UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

ALLCO FINANCE LIMITED, CHELSEA SOLAR LLC, and APPLE HILL SOLAR LLC, Plaintiffs, v. ANTHONY Z. ROISMAN,[1] RILEY ALLEN, and MARGARET CHENEY, in their official capacities as commissioners of the Vermont Public Utility Commission, Defendants.	)	Case No. 2:23-cv-691

ORDER ON MOTION TO DISMISS
(Doc. 11)

The above-captioned plaintiffs—all companies involved in the development of solar power generation facilities—have sued the three commissioners of Vermont's Public Utility Commission (PUC)[2] in their official capacities, alleging that section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. §§ 2601–2645, preempts the 2.2 megawatt (MW) plant size limit in Vermont's Standard Offer program for purchasing renewable energy, 30 V.S.A. § 8005a, and further preempts PUC orders requiring aggregation of the sizes of separate "qualifying facilities" (QFs) in calculating the 2.2 MW limit. (*See* Doc. 1.) Plaintiffs

[1] Edward McNamara succeeded Anthony Z. Roisman as Chair of the Public Utility Commission in 2024, shortly after Plaintiffs filed their Complaint. Insofar as Roisman is being sued in his official capacity, Chair McNamara is automatically substituted as a party under Fed. R. Civ. P. 25(d).

[2] The PUC was called the Public Service Board (PSB) until 2017. *See* 2017, No. 53, § 9 ("Name Change to Public Utility Commission"). Although some events relevant to this case occurred before 2017, the court refers to the state regulator as the PUC throughout for simplicity.

also contend that Vermont's regulatory process "bars the use of the FERC-mandated least-cost interconnection cost responsibility for a QF's interconnection cost." (*See id.* ¶¶ 22, 25.) The Complaint asserts a "preemption" count (Count I) and a claim under 42 U.S.C. § 1983 for "unlawful taking" in violation of the Takings Clause of the Fifth Amendment (Count II). (*Id.* ¶¶ 62–83.) Plaintiffs seek declaratory and injunctive relief.

Defendants have moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(1) and 12(b)(6), arguing that sovereign immunity bars Plaintiffs' takings claim to the extent Plaintiffs seek money damages, and that Plaintiffs have failed to state either a preemption or a takings claim. (Doc. 11.) After several extensions of time, briefing on the motion to dismiss is now complete. (*See* Docs. 21, 26.) The court has also considered Plaintiffs' supplemental filing (Doc. 27) asserting that *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), constitutes relevant "additional authority."

Background

Similar to Allco Finance Ltd.'s pleadings in another case pending in this court against the PUC Commissioners, the Complaint in this case is "a lengthy document that melds legal argument and historical background, provides legal citations and analysis, and addresses key factual issues through conclusory statements of law." *Allco Finance Ltd. v. Roisman*, No. 20-cv-103, 2022 WL 2528328, at *2 (D. Vt. July 7, 2022), *vacated and remanded on other grounds*, No. 22-2726, 2023 WL 4571965 (2d Cir. July 18, 2023) (summary order). However, in contrast to that case, Defendants here do not challenge the Complaint for failure to comply with Fed. R. Civ. P. 8.[3] Both the Complaint and Defendants' Motion to Dismiss present the legal and factual

[3] Even if Defendants had sought dismissal under Rule 8, the court would proceed on that issue as it did in that prior case and rule that further efforts to improve the Complaint "would not

background by first summarizing the federal and state statutory provisions, and then describing Plaintiffs' proposed Vermont solar developments and PUC decisions underlying this civil case. (*See* Doc. 1; Doc. 11.) The court does the same here.

I. Statutory Framework

Prior cases summarize the applicable federal and state statutory framework. *See, e.g.*, *Allco Renewable Energy Ltd. v. Volz*, No. 20-cv-34, 2021 WL 12310907, at *1–2 (D. Vt. Mar. 26, 2021) (Crawford, C.J.). The court reviews those basic outlines again here.

