. Power & Light Co. v. Mississippi, 487 U.S. 354 (1988); Entergy La., Inc. v. La. Pub. Serv. Comm'n, 539 U.S. 39 (2003).

392 *Nantahala Power & Light Co.*, 476 U.S. at 963.

393 *Miss. Power & Light Co.*, 487 U.S. 354.

394 *Entergy La., Inc.*, 539 U.S. 39.

395 Morgan Stanley Capital Grp., Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash., 554 U.S. 527 (2008).

396 *Id.*

397 Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash. v. FERC, 471 F.3d 1053, 1066 (9th Cir. 2006). While this decision proceeded on appeal to the U.S. Supreme Court, *see* Morgan Stanley Capital Group, 554 U.S. 527 (2008), and thereafter was remanded to FERC for more clarification, this ruling against California's market regulation rendered by the Ninth Circuit was not substantively overturned when before the Supreme Court.

398 *See* Entergy Nuclear Vermont Yankee, LLC, 838 F. Supp. 2d. 183. Steven Ferrey, *Legal After-Shocks on the Energy Seismograph: Judicial Prohibitions of Recent State Regulation and Promotion of Power*, 45 ENVTL. L. REP. 10523, 10524 n. 12 (2015); *see* Steven Ferrey, *The Fifth Dimension: Legal Infrastructure, Cracks, and Governance*, 15 MINN. J.L. SCI. & TECH. 469, 488-89 (2014).

399 Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994).

400 *Id.*

401 *Id.* at 858.

and increase a QF tariff above avoided cost. In *Southern California Edison Company, San Diego Gas & Electric*,[402] FERC blocked California action conflicting with federal requirements that QFs receive full avoided cost rates.[403] FERC refused to sanction a higher California price for renewable power supply.[404] FERC also separately held that a state-mandated above-market wholesale renewable power feed-in tariff was inconsistent with federal law whether imposed by "law or policy," and such "contracts will be considered to be void *ab initio*."[405] The Ninth Circuit *Allco* decision in 2019 was the fourth time that a federal court or agency had declared that California manipulation of PURPA prices diverging from federal regulations was not legal.

2. Prior Stricken California Enforcement of PURPA

California's legal defense in the Allco matter reprised defenses it had raised unsuccessfully two decades before. Focusing on the most recent of those prior challenges, the Waste Heat and Carbon Emissions Reduction Act was enacted by California to require its investor-owned utilities to offer to purchase, at an administrative price set by the CPUC, all power generated by combined heat and power (CHP) generators if those facilities had a nameplate capacity of 20 MW or less. This size also qualifies those projects as PURPA QFs.[406] This obligated the regulated California utilities to file with the CPUC and adhere to decade-long wholesale power purchase contracts in which they would "offer to purchase" all CHP power at the CPUC's administratively-dictated above-market price.[407] This above-competitive-market rate was a "feed-in tariff,"[408] well in excess of wholesale rates for power and in excess of PURPA's "avoided cost" level.[409]

California initiated an adjudicatory claim attempting to exonerate its practice as constitutionally permitted.[410] First, California made an

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402 S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215 (1995).

403 *Id.* Edison, one of the affected utilities, had wholesale electricity supply options available for purchase at $0.04 per kWh or less, while the PUC required purchase of renewable power at prices as high as $0.066 per kWh.

404 *Id.* The California PUC had ordered two of its investor-owned and regulated utilities to sign long-term fixed-price contracts with renewable QF power sellers to purchase electricity at prices that were competitive with what it cost for the developer to move forward on a renewable energy project, but nonetheless in excess of the utilities' avoided cost and/or the price of wholesale power in the market.

405 Connecticut Light & Power Co, 70 F.E.R.C. ¶ 61,012, 61,030 (1995).

406 Cal. Pub. Utils. Comm'n,132 F.E.R.C. ¶ 61,047, 61,326 (2010).

407 *Id.*

408 *Id.*

409 *See* 16 U.S.C. 824a.

