No. 17-737

In The Supreme Court of the United States

ALLCO FINANCE LIMITED,

Petitioner,

v.

ROBERT KLEE, in his Official Capacity as Commissioner of the Connecticut Department of Energy and Environmental Protection, KATHERINE S. DYKES, JOHN W. BETKOSKI, III and MICHAEL CARON, in their Official Capacities as Commissioners of the Connecticut Public Utilities Regulatory Authority,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In order to meet important state environmental and other public policy goals, the Connecticut Commissioner of the Department of Energy and Environmental Protection ("DEEP" or the "Department") issued a series of requests for proposals ("RFPs") seeking to procure new sources of renewable energy. Allco, a developer of renewable energy, sued claiming that the Federal Power Act, 16 U.S.C. § 824 et seq., granted exclusive jurisdiction over wholesale energy rates to the Federal Energy Regulatory Commission ("FERC") and therefore that these state procurement efforts intruded on this exclusive authority and were preempted.

The Second Circuit, relying in large part on this Court's recent decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S. Ct. 1288 (2016), held that the District Court properly dismissed the case because the state renewable energy procurement programs did not regulate wholesale energy sales and thus were outside the scope of FERC's jurisdiction under the Federal Power Act.

The question presented is:

> Did the Second Circuit correctly hold that Connecticut's competitive procurements do not violate the Federal Power Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTRODUCTION

As this Court has noted in its recent decision in *Hughes v. Talen Energy Marketing, LLC*, 136 S.Ct. 1288 (2016) ("*Hughes*"), the Federal Power Act, 16 U.S.C. § 824 et seq. ("FPA") is a careful and deliberate exercise in federalism, dividing regulatory authority over the generation and transmission of electric energy between the Federal Energy Regulatory Commission ("FERC"), for the federal government, and the states. The FPA grants FERC full jurisdiction over interstate wholesale rates and interstate transmission, but reserves solely to the states regulatory authority over retail rates and the sources of generation.

Connecticut has embarked on a broad and transformative program of reducing carbon and other air pollutant emissions while correspondingly increasing its reliance on renewable energy. Consistent with that goal, the Commissioner of the Connecticut Department of Energy and Environmental Protection ("Commissioner" or "Defendant") has been granted the authority by state law to procure new renewable energy resources. Once the Commissioner has reviewed bids for new projects, and determined which projects best meet Connecticut's program goals, the Commissioner then directs the state's regulated utilities to enter into negotiations for binding traditional bilateral contracts. Through these energy procurements, the Commissioner directs the mix of energy resources for the utilities under his authority as permitted by the FPA. Nowhere in state law is the Commissioner given any authority to set interstate

rates or otherwise intrude on FERC's authority. All rates established in the contracts are set by the bidding developers.

Petitioner Allco Finance Limited ("Allco"), a developer of solar energy, bid into one of the Commissioner's requests for proposal ("RFP"), but not another. Allco sued in both cases claiming that the state's action in directing utilities to contract for renewable energy is itself an intrusion into FERC's exclusive jurisdiction and thus preempted.[1]

This Court should reject Petitioner's request. The Connecticut RFPs are purely an exercise of the state's expressly reserved authority under the FPA over the resource mix of its domestic utilities. The method used by the state to procure new resources was the traditional bilateral contract that this Court has expressly approved in its recent FPA decision in *Hughes*. The state did not, and cannot, set interstate rates or otherwise intrude upon FERC's exclusive jurisdiction and there is nothing presented in this case that should cause the Court to revisit *Hughes*.

For all of these reasons, as set forth more fully below, the Court should deny the petition.

[1] Allco also raised a dormant Commerce Clause claim against the state's renewable portfolio standard but has not included that claim in its petition for writ of certiorari.

STATEMENT OF THE CASE

A. CONNECTICUT'S REGULATORY SCHEME

The Connecticut General Assembly has decided that it is the policy of the state to encourage new renewable energy generation in order to meet the needs of environmental regulatory programs.[2] These programs in Connecticut include the Global Warming Solutions Act[3] and the Regional Greenhouse Gas Initiative[4] designed to address climate change and the Integrated Resources Plan[5] and Renewable Portfolio Standard[6] designed to meet other important environmental and energy-related goals. In addition, the state already has a federal mandatory obligation to reduce Connecticut's air quality problems. Currently, the entire state of Connecticut is in violation of the ozone limits established under the federal Clean Air Act.[7] In totality, these various statutes and programs grant the Commissioner authority to take actions to increase the state's reliance on renewable energy and offset carbon emissions.