A. The Federal Power Act and PURPA

"The Federal Power Act ('FPA') gives the Federal Energy Regulatory Commission ('FERC') exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce." *Allco Finance Ltd. v. Klee*, 861 F.3d 82, 87 (2d Cir. 2017) (citing 16 U.S.C. § 824(b)(1) and *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016)). The FPA leaves it to the states to regulate retail sales of electricity, and that authority does not extend to wholesale electricity sales "unless Congress creates an exception to the FPA." *Id.* (citing 16 U.S.C. § 824(b)). "The Public Utility Regulatory Policies Act ('PURPA') contains such an exception, permitting states to foster electric generation by certain power production facilities ('qualifying facilities' or 'QFs') that have no more than 80 megawatts of capacity and use renewable generation technology." *Id.* (footnote omitted) (citing 16 U.S.C. § 824a-3). Thus, PURPA sets up "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory

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further the 'just, speedy, and inexpensive determination of [this] action.'" *Allco*, 2022 WL 2528328, at *2 (alteration in original; quoting Fed. R. Civ. P. 1).

programs, structured to meet their own particular needs." *FERC v. Mississippi*, 456 U.S. 742, 767 (1982) (quoting *Hodel v. Va. Surface Mining & Recl. Ass'n, Inc.*, 452 U.S. 264, 289 (1981)).

As relevant to this case, PURPA imposes the following requirements. One PURPA requirement—sometimes called the "must-take" provision—"requir[es] utilities to purchase power from QFs at the utilities' 'avoided costs,' which are the costs that the utility would have otherwise incurred in procuring the same quantity of electricity from another source." *Klee*, 861 F.3d at 87 (citing 16 U.S.C. § 824a-3(b)); *see also* 18 C.F.R. §§ 292.101(b)(6), 292.303(a). PURPA "also provides all QFs with a guaranteed right to sell their energy and capacity to electricity utilities at the utilities' avoided costs." *Id.* (citing 16 U.S.C. § 824a-3(a)); *see also* 18 C.F.R. § 292.304(b)(2). "QFs are guaranteed their choice of this 'avoided cost' rate as calculated either at the time of contracting or the time of delivery." *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 862 (9th Cir. 2019) (citing 18 C.F.R. § 292.304(d)(2)). Federal regulations also generally require electric utilities to "make such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales," 18 C.F.R. § 292.303(c)(1), and require QFs to pay "any interconnection costs which the State regulatory authority . . . may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics." *Id.* § 292.306(a).

B. Vermont Energy Statutes and Policies

The Complaint acknowledges that the PUC oversees "two types of interstate wholesale electricity programs with a QF—Vermont's Standard Offer program . . . and VPUC Rule 4.100, which is entitled Small Power Production and Cogeneration." (Doc. 1 ¶ 15.) The court briefly introduces each program here; additional relevant details are included as necessary in the analysis below.

1. Rule 4.100 – Vermont's "Must-Take Program" for Certain Renewable Energy Producers

Vermont law grants jurisdiction to the PUC "in all matters respecting . . . the sale to electric companies of electricity generated by facilities":

> (A) that produce electric energy solely by the use of biomass, waste, renewable resources, cogeneration, or any combination thereof; and
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> (B) that are owned by a person not primarily engaged in the generation or sale of electric power, excluding power derived from facilities described in subdivision (A) of this subdivision (8); and
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> (C) that have a power production capacity that, together with any other facilities located at the same site, is not greater than 80 megawatts.

30 V.S.A. § 209(a)(8). To implement § 209(a)(8), the PUC has exercised its rulemaking authority[4] to adopt Rule 4.100.

Rule 4.100 "applies to Vermont electric distribution utilities and to those Qualifying Facilities that fall within the definitions contained in 30 V.S.A. § 209(a)(8) or 18 C.F.R. Part 292." Vt. Admin. Code 18-1-10:4.102(A). The rule does not prohibit "voluntary contracts with terms different from the terms contained herein." *Id.* 18-1-10:4.102(B). The Rule applies "to all contracts and obligations formed pursuant to the provisions of 30 V.S.A. § 209(a)(8), 16 U.S.C. § 824a-3, and 18 C.F.R. Part 292, except standard-offer contracts formed pursuant to 30 V.S.A. §8005a." *Id.* 18-1-10:4.102(C).

2. The Standard Offer Program

In addition to the "must-take" program established by Rule 4.100 for QFs producing up to 80 megawatts, Vermont has enacted the "Standard Offer Program" for much smaller renewable energy facilities producing up to 2.2 megawatts. 30 V.S.A. § 8005a(a).

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[4] *See* 30 V.S.A. § 2(c) and 3 V.S.A. § 836.