410 Cal. Pub. Utils. Comm'n,132 F.E.R.C. at 61,326.

argument that past constitutional precedent no longer applies if California was now addressing a new environmental issue of climate change.[411] California argued that its environmental purpose for regulation should make it exempt from past federal court and FERC interpretations of constitutional legal precedent.[412]

The counter-argument by the regulated California utilities was simply that California's action "sets rates for electric energy that is sold at wholesale."[413] Wholesale and interstate power market transactions are beyond state authority as established by the Supreme Court in multiple challenges.[414] The utilities submitted that federal law does not allow state regulation to violate the Constitution or create an exception to the Federal Power Act in order to achieve state environmental goals.[415] They also argued that federal preemption does not yield to an environmental purpose of any inferior-level government agency nor can a state require purchases of electricity by utilities at a wholesale price that exceeds "avoided cost."[416]

FERC ruled for the utilities and against California on all of these issues. FERC noted that, pursuant only to Section 210(a) of the Public Utilities Regulatory Policies Act, state commissions have the authority to set avoided cost rates for QFs.[417] However, there is only one price at which states can set the PURPA QF avoided cost rate, whereby "wholesale QF rates cannot both be capped by full avoided cost [pursuant to the federal statute] and exceed the avoided cost cap [via the state statute],"[418] and cannot require a feed-in tariff that exceeds the avoided cost of the purchasing utility.[419] FERC clarified that technology-differentiated avoided cost rates can be consistent with PURPA.[420]

FERC also rejected California's argument that prior legal precedent no longer applied because California now sought to address climate change.[421] FERC rejected California's argument that where a state has an

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411 *Id.* at 61,327-28.

412 *Id.*

413 *Id.* at 61,326.

414 *See id.* at 61,331.

415 *Id.* at 61,327.

416 *Id.* at 61,330.

417 *Id.* at 61,338.

418 *Id.*

419 *Id.* at 61,331, 61,338.

420 Cal. Pub. Utils. Comm'n, 133 F.E.R.C. ¶ 61,059, 61,268 (Oct. 21, 2010) (Order Granting Clarification and Dismissing Rehearing). States may account for the cost of the next unit of generation and take into account obligations for purchasing energy from particular sources. Environmental costs may only be what "are real costs that would be incurred by utilities" and they "may be accounted for in a determination of avoided cost rates." (internal quotation marks omitted).

421 132 FERC ¶ 61,047 at 61,337–38.

environmental purpose state law is not preempted.[422] FERC declared that a new global warming environmental motive for California's regulation did not supersede applicable constitutional precedent.[423] FERC reiterated that only the federal government can regulate commerce between the states, and California cannot attempt to regulate commerce outside its borders.[424]

California raised an additional jurisdictional issue: That CHP facilities interconnected at the distribution facility or voltage level of the utility grid, rather than at the transmission level, are exclusively within state authority and beyond FERC's authority.[425] FERC reaffirmed federal "exclusive jurisdiction"[426] regardless of whether a facility making a wholesale PURPA sale was interconnected on the transmission or lower voltage distribution system.[427] Even at distribution voltage interconnections, a state may not set a state wholesale feed-in tariff diverging from "avoided cost."[428]

Third, California asserted that since its state law only required that California regulated utilities "offer" to purchase wholesale power at dictated super-normal feed-in tariff rates, this was one step short of actually requiring its utilities to "purchase" power at these rates, and FERC's exclusive authority only applies to power "purchases."[429] However, if a utility is forced by state regulation to make a binding "offer," and the CHP developer accepts, that creates a binding legal contractual obligation, pursuant to state contract law applicable in every U.S. state. FERC's order dismissed California's semantic distinctions,[430] holding that its authority under the Federal Power Act includes the exclusive jurisdiction to regulate the rates, terms, and conditions of every

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422 *Id.* at 61,337 ("The Commission's authority under the [Federal Power Act] includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities."). *Clarified on reh'g*, 133 FERC ¶ 61,059 (2010).

423 132 FERC ¶ 61,047 at 61,338.

424 133 FERC ¶ 61,059 at 61,268. FERC also reaffirmed that since a state cannot add a bonus or "adder" to the tariff that is not real and actually incurred by the buying utility, a bonus can be supplied "outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs)."

425 132 FERC ¶ 61,047 at 61,339.

426 *Id.* at 61,339 & n. 99 (citing FPC v. S. Cal. Edison Co., 376 U.S. 205 (1964)).