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[2] *See* Conn. Gen. Stat. § 22a-200c *et seq*. (setting forth requirements to reduce greenhouse gas emissions).

[3] Conn. Gen. Stat. § 22a-200a.

[4] Conn. Gen. Stat. § 22a-200c.

[5] Conn. Gen. Stat. § 16a-3a.

[6] Conn. Gen. Stat. § 16-245a.

[7] U.S. Environmental Protection Agency, 8-Hour Ozone (2008) Designated Area/State Information, *available at* https://www3.epa.gov/airquality/greenbook/hbtc.html.

In order to implement the state policy goals of carbon reductions, air quality and renewable energy, the Connecticut legislature passed two public acts. The first was Public Act (P.A.) 13-303, "An Act Concerning Connecticut's Clean Energy Goals." Public Act 13-303 authorized the Commissioner to solicit proposals from providers of renewable energy sources and "[i]f the commissioner finds such proposals to be in the interest of ratepayers including, but not limited to, the delivered price of such sources, and consistent with the requirements to reduce greenhouse gas emissions . . . and in accordance with the policy goals outlined in the [2013 Comprehensive Energy Strategy] . . . the commissioner may select proposals . . . to meet up to four percent" of the state's electric load. Public Act No. 13-303, § 6 (2013) (codified at Conn. Gen. Stat. § 16a-3f). Pet. App. 70a-71a. The Act further specifies that the "commissioner may direct the electric distribution companies to enter into power purchase agreements. . . ." *Id*. *See* Pet. App. 10a-11a.

Two years later in P.A. 15-107, using very similar language, the Connecticut General Assembly directed the Commissioner to solicit additional contracts for large-scale renewable energy projects as well as large-scale hydropower and natural gas capacity. P.A. 15-107, § 1 (2015) (codified at Conn. Gen. Stat. § 16a-3j). Pet. App. 14a fn5. Under both public acts, the Commissioner must determine if the projects submitted in response to the solicitation are consistent with state environmental and renewable energy goals and if they are in the ratepayers' interest. If so, the

Commissioner is authorized to direct utilities to enter into such contracts. Conn. Gen. Stat. §§ 16a-3f, 16a-3j. Connecticut law does not permit the Commissioner to set wholesale electric energy rates.

Renewable Energy Procurements

The Commissioner issued several RFPs based on the authority of P.A. 13-303 and P.A. 15-107. The first was on July 8, 2013, when the Connecticut Department of Energy and Environmental Protection ("DEEP") released a Notice of Request for Proposals issued pursuant to P.A. 13-303 ("2013 Procurement"). Pet. App. 11a. On July 22, 2013, Allco submitted five solar power bid proposals alongside forty-two other project submissions. After an extensive review and consideration of the forty-seven bids, the Commissioner directed the electric distribution companies to negotiate possible purchase power agreements ("PPAs") with two selected projects, the Fusion Solar Center, a 20 megawatt solar project, and the Number Nine Wind Farm, a 250 megawatt wind power project. Pet. App. 11a, 71a. None of Plaintiff's projects were selected. Pet. App. 11a. The Connecticut Public Utilities Regulatory Authority ("PURA"), after a full hearing and review required by statute, approved the two PPAs.[8]

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[8] *Application for Approval of Class I Renewable Power Purchase Agreements Resulting from Department of Energy and Environmental Protection's July 8, 2013 Requests for Proposals pursuant to Section 6 of P.A. 13-303*, Final Decision,

Subsequently, a three state renewable energy procurement draft RFP was issued on February 26, 2015, and issued in final form on November 12, 2015 ("2015 RFP") by the Commonwealth of Massachusetts, and the States of Connecticut and Rhode Island. Pet. App. 14a.