> To be eligible for a standard offer under this section, a plant must constitute a qualifying small power production facility under 16 U.S.C. § 796(17)(C) and 18 C.F.R. part 292, must not be a net metering system under section 219a of this title, and must be a new standard offer plant. In this section, "new standard offer plant" means a renewable energy plant that is located in Vermont, that has a plant capacity of 2.2 MW or less, and that is commissioned on or after September 30, 2009.

Id. § 8005a(b). Vermont law defines a "plant" for purposes of the Standard Offer Program as:

> [A]n independent technical facility that generates electricity from renewable energy. A group of facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid. Common ownership, contiguity in time of construction, and proximity of facilities to each other shall be relevant to determining whether a group of facilities is part of the same project.

Id. § 8002(18). The Vermont Legislature added the final sentence of that definition in 2014. 2013, No. 99 (Adj. Sess.), § 3. Like Rule 4.100, the Standard Offer Program provides a mechanism for small scale renewable energy producers to compel traditional electrical utilities to purchase their output. The Standard Offer Program differs from Rule 4.100 in several important respects. The rate which participants receive for their electricity is market-based and not set by the PUC through administrative determination of avoided costs. Producers seeking to participate submit reverse auction bids notifying the administrator of the program of the lowest rate they will accept. The scale of the program is limited to a total of 127.5 megawatts of total capacity, rolled out over a 10-year period between 2009 and 2019 and closing when the program reaches the authorized capacity. 30 V.S.A. § 8005a. *See In re Programmatic Changes to Standard-Offer Program*, 2014 VT 29, 196 Vt. 175, 95 A.3d 999, superseded by statute as stated in *In re Portland Street Solar LLC*, 2021 VT 67, ¶ 20, 215 Vt. 394, 264 A.3d 872.

II. Plaintiffs and Their Proposed Solar Development

Allco Finance Limited ("Allco") is a Florida corporation that owns and operates certain small power production facilities, including Chelsea Solar, LLC and Apple Hill Solar, LLC.

(Doc. 1 ¶ 45.) Allco is the single member of both Chelsea Solar, LLC and Apple Hill Solar, LLC. (*Id.* ¶¶ 46–47.) Plaintiff's counsel, Thomas Melone, Esq., is Allco's indirect whole owner. *PLH Vineyard Sky LLC v. Vt. Pub. Util. Comm'n*, No. 23-cv-154, 2024 WL 1072017, at *1 (D. Vt. Mar. 12, 2024) (Sessions, J.).

A significant body of prior state and federal court decisions describes Plaintiffs' efforts to develop solar facilities on property in Bennington, Vermont.[5] Those efforts commenced in 2013 when Allco affiliate Ecos Energy LLC ("Ecos")[6] entered into a contract with VEPP, Inc. ("VEPP")—the PUC-appointed facilitator for the standard offer program[7]—to deliver electricity from solar photovoltaic QFs at a 27-acre parcel on Willow Road in Bennington. (Doc. 1-1.) The contract was for a facility at the "northerly" portion of the parcel, dubbed the "Bennington Solar Project." (*Id.* at 18.) The contract described the project as "a 2 MW AC solar photovoltaic generation facility." (*Id.*) Ecos also proposed another 2 MW solar project at the same parcel called the "Apple Hill Solar" project. *In re Programmatic Changes*, 2014 VT 29, ¶ 5.

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[5] *See, e.g.*, *In re Apple Hill Solar LLC*, 2019 VT 64, 211 Vt. 54, 219 A.3d 1295 (Robinson, J.); *Allco Renewable Energy Ltd. v. Volz*, No. 20-cv-34, 2021 WL 12310907 (D. Vt. Mar. 26, 2021) (Crawford, C.J.); *In re Chelsea Solar LLC*, 2021 VT 27, 214 Vt. 526, 254 A.3d 156 (Reiber, C.J.); *In re Investigation Pursuant to 30 V.S.A. §§ 30 and 209 into Whether the Petitioner Initiated Site Preparation at Apple Hill in Bennington*, 2021 VT 92, 216 Vt. 145, 274 A.3d 823 (Eaton, J.); *Allco Finance Ltd. v. Roisman*, No. 22-2726, 2023 WL 4571965 (2d Cir. July 18, 2023) (summary order); *In re Petition of Apple Hill Solar LLC*, 2023 VT 57, 311 A.3d 117 (Reiber, C.J.); *PLH Vineyard Sky LLC v. Vt. Pub. Util. Comm'n*, No. 23-cv-154, 2024 WL 1072017 (D. Vt. Mar. 12, 2024) (Sessions, J.); *Apple Hill Solar LLC v. Cheney*, No. 23-cv-644, 2024 WL 3925912 (D. Vt. Aug. 23, 2024) (Sessions, J.).

