

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COALITION FOR COMPETITIVE
ELECTRICITY, DYNEGY INC., EASTERN
GENERATION, LLC, ELECTRIC POWER
SUPPLY ASSOCIATION, NRG ENERGY,
INC., ROSETON GENERATING LLC, and
SELKIRK COGEN PARTNERS, L.P.,

Plaintiffs,

-against-

JOHN B. RHODES, in his official Capacity as
Chair of the New York Public Service
Commission and GREGG C. SAYRE, DIANE
X. BURMAN, and JAMES S. ALESI, in their
official capacities as Commissioners of the New
York Public Service Commission,

Defendants.

Docket No. 1:16-CV-8164

(VEC/KNF)

SUPPLEMENTAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS
COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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At the Court's directive (Dkt. 153 at 2), State Defendants submit this supplemental brief limited to "addressing the impact, if any, of *Allco Finance Limited* [*v. Klee*, No. 16-2946 (2d Cir. June 28, 2017)] on the arguments raised in the motions to dismiss briefing." *Allco* affirmed Rule 12(b)(6) dismissals of: (1) claims that the Federal Power Act (FPA) preempted a Connecticut renewable energy procurement; and (2) a dormant Commerce Clause challenge to Connecticut's Renewable Portfolio Standard (RPS), which limits eligibility for renewable energy credits (RECs) to producers located in or adjacent to New England. *Allco*, slip op. at 1. Plaintiffs here challenge the Zero-Emission Credit (ZEC) portion of New York's Clean Energy Standard (CES) Order, but their claims are even weaker than those the Second Circuit rejected. *Allco* strongly supports dismissal of Plaintiffs' complaint.

I. ALLCO SUPPORTS DISMISSING PLAINTIFFS' FIELD-PREEMPTION CLAIM.

Allco rejected a claim, premised in part on *Hughes v. Talen Energy Marketing*, 136 S. Ct. 1288 (2016), that the FPA preempts state-directed wholesale electricity purchases except those authorized by the Public Utilities Regulatory Policies Act. *Allco* is the first appellate decision construing *Hughes*, and confirms that the decision is "limited" (*Allco*, slip op. at 34) and establishes a "bright line" proscribing only state-sponsored payments for electric sales into wholesale energy auctions. *Id.* at 36, 39 (discussing the "bright line" and "fatal defect" identified in *Hughes*).

Plaintiffs here attempt to bring this case within *Hughes* by contending that the ZEC program adjusts an "'interstate wholesale rate' with a price supplement to a favored generator." Dkt. 95 at 3 (quoting *Hughes*, 136 S. Ct. at 1297). But this case is even further removed from *Hughes* than *Allco*. Unlike the contracts at issue in *Hughes* and the *Allco* renewable energy solicitations, "ZECs and RECs do not set prices for any wholesale energy or capacity sale at all. They provide compensation for the unbundled environmental attributes of energy produced by an

eligible generator—regardless of how the energy is disposed of.” Dkt. 55 at 21-22. New York has neither “‘command[ed] generators to sell capacity’ into the FERC-approved interstate auction,”¹ nor premised the receipt of ZEC revenues on selling into and clearing the wholesale auction, and the ZEC program “thus lack[s] the ‘fatal defect’ (136 S. Ct. at 1299) that triggered *Hughes* preemption.” Dkt. 55 at 21; *see also Allco*, slip op. at 36 (construing *Hughes* to like effect).

Allco found that Connecticut had not compelled wholesale energy purchases on state-dictated terms, and did not reach whether the FPA would preempt such purchases. *Allco*, slip op. at 28-29, 36 & n.15. Compared to the *Allco* power purchases, the ZEC Program is more clearly on the State side of the jurisdictional line, as it involves the purchase and sale of environmental attributes separate, i.e., “unbundled,” from any electricity sale. The Federal Energy Regulatory Commission (FERC) has already held—in the REC context—that such sales do not directly affect wholesale energy transactions. *WSPP Inc.*, 139 FERC ¶ 61,061, PP 18, 24 (2012).

II. *ALLCO* DISPOSES OF PLAINTIFFS’ CONFLICT PREEMPTION THEORY.

Plaintiffs contend that the ZEC program interferes with FERC’s competitive markets by unduly distorting the prices that would prevail absent the ZECs. Dkt. 1 ¶¶ 86-89. Similarly, the plaintiff in *Allco* claimed that Connecticut’s renewable procurement infringed upon FERC’s authority by increasing electricity supply and “plac[ing] downward pressure on . . . wholesale prices.” *Allco*, slip op. at 38. But *Allco* holds that this “incidental effect on wholesale prices does not . . . amount to a regulation of the interstate wholesale electricity market that infringes on FERC’s jurisdiction.” *Id.* at 38-39. Like Connecticut, New York “may regulate within the domain Congress assigned to [it] even when [doing so] incidentally affect[s] areas within FERC’s

¹ *Allco*, slip op. at 36 (identifying fatal defect in New Jersey program at issue in *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 252-53 (3d Cir. 2014)).