427 *Id.* at 61,339.

428 *Id.* at 61,338 ("even if a QF has been exempted pursuant to the Commission's regulations from the ratemaking provisions of the Federal Power Act, a state still cannot impose a ratemaking regime inconsistent with the requirements of PURPA and this Commission's regulations—i.e., a state cannot impose rates in excess of avoided cost.").

429 *Id.* at 61,331.

430 *Id.*

aspect of wholesale sales of electric energy in interstate commerce and preempts any state authority, without exceptions.[431]

After not prevailing on any count, California moved for FERC rehearing, or in the alternative, a clarification, of this FERC order.[432] While FERC dismissed a rehearing regarding preempted wholesale power rates,[433] FERC issued a clarification that the avoided costs for a QF selling power could be determined with respect to actual costs incurred by the purchasing electric utility, and different technologies could exhibit different avoided cost prices.[434] Renewable wholesale generators could receive no more than fair wholesale market 'avoided cost' prices under federal law.[435]

Thereafter, the CPUC reestablished the tariff so that it was available to PURPA QFs at an avoided cost rate established by the winning bid price from a competitive renewable energy supply auction.[436] The initial price could be adjusted by the CPUC every two months,[437] which became an issue in the subsequent *Winding Creek* matter.

VI. SQUARING FEDERAL PREEMPTION IN THE CLIMATE CHANGE VORTEX

A similar violation of federal law was found by both the Ninth Circuit in California and the First Circuit in Massachusetts, with each violation causing the identical Allco plaintiff to suffer a substantial injury because of separate unconstitutional state actions. Both also found a private remedy to be beyond judicial competence and discretion. Each circuit determined that the judiciary was not the appropriate branch of government to correct and reset the federally required power purchase rate. Sidestepping the merits, the Second Circuit held that Allco had no standing to contest Connecticut's post-decision-admitted illegal action, as did the federal trial court in Vermont (within the Second Circuit) when Allco challenged Vermont's PURPA implementation for solar projects in late 2020. The Second Circuit and its district court found no private right of action for plaintiffs knowingly injured by preempted state action, even when those states later admitted that they did not follow the orders of federal courts.

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431 *Id.* at 61,337 (citing 16 U.S.C. §§ 824, 824d, 824e (2006); e.g., Mississippi Power & Light Co. v. Mississippi, 487 U.S. 354 (1988)).

432 Cal. Pub. Utils. Comm'n, 133 F.E.R.C. ¶ 61,059 (Oct. 21, 2010) (Order Granting Clarification and Dismissing Rehearing).

433 *Id.* at 61,261.

434 *Id.* at 61,266.

435 *Id.*

436 *See* Winding Creek Solar LLC v. Cal. Pub. Utils. Comm'n 15 F. Supp. 3d 965, 970 (2014).

437 *Id.*

In context, this matters. There is no private right of action for individual persons to prosecute environmental crimes. For example, the Migratory Bird Treaty Act, a treaty and criminal statute which protects more than one thousand species of birds, provides no private right of action, with only the United States Fish and Wildlife Service able to prosecute crimes.[438] However PURPA, renewable energy, and climate change are civil environmental law matters. In civil law, a private right of action is included in most other environmental statutes, including in section 505(a)(1) of the Clean Water Act,[439] section 304 of the Clean Air Act,[440] the Safe Drinking Water Act,[441] the Endangered Species Act,[442] the Toxic Substances Control Act,[443] the Resource Conservation and Recovery Act,[444] and the Emergency Planning and Community Right to Know Act.[445]

One of the few other federal statutes under which no private right of action is present is the National Environmental Policy Act (NEPA), which requires federal agencies to consider, and in some cases study, the potential environmental impacts of a "major federal action."[446] No private citizen "owns" the ambient air, water, or the environment which is injured by an ill-considered "major federal action." However, even with NEPA there is a "back-door" ability for a private party to litigate under NEPA by using the Administrative Procedures Act (APA) to litigate as "a person . . . aggrieved by agency action."[447] Of note, in the recently decided *Juliana* case concerning environmental impacts of global warming, children (who do not "own" the air) were found by the Ninth Circuit in 2020 not to have standing to contest U.S. environmental actions which are causing our climate to warm.[448] However, the private losses under repeated non-compliance with federal PURPA in these three states, and the fact that in the California matter no party contested that the court

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438 *See* ABOUT THE U.S. FISH AND WILDLIFE SERVICE, https://www.fws.gov/help/about_us.html (last visited June 1, 2019).