[6] Allco's publicly available website states that Ecos "is Allco's renewable energy development and services company that develops and operates distributed generation solar projects throughout the U.S." Ecos Energy, https://allcous.com/ecos-energy (last visited Oct. 2, 2024) [https://perma.cc/L3CG-F5RA]. This court noted in *Allco Renewable Energy Ltd. v. Kulkin*, No. 20-cv-44, 2020 WL 6397928, at *1 (D. Vt. Nov. 2, 2020) (Conroy, M.J.), that Ecos was Allco's agent for purposes of a property transaction in the mid-2010s.

[7] *See* 30 V.S.A. § 8005a(a); *see generally* VEPP, https://vermontstandardoffer.com/standard-offer (last visited Oct. 2, 2024) [https://perma.cc/CW47-63PK].

To proceed with its two projects, Ecos required a certificate of public good (CPG) from the PUC under 30 V.S.A. § 248. The PUC denied those § 248 applications in 2013, ruling that, "[w]hile the projects may be operationally independent, they are still being advanced by the same developer, located on the same parcel of land, and adjoining each other." *Programmatic Changes*, 2014 VT 29, ¶ 7 (alteration in original; quoting the PUC's decision). Ecos appealed the PUC's decision, and the Vermont Supreme Court reversed.

Analyzing the definition of a "plant" as it appeared at the time—before 2013, No. 99 (Adj. Sess.), § 3 added the final sentence of the definition as it currently appears at 30 V.S.A. § 8002(18)—the Supreme Court reasoned that "[u]nder the plain language of the statute . . . the Bennington and Apple Hill projects would qualify as 'independent technical facilities.'" *Programmatic Changes*, 2014 VT 29, ¶ 12 (quoting 30 V.S.A. § 8002(14) (current version at 30 V.S.A. § 8002(18))). The Court concluded that "[a]s independent plants, both should have been awarded standard-offer contracts . . . because they were the lowest and second-lowest priced projects, respectively." *Id.* With that favorable ruling in hand, the developer returned to the PUC seeking CPGs for both facilities. (*See* Doc. 1-2 (Ecos contract with VEPP for the Apple Hill project, effective May 12, 2014)); *see also In re Chelsea Solar LLC*, 2021 VT 27, ¶ 12, 214 Vt. 526, 254 A.3d 156. The subsequent regulatory and judicial processes can be organized based on the action with respect to each of the two proposed projects.

A. The Bennington Solar / Chelsea Solar / Willow Road Project

In February 2016, the PUC denied a CPG for the Bennington Solar Project—renamed the "Chelsea Solar" project—for "fail[ure] to satisfy several CPG factors." *Chelsea Solar*, 2021 VT 27, ¶ 12. In an amended petition for a "Willow Road Facility," the developer, Chelsea Solar, LLC, sought "to install and operate a 2.0-MW solar facility in approximately the same location

as the Chelsea Solar project." *Id.* The PUC denied the amended petition in June 2019, reasoning that "developer's proposals had significantly changed since 2013 and that Willow Road and Apple Hill were now one 'plant' given their use of common electrical infrastructure agreed to by a common developer as part of a common development scheme." *Id.* ¶ 13; (*see also* Doc. 1-4). On appeal, the Vermont Supreme Court discussed the language that 2013, No. 99 (Adj. Sess.), § 3 added to 30 V.S.A. § 8002's definition of a "plant," and affirmed the PUC's denial of a CPG based on its determination that the Willow Road and Apple Hill Facilities, as reconfigured, are a single "plant" under that definition. *Chelsea Solar*, 2021 VT 27, ¶ 40.