domain.” *Id.* at 39 (quoting *Hughes*, 136 S. Ct. at 1298).² And, like Connecticut’s renewable procurement program, the ZEC program “serves [the state’s] legitimate interest in promoting increased production of [environmentally beneficial] power generation in the region, thereby protecting its citizens’ health, safety, and reliable access to power.” *Allco*, slip op. at 51. As the *Allco* court held, “[t]hese means and ends are well within the scope of what Congress and FERC have traditionally allowed the States to do in the realm of energy regulation.” *Id.*

Allco also found the state’s program “not preempted by the FPA,” because “FERC has the ability to review any bilateral contracts that arise out of Connecticut’s RFPs.” *Id.* at 34. The ZEC program does not require recipient nuclear plants to sell the associated energy at wholesale. If they do so, FERC retains the ability to review the terms of those energy sales: FERC can review bilateral energy sales contracts, or, if the nuclear output is sold into auctions conducted by the New York Independent System Operator, FERC can regulate the terms under which the resources participate in the auctions and the resulting clearing prices. As Defendants have explained and as *Allco* confirms, “[t]his Court cannot find a conflict when *FERC*, not New York, will decide how subsidized resources participate in wholesale auctions and affect resulting prices.” Dkt. 105 at 9.

III. ALLCO SUPPORTS DISMISSING PLAINTIFFS’ DORMANT COMMERCE CLAUSE CLAIM.

In addition to disposing of FPA preemption challenges to Connecticut’s renewable energy procurement program, *Allco* rejected a dormant Commerce Clause challenge to Connecticut’s RPS. Connecticut’s RPS requires load-serving entities to procure specified quantities of state-defined RECs representing the production of electric energy by a qualified technology in New England or an adjoining region. *Allco*, slip op. at 19. *Allco* upheld Connecticut’s RPS against

² See also *Nw. Cent. Pipeline Corp. v. State Corp. Comm’n of Kan.*, 489 U.S. 493 (1989).

discrimination claims despite the program's express geographic restrictions. *Id.* at 43. Starting from the premise that Commerce Clause analysis turns upon "a comparison of substantially similar entities," *id.* at 44 (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997)), the Second Circuit found no discrimination because Connecticut-created RECs represent different products, serving different markets than those established by other states. *Id.* at 43.

Allco makes clear that New York's ZEC program is a "legitimate state pursuit" (*id.* at 53) that satisfies the Commerce Clause with room to spare. Unlike Connecticut's RPS, ZEC availability does not turn on where generation facilities are located. New York makes ZECs available to eligible facilities, *wherever located*, that have made verifiable contributions to New York's power supply. Dkt. 55-1 at 19, 127-28.

Allco confirms that it was constitutionally permissible to make ZECs available only to facilities that supply energy to New York. *Allco*, slip op. at 48-49 (discussing Connecticut consumers' need for renewable energy "accessible to them" which "would not be served" by distant facilities). That the plants that satisfied that criteria with respect to the first ZEC tranche were located in New York reflects trading patterns *predating* the CES Order—not a geographic limit imposed by it. *See id.* (Connecticut's "definition of qualifying RECs appears to be a response to, rather than a cause of" any geographic limitations); *id.* at 51-52 (FERC "has created the geographic distinctions on which [the state] program is predicated by organizing owners of transmission lines into 'independent system operators' (ISOs), such as [NYISO]"). And, going forward, if an out-of-state nuclear plant were to provide electric energy to New York and later suffer financial difficulty jeopardizing its ability to continue providing its zero-emission

attributes, the plant could seek ZECs in future tranches. Dkt. 55-1, App. E at 1; Dkt. 145 at 12-13. Thus, there is no geographic discrimination.

Allco also confirms that New York could limit ZEC eligibility to specified nuclear facilities.³ Like Connecticut (*Allco*, slip op. at 51), New York concluded that there are environmental and health benefits associated with resources that deliver carbon-free electricity to the regional (i.e., New York) electric grid. Dkt. 55-1 at 3-4, 14-19. New York has chosen to achieve these goals by fostering new renewable energy resource development and maintaining for a limited number of years existing, financially at-risk nuclear units serving New York consumers. *Id.* at 19, 127-28. It was “well within” (*Allco*, slip op. at 38) New York’s authority to make these findings and to conclude that renewable energy and nuclear resources are differently situated and warrant different support mechanisms. New York’s ZEC and REC programs do “no more than treat different products differently in a nondiscriminatory fashion.” *Id.* at 43.

The same analysis shows that any burden imposed by the ZEC program is not “clearly excessive in relation to the putative local benefits.” *Id.* at 53 (quotation omitted). “The Commerce Clause . . . was ‘never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens.’” *Id.* (quoting *Tracy*, 519 U.S. at 306-07).

State Defendants respectfully ask that the Court grant their motion (Dkt. 54) and dismiss the case.

³ See *Allco*, slip op. at 38 (“specifying the sizes and types of generators” supplying energy to state consumers “lies well within the scope of Connecticut’s power to regulate its utilities”); *id.* at 53 (Commerce Clause allows state “regulatory response to the needs of the local energy market [to] result[] in a noncompetitive REC product”).

Respectfully submitted,

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Dated: July 10, 2017

CERTIFICATE OF SERVICE

I hereby certify that I have on this 10th day of July, 2017, electronically filed the foregoing Supplemental Brief in Support of Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(B)(6) with the Clerk of the District Court using the CM/ECF system, which will send notification of such filing to counsel of record in this proceeding.

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