439 33 U.S.C. § 1365(a) ("any citizen" for any violation of an effluent standard or limitation).

440 42 U.S.C. § 7604(a)) ("any person" for violation of an emission standard or limitation).

441 42 U.S.C. § 300j-8(a).

442 16 U.S.C. § 1540(g).

443 15 U.S.C. § 2619(a).

444 42 U.S.C. § 6972(a).

445 42 U.S.C. § 11046(a)(1).

446 *See* FERREY, *supra* note 121, at 95.

447 5 U.S.C. § 702; *see, e.g.*, Bennett v. Spear, 520 U.S. 154 (1997) (utilizing the Administrative Procedures Act to raise Endangered Species Act and NEPA claims).

448 Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020) (finding no standing to challenge U.S. policy on climate change). *Cf.* Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (finding that children have standing under public trust doctrine to bring climate action negligence claims).

had the power to craft a private remedy if it chose, would suggest that a court could enforce a private right of action for a court to effect a remedy.

California, Massachusetts, and Connecticut, defendant states in the three Allco matters, did not take regulatory actions consistent with prior court orders to cease illegal treatment of sustainable power developers under PURPA. In California, three prior state-issued alterations to the federally required PURPA avoided cost rate resulted in both FERC and the Ninth Circuit finding that California acted illegally in 1994,[449] 1995,[450] and 2010.[451] The Ninth Circuit decision in the second half of 2019 still is too recent to trace if California will implement an effective remedy. And in the 2020 federal district court decision within the Second Circuit, a court again found no standing for injured plaintiff Allco to pursue a private remedy.

These state actions are not a situation of "no harm, no foul" to captive utility consumers if a state violates PURPA regarding rates it must set under federal law as a delegate of a federal agency, FERC. The rates charged by a utility pursuant to a state regulatory command are not borne by the utility, but instead are passed on entirely to its captive retail ratepayers. This does not involve state money or utility resources; the state regulatory action changes the ultimate cost that will be borne by captive consumers.

With the tables turned and states occupying the *plaintiff* role in court, both Connecticut and Massachusetts fought successfully to be granted standing to bring suit against operators of non-sustainable power plants in other states.[452] When instead in the position as defendants regarding their state solar policies, both Connecticut and Massachusetts sought to procedurally deny Allco standing and thereby avoid a court being able to

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[449] Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n, 36 F.3d 848, 853 (9th Cir. 1994). The California state utility commission, the CPUC, authorized utilities to suspend payment to renewable power-selling Qualifying Facilities (QFs) if the utility found that the QF did not comply with federal standards, and substitute a 20% lower, alternative power purchase rate. The Ninth Circuit this determined this to be an impermissible state manipulation of the PURPA QF wholesale rate, over which the state CPUC had no authority.

[450] S. Cal. Edison Co., 70 F.E.R.C. ¶ 61,215 (1995). The California PUC had ordered two of its investor-owned and regulated utilities to sign long-term fixed-price contracts with renewable QF power sellers to purchase electricity at prices that were competitive with what it cost for the developer move forward on a renewable energy project, but nonetheless in excess of the utilities' avoided cost and/or the price of wholesale power in the market. Edison, one of the affected utilities, had wholesale electricity supply options available for purchase at $0.04 per kWh or less, while the PUC required purchase of renewable power at prices as high as $0.066 per kWh. FERC refused to sanction a higher California price for renewable power supply.

[451] Cal. Pub. Utils. Comm'n, 132 FERC ¶ 61,047 (July 15, 2010).