In January 2023, Chelsea Solar LLC filed a new petition with the PUC under 30 V.S.A. § 248 for a CPG authorizing installation and operation of a 2.0 MW solar electric generation facility on a 4.8-acre site on Willow Road in Bennington, Vermont. *Petition of Chelsea Solar LLC*, No. 23-0249-PET (Vt. Pub. Util. Comm'n Jan. 25, 2023), https://epuc.vermont.gov/?q=node/64/176951 [https://perma.cc/6CCQ-PMC6]. In April 2023, Chelsea Solar LLC filed a separate petition for extension of the standard-offer contract commissioning deadline milestone. *Petition of Chelsea Solar LLC*, No. 23-1138-PET (Vt. Pub. Util. Comm'n Apr. 13, 2023), https://epuc.vermont.gov/?q=node/64/178734 [https://perma.cc/NCT5-VKKN]. The PUC denied the latter petition, reasoning that the Vermont Supreme Court's decision in *Chelsea Solar*, 2021 VT 27, voided the standard-offer contract (including that contract's commissioning milestone). (*See* Doc. 1-3.) Meanwhile, the January 2023 petition for a CPG remains pending and proceedings are ongoing in the PUC.[8]

[8] Related to the January 2023 petition, Plaintiffs have sued the Town of Bennington, Vermont in this court on a variety of theories arising out of the Town selectboard's June 12, 2023 decision finding that the Chelsea Solar Project would not be on a "preferred site" as defined by the 2018 Energy Amendment to the Bennington Town Plan. *See* First Am. Compl., *PLH Vineyard Sky LLC v. Town of Bennington*, No. 23-cv-645 (D. Vt. Mar. 7, 2024), ECF No. 9. A

B. The Apple Hill Facility

In 2018, the PUC granted a CPG to Apple Hill Solar LLC ("Apple Hill") for construction and operation of a 2.0 MW solar facility. *Petition of Apple Hill Solar LLC*, No. 8454, 2018 WL 4696953 (Vt. Pub. Util. Comm'n Sept. 26, 2018). A group of neighbors appealed, and the Vermont Supreme Court reversed and remanded for further proceedings. *In re Apple Hill Solar LLC*, 2019 VT 64, ¶ 41, 211 Vt. 54, 219 A.3d 1295. After the remand, the PUC denied Apple Hill's request for a CPG and Apple Hill appealed. *In re Apple Hill Solar LLC*, 2021 VT 69, ¶ 1, 215 Vt. 523, 280 A.3d 44. In a 3–2 decision, the Vermont Supreme Court reversed and remanded "for the PUC to reassess petitioner's application without the conclusions that siting the facility in the Rural Conservation District would interfere with orderly development and cause an undue adverse aesthetic impact." *Id.* ¶ 67.

On remand, the PUC again denied Apple Hill's petition for a CPG. *Petition of Apple Hill Solar LLC*, No. 8454, 2022 WL 1908904 (Vt. Pub. Util. Comm'n May 16, 2022). Apple Hill appealed again, and the Vermont Supreme Court unanimously affirmed. *In re Petition of Apple Hill Solar LLC*, 2023 VT 57, 311 A.3d 117, *motion for reargument denied*, Dec. 12, 2023, *motion to stay mandate denied*, Dec. 19, 2023. Apple Hill filed a complaint in this court against PUC Commissioners Cheney and Roisman for alleged improper actions in the CPG process. *Apple Hill Solar LLC v. Cheney*, No. 23-cv-644, 2024 WL 3925912, at *1 (D. Vt. Aug. 23, 2024) (Sessions, J.). The court dismissed that action. *Id.* at *10.

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motion to dismiss is pending and the court has requested supplemental briefing on questions of abstention. No. 23-cv-645 (D. Vt. Sept. 13, 2024), ECF No. 24.

Rule 12(b) Standards

Rule 12(b)(1). Rule 12(b)(1) concerns dismissals for lack of subject-matter jurisdiction. "In resolving a motion to dismiss under Rule 12(b)(1), the district court must take all uncontroverted facts in the complaint (or petition) as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Collins v. United States*, 996 F.3d 102, 105 n.1 (2d Cir. 2021) (quoting *Fountain v. Karim*, 838 F.3d 129, 134 (2d Cir. 2016)).