B. THE PROCEEDINGS BELOW

Allco brought several actions in district court. The initial case, *Allco Fin. Ltd. v. Klee*, *et al*., No. 3:13-CV-1874 JBA, was brought by Allco against the Defendant DEEP Commissioner regarding the 2013 energy procurement effort. Pet. App. 11a-12a. The District Court (Arterton, J.) dismissed Allco's complaint, finding both a lack of standing and further that the Commissioner did not set wholesale rates and thus the procurement could not be barred as preempted by the FPA. *Allco I*, No. 3:13-CV-1874 JBA, 2014 WL 7004024 (D. Conn. Dec. 10, 2014), A166-67. Pet. App. 72a. The Second Circuit, *Allco v. Klee*, 805 F.3d 89, 93 (2d Cir. 2015) (*Allco II*), concluded that Allco failed to exhaust its administrative remedies with the FERC. Pet. App. 13a. Allco responded to the Court's ruling by filing an administrative implementation challenge under the Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §824a-3(h) ("PURPA"), with the FERC. *Allco Renewable Energy Ltd*., FERC Docket No. EL16-11-000 (filed Nov. 9, 2015). FERC

PURA Docket No. 13-09-19 (October 23, 2013), *available at* http://www.ct.gov/pura/docketsearch.

responded in its January 8, 2016, Notice of Intent Not to Act, declining to take action under PURPA. *Allco Renewable Energy Ltd.*, 154 FERC ¶ 61,007 (2016). Pet. App. 128a-129a.

Subsequently, Allco brought another case, *Allco Fin. Ltd. v. Klee et al.*, No. 3:15-CV-608 CSH (*Allco III*), filed on April 26, 2015, which is based largely upon the legal theory advanced in *Allco I* against both Defendants Klee and the PURA Commissioners. Pet. App. 14a-15a. Allco then brought a very similar action on March 30, 2016, against the same defendants and including the same basic legal theory in *Allco Fin. Ltd. v. Klee, et al.*, No. 3:16-CV-508 CSH (*Allco IV*). Pet. App. 16a. *Allco IV* restates the essential allegations of *Allco I* and *Allco III*, namely, that the 2013 RFP was in violation of the Federal Power Act's prohibition on state regulation of wholesale electricity sales—subject only to the limited exception for sales by statutorily defined clean energy qualifying facilities ("QFs"), such as Allco's, under PURPA and that the 2015 Procurement should also be preempted. Specifically, Allco shifted its theory somewhat from asserting that the Commissioner could not set rates to the broader theory that the Commissioner cannot direct or "compel" utilities to enter into wholesale electric contracts. Pet. App. 15a-17a. Allco asserts that any such contract, directed by the Commissioner, is prohibited by this Court's decision in *Hughes*. Pet. Cert. at 21. *Allco IV* also added a new count claiming that the state's Renewable Portfolio Standard violates the dormant Commerce Clause because it does not

permit Allco to sell renewable energy certificates generated in Georgia to Connecticut utilities. Pet. App. 40a. This count appears to have been abandoned.

Allco III and *Allco IV* were dismissed by the trial court and appealed to the Second Circuit. Pet. App. 60a, 13a-14a. On appeal, Allco continued to press its preemption claim, arguing that the Commissioner violates the Federal Power Act if he "compels" utilities to enter into contracts with generators and that the state's Renewable Portfolio Standard violates the dormant Commerce Clause. The Second Circuit held that Allco had failed to state a claim for preemption because the Commissioner had directed the utilities to enter into traditional bilateral contracts as was precisely permitted by *Hughes* and, therefore this case was outside of FERC's exclusive jurisdiction. Pet. App. 28a-40a. In addition, the court held that the Commissioner's actions were well within the state's authority under the FPA to regulate state utilities. Pet. App. 34a.

REASONS FOR DENYING THE PETITION

Rule 10 of the Rules of the Supreme Court describes the considerations governing the review of a petition for writ of certiorari. Rule 10 notes that a petition for writ of certiorari will be granted only for a compelling reason and that the Court may consider whether there is a conflict in the United States Courts of Appeals, whether a state court of last resort has

decided a federal question in a way that conflicts with another state or federal court, or if the petition raises an important question of federal law that needs to be settled by this Court. *See* Sup. Ct. R. 10.