[452] Am. Elec. Power Co. v. Connecticut, 131 S. Ct. 2527 (2011). Of note, Connecticut and Massachusetts chose not to name as defendants in that case their own in-state operators of non-sustainable power plants.

get to the merits of the dispute. Although Connecticut successfully avoided Allco's merits challenge in 2015, the Connecticut Public Utilities Regulatory Authority admitted that these challenged QF rate provisions impermissibly violated PURPA's requirements in January 2018.[453] In 2020, within the Second Circuit, the Vermont federal district court again found no standing for Allco to raise issues about Vermont not following federal renewable energy law despite the First Circuit's finding of standing for Allco on a similar claim, FERC's adjudicatory ruling that New Hampshire had transgressed into federal jurisdiction, and the Ninth Circuit's holding that Allco had standing and had prevailed on a similar PURPA claim regarding solar energy. After the federal district court decision five years ago, subsequently upheld by the First Circuit Court of Appeals in Massachusetts, Massachusetts has not made the PURPA regulatory change ordered and affirmed by both federal courts.[454] It has not changed its rule. The U.S. Supreme Court, on multiple occasions regarding energy and power,[455] including a unanimous decision in 2016, upheld its "bright line" principle that states may *not* directly or indirectly cause to be paid other than the federal PURPA full "avoided cost" for renewable power.[456] With these contrasting federal circuit court decisions regarding the rights of states to deny standing to those who address climate change with renewable energy projects or for states to not follow federal law regarding renewable energy, there is a need for Supreme Court reconciliation of sustainable energy law. No party in the California matter contested that the federal court had the power to set the required rate if it chose, rather than deferring to executive state agency action, although neither court chose to exercise that opportunity to create relief.

The dimensional scope is significant in two regards. First, without drastic action, the United Nations forecasts the seriousness of coming "tipping points that are irreversible within the time span of our current civilization."[457] Now, almost alone in federal law, PURPA is what remains to address legally the need to create a sustainable, electric future for the United States. Under PURPA, the state acts exclusively as a

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453 Jennifer Key, *PURPA Rates Set at Time of Obligation Part II: Allco's Impact Has Remained Somewhat Limited*, PURPA & DISTRIB. ENERGY BLOG (Apr. 5, 2018), https://www.steptoepurpablog.com/2018/04/purpa-rates-set-time-obligation-part-2-allcos-impact-remained-somewhat-limited/.

454 *See supra* text accompanying note 284.

455 *See supra* notes 392-395.

456 Hughes v. Talen Energy Mktg., LLC, 136 S. Ct. 1288 (2016).

457 *New Science and Developments in Our Changing Environment*, 2009 UNEP Y.B. at 53, U.N. Doc. UNEP/GC.25/INF/2, http://wedocs.unep.org/bitstream/handle/20.500.11822/7759/840%20-%20english.pdf?sequence=8&isAllowed=y.

delegate of FERC,[458] not under its own state law or any separate authority.[459] Second, the scope of federal preemptive authority has expanded dramatically: the amount of wholesale power sales, subject to exclusive federal regulation, has quadrupled in the last few decades.[460] The Supreme Court noted that it is now "possible for a customer in Vermont [to] purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma."[461]

This is where "the rubber meets the road": therein, regarding U.S. renewable energy law, will lie the success or not of U.S. climate change mitigation efforts. The power sector is expected to shoulder a disproportionate share of the burden of U.S. climate change mitigation.[462] And to do so, the states must follow preemptive federal law pursuant to the Constitution on sustainable energy. Where goes the United States, so goes the world climate. As the key next step, resolution of these newly inconsistent Allco circuit court Supremacy Clause cases would greatly benefit from Supreme Court reconciliation as a matter of first impression to sculpt U.S. climate law.

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458 *See supra* notes 27-29.

459 *Id.*

460 In 2019, more than forty percent of U.S. electricity was generated by what the U.S. Energy Information Administration terms "independent power producers," increased over 400% from ten percent twenty-five years earlier. *See* U.S. DEP'T OF ENERGY, ENERGY INFO. ADMIN., ANNUAL ENERGY REPORT, at Table 1.3, https://www.eia.gov/electricity/annual/html/epa_01_03.html (1,699,628 thousand MWh of 4,185, 935 thousand MWh in 2019 were supplied by IPPs); Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, FERC Stats. & Regs. ¶ 31,036, 61 Fed. Reg. 21,540 21,541, 21,549-50 (May 10, 1996).

461 New York v. FERC, 535 U.S. 1, 8 (2002) (internal quotation marks omitted).

462 *See supra* Figure 1.