Rule 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss for failure to state a claim, Plaintiffs' complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86, 93 (2d Cir. 2019) (internal quotation marks omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In evaluating Defendants' Rule 12(b)(6) motion, the court must "draw[] all reasonable inferences in favor of the plaintiff[s]." *Biocad JSC v. F. Hoffman-La Roche*, 942 F.3d 88, 93 (2d Cir. 2019). "Dismissal is appropriate when 'it is clear from the face of the complaint . . . that the plaintiff's claims are barred as a matter of law.'" *Id.* (alteration in original) (quoting *Parkcentral Glob. Hub Ltd. v. Porsche Auto Holdings SE*, 763 F.3d 198, 208–09 (2d Cir. 2014)).

Analysis

Defendants seek dismissal of the Complaint in its entirety, arguing that: (1) sovereign immunity bars the takings claim in Count II insofar as Plaintiffs are seeking to sue the PUC Commissioners in their official capacity for money damages; (2) former Chair Roisman should be dismissed from the action or substituted by his successor, Chair McNamara; and (3) Plaintiffs have failed to state a claim because PURPA does not preempt the Standard Offer Program and because Defendants' prior application of that program is not a taking even if preemption applies.

(*See* Doc. 11 at 2.) Plaintiffs oppose the motion (Doc. 21) and Defendants have filed a reply (Doc. 26).

I. Defendant Roisman

Defendants argue that, insofar as former Chair Roisman is being sued in his official capacity, he should be dismissed from the action or substituted by current Chair McNamara. (Doc. 11 at 15.) Plaintiffs represent that they have offered to substitute Chair McNamara for former Chair Roisman but that "Defendant[s] inexplicably refused." (Doc. 21 at 18.) Defendants' reply memorandum offers no response on this issue.

"Insofar as Roisman is being sued in his official capacity, he may be substituted as a party by his replacement, current PUC Chair Ed McNamara." *Apple Hill*, 2024 WL 3925912, at *5 (citing Fed. R. Civ. P. 25(d)). Rule 25(d) makes this substitution automatic. To the extent that Plaintiffs seek to retain Roisman as a defendant in his individual capacity, the court perceives no claim for money damages against him and, because Roisman is no longer a member of the PUC, he "is no longer able to provide the [non-monetary] relief requested by the Complaint." *Apple Hill*, 2024 WL 3925912, at *5. The court will dismiss the claims against Defendant Roisman in his official capacity and substitute Commissioner McNamara. *See id.* (same).

II. Sovereign Immunity

"A motion for dismissal based on sovereign immunity is properly reviewed as a motion under Fed. R. Civ. P. 12(b)(1)." *Volz*, 2021 WL 12310907, at *5. Because Defendants' sovereign immunity argument arises from the immunity enjoyed by the states under the Eleventh Amendment, the court must address this Rule 12(b)(1) issue before the merits in the 12(b)(6) context. *See Butcher v. Wendt*, 975 F.3d 236, 242 (2d Cir. 2020) (courts cannot assume

"hypothetical jurisdiction" when "the potential lack of jurisdiction is a constitutional question" (quoting *Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 497 (2d Cir. 2002))); *cf. Springfield Hosp., Inc. v. Guzman*, 28 F.4th 403, 416 (2d Cir. 2022) ("When a jurisdictional issue is statutory in nature, we are not required to follow a strict order of operations but may instead proceed to dismiss the case on the merits rather than engage with the jurisdictional question . . . .").

Defendants argue that Vermont's sovereign immunity bars the takings claim in Count II "[t]o the extent Plaintiffs seek to sue the PUC Commissioners in their official capacity for money damages." (Doc. 11 at 12.) But Plaintiffs' Complaint does not expressly seek money damages, and Plaintiffs' opposition memorandum clarifies that the relief they are requesting is only "prospective declaratory and injunctive relief," thereby "side-stepping Eleventh Amendment issues." (Doc. 21 at 12.) Based on that clarification, the court DENIES the portion of Defendants' motion that seeks dismissal on sovereign immunity grounds. This ruling follows the decision of the Second Circuit in *Allco Finance Ltd. v. Roisman*, No. 22-2726, 2023 WL 4571965 (2d Cir. July 18, 2023) (summary order), in which the court ruled that similar claims seeking to enjoin alleged ongoing violations of federal law were not barred by the Eleventh Amendment.