There is no split in the Courts of Appeals in this case. Furthermore, the case below was decided by a federal court and therefore no state court of last resort has issued a decision contrary to federal law. Finally, the case below is a straightforward application of a recent decision of this Court and therefore there is no important issue of federal law that this Court has not already decided.

Specifically, the Second Circuit correctly held that Allco has failed to state a preemption claim because the Commissioner acted wholly within the authority the FPA preserved to the states with respect to environmental and utility integrated resource planning and has not intruded upon FERC's exclusive authority over wholesale electric rates.

I. Connecticut's RFPs Are A Straightforward Application Of *Hughes* and Are Not Preempted

Allco argues that Connecticut authorities "compelled" utilities to enter into contracts for the wholesale sale of electricity that are solely within the jurisdiction of FERC. Allco asserts that "Connecticut's decision to force a utility to enter a wholesale power contract constitutes regulation in the field of wholesale

energy sales, which is categorically field preempted." Pet. Cert. at 9.

Allco adds that the state's actions in this case are virtually identical to those struck down by this Court's decision in *Hughes*, which held that contracts tethered to FERC markets are preempted by the FPA. Pet. Cert. at 21. Finally, Allco repeatedly quotes a colloquy between counsel and Justices Kagan and Alito during oral argument for *Hughes* to the effect that if a contract for the wholesale sale of electricity is subject to FERC's jurisdiction and any state action affecting that contract is preempted. Pet. Cert. at 3, 20. Allco concludes claiming that the Second Circuit decision, if permitted to stand, would "create[] a massive loophole" in FERC's exclusive jurisdiction under the FPA. Pet. Cert. at 13.

These claims lack merit because, as the Second Circuit found, the state did not "compel" or obligate its utilities to enter into contracts and it was possible that utilities and bidders would not come to terms. Pet. App. 28a-30a. Connecticut did not set wholesale rates in violation of the FPA or otherwise "tether" the planned contracts to any FERC market and the bilateral contracts entered into were of the type expressly permitted under *Hughes*. Pet. App. 40a. Consequently, there is no massive loophole in the FPA because the state has carefully conducted its procurements in a manner consistent with this Court's rulings. Finally, comments of one or more judges in the context of oral argument are not the holding of the court and are not law and Allco's reliance upon them cannot advance its argument.

A. The Commissioner's Actions Are Within His Authority

Federal law gives FERC authority over wholesale electric rates but preserves the authority of states to require regulated utilities to enter into bilateral contracts with generators for clean renewable energy and to direct the utilities mix of clean and other resources. Pet. App. 5a; *see Allco v. Klee*, 805 F.3d 89, 91 (2d Cir. 2015) (*Allco II*); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 432 (2d Cir. 2013) (*quoting Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986)). As the Second Circuit noted, the 2013 and 2015 RFPs resulted in straightforward, wholly unexceptional bilateral contracts for clean energy between the utilities and generators. Pet. App. 34a. The only action of the Commissioner was to review the proposed contracts to see if they met state policy goals, all of which was clearly within the state's authority to direct the resource mix of regulated utilities. Pet. App. 10a.

This Court has explained that under the FPA, states retain "authority over . . . *administration of integrated resource planning and . . . authority over utility generation and resource portfolios*. . . ." *New York v. FERC*, 535 U.S. 1, 24 (2002) (emphasis added), *citing* Order No. 888, at 31,782, n.544. Further, the FPA clearly permits states to "direct the planning and resource decisions of utilities under their jurisdiction." *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013).

It is therefore beyond dispute that states may "order utilities to build renewable generators themselves, or . . . direct retail utilities to 'purchase electricity from an environmentally friendly power producer in California or a cogeneration facility in Oklahoma, if [they] so choose[].'" *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013), *citing S. Cal. Edison Co. San Diego Gas & Elec. Co.*, 71 FERC P 61269 at *8 (June 2, 1995).

Thus, it is clear that state authorities retain full jurisdiction over the resource portfolio planning of regulated utilities and can direct utilities to purchase clean (or other) energy as required.

B. Bilateral Contracts Do Not Violate *Hughes*

Allco clams that "State-coerced bilateral contracting" is inconsistent with *Hughes*. Pet. Cert. at 2. The use of bilateral contracts is fully consistent with *Hughes*.

As an initial matter, the claim that the state "coerced" anyone is flatly untrue. As the court below found, utilities were fully able to decline to sign contracts if negotiations were unsuccessful. Pet. App. 29a-30a.

Beyond that, the record shows that the 2013 and 2015 RFPs resulted in standard bilateral contracts. Both RFPs resulted in the Commissioner directing state utilities to negotiate contracts with prospective

generators. Pet. App. 30a. These contracts, by and between the utilities and generators, were clearly traditional bilateral contracts for the purchase and sale of electricity, as the court below found. Pet. App. 34a.

This Court's decision in *Hughes* notes that the FPA vests exclusive jurisdiction over wholesale energy sales in the FERC. FERC, in turn, exercises its jurisdiction in two ways:

> Interstate wholesale transactions in deregulated markets typically occur through two mechanisms. The first is *bilateral contracting*: [load serving entities] sign agreements with generators to purchase a certain amount of electricity at a certain rate over a certain period of time. After the parties have agreed to contract terms, FERC may review the rate for reasonableness. *See Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cty*., 554 U.S. 527, 546-548 (2008). . . . Second, [regional grid operators] administer a number of *competitive wholesale auctions*. . . .

Hughes, 136 S. Ct. at 1292-93 (emphasis added). Thus, this Court ruled that traditional bilateral contracting is permissible under the FPA and in fact went further noting that bilateral contracts are arrangements "which FERC has long accommodated. . . ." *Id.* at 1299.

The Second Circuit reviewed the record before it and concluded that "the contracts . . . before us are the kind of traditional bilateral contracts between utilities

and generators . . . [and] are . . . precisely what the *Hughes* court placed outside its limited holding." Pet. App. 34a.

Allco then asserts that the state procurements are "economically indistinguishable" to the prohibited transactions in *Hughes*. Pet. Cert. at 21. In reality, this Court explicitly differentiated *the contracts for differences* in *Hughes* from the standard *bilateral contracts*. *Hughes*, 136 S. Ct. at 1299. Specifically, the *Hughes* contract "involve[d] the capacity auction administered" by a regional grid operator. *Id*. at 1293. This Court noted that the State of Maryland had, in that case, required a generator to participate in the regional auction, but at a different rate from the FERC-approved market rate and thus "Maryland's program invades FERC's regulatory turf." *Id*. at 1297. This Court noted that "the contract at issue here differs from traditional bilateral contracts in this significant respect: The contract for differences does not transfer ownership of capacity from one to another outside the auction. Instead, the contract for differences operates within the auction. . . ." *Id*. at 1299.

This Court concluded:

> So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable.

Id.

In its decision below, the Second Circuit applied the reasoning of *Hughes* and found "important and telling distinctions" between the Maryland and Connecticut programs. The court found that the Connecticut RFPs were not tethered to the market and resulted in the actual purchase of electricity. Pet. App. 34a. Thus, the court concluded that the contracts at issue were not contracts for differences, but rather traditional bilateral contracts. *Id*.

The Commissioner has issued a competitive renewable energy RFP under *state* law to address *state* environmental and resource adequacy needs. Nothing in state law permits the Commissioner to change, modify, or affect regional energy auction prices or in any manner intrude upon FERC's jurisdiction. The contracts that resulted from the RFPs were traditional bilateral contracts that were never forced upon any utility and were not tethered to participation in any FERC auction market. Therefore, the state's actions are not preempted by the Federal Power Act and Allco cannot prevail on the merits of its case.

B. Judicial Colloquy Is Not the Decision of the Court

Allco argues that the "permissibility of State-coerced bilateral contracts was rejected out-of-hand at oral argument" in *Hughes*. Pet. Cert. at 2, 20. Allco quotes an excerpt from oral argument to the effect that "at least two justices rejected" the claim that states have the "right under the FPA to compel or direct its

utilities to enter into wholesale power contracts. . . ." Pet. Cert. at 2.

The formal decision of a court is its published decision. What a judge or judges say at oral argument is not the ruling of the court.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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