III. Preemption (Count I)

A. *Allco*, 2023 WL 4571965, Did Not Resolve the Preemption Issue

As an initial matter, Plaintiffs assert that Defendants' arguments for dismissal of the preemption claim "are simply re-warmed versions of the arguments they made to the Second Circuit" in *Allco Finance Ltd. v. Roisman*, No. 22-2726, and that the Second Circuit had "rejected" those arguments. (Doc. 21 at 18.) Defendants disagree, arguing that the Second

Circuit's decision did not address the merits of the PURPA preemption issue, and instead focused only on "immunity and justiciability issues." (Doc. 26 at 5.)

The court agrees that the Second Circuit's July 2023 decision discussed only sovereign immunity, mootness, exhaustion, and standing. *See Allco*, 2023 WL 4571965, at *2–5. It is true that, in addition to arguments on those topics, the PUC Commissioner-appellees argued in their brief that Allco had failed to state a claim for preemption. Br. of Appellees, *Allco Finance Ltd. v. Roisman*, No. 22-2726, 2023 WL 1098018, at *51 (2d Cir. Jan. 24, 2023). And the Second Circuit wrote in its decision that it "considered Defendants' remaining arguments and [found] them to be without merit." *Allco*, 2023 WL 4571965, at *5.

Notwithstanding that general statement, the Second Circuit decision specifically states that "it is not clear from the facts available to us at this stage that the change in the [PURPA] regulations moots Plaintiffs' claims." *Id.* at *4. The Second Circuit thus determined that the question of "[w]hether PURPA preempts Vermont's program, in light of the new regulations, is an issue to be considered on the merits." *Id.* The court concludes that this specific statement controls and indicates that the Second Circuit did not rule on the merits of the preemption issue in that appeal. Ruling here on that issue here is "consistent with" the Second Circuit's order remanding that case for further proceedings. *Id.* at *5.

B. Plaintiffs Fail to State a Plausible Preemption Claim

"Under the Supremacy Clause, 'the Laws of the United States' made 'in Pursuance' of the Constitution 'shall be the supreme Law of the Land . . . . [the] Laws of any State to the Contrary notwithstanding.'" *Buono v. Tyco Fire Prods., LP*, 78 F.4th 490, 495 (2d Cir. 2023) (alterations in original; quoting U.S. Const. art. VI, cl. 2). "A corollary of the Supremacy Clause is the doctrine of preemption, under which Congress may 'exercise its constitutionally delegated

authority to set aside the laws of a State.'" *Id.* (quoting *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 30 (1996)). Plaintiffs do not rely on the "complete" (or "jurisdictional") category of preemption, but instead assert that the "ordinary" (or "defensive") category applies in this case. *See Sullivan v. Am. Airlines, Inc.*, 424 F.3d 267, 272 (2d Cir. 2005) (discussing the distinction between complete and ordinary preemption).

> Courts generally recognize three types of "ordinary" preemption:
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> (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, 'where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law'; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

Gazzola v. Hochul, 88 F.4th 186, 198 (2d Cir. 2023) (per curiam) (quoting *New York SMSA Ltd. P'Ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010)). These categories are not, however, "rigidly distinct." *Buono*, 78 F.4th at 495 (quoting *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 n.6 (2000)). The court is mindful that, because Plaintiffs' preemption claim arises in the context of PURPA's framework of cooperative federalism, it is essential "not to confuse the 'congressionally designed interplay between state and federal regulation' . . . for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 167 (2016) (Sotomayor, J., concurring) (quoting *Nw. Cent. Pipeline Corp. v. State Corp., Comm'n of Kan.*, 489 U.S. 493, 518 (1989)).

Defendants argue that "the Standard Offer Program and the provisions at issue in this action do not present an obstacle to PURPA because no generator is required to participate in the Standard Offer Program in order to receive the treatment that PURPA guarantees." (Doc. 11 at 18.) In Defendants' view, the Standard Offer Program is "merely an alternative" to Vermont's

implementation of PURPA through Rule 4.100. (*Id.*) And Defendants assert that "Plaintiffs make no allegation that Rule 4.100 violates PURPA." (*Id.* at 19.)

In opposition, Plaintiffs argue that "Rule 4.100 suffers from multiple fatal deficiencies" (Doc. 21 at 22) and further contend that "even if Rule 4.100 did fully satisfy PUC's obligations under PURPA, the Standard Offer's volumetric caps, the aggregation rule and redundant transmission requirements would still be preempted because they conflict with PURPA and would be field and conflict preempted." (*Id.* at 25.) In reply, Defendants maintain that Rule 4.100 is a valid implementation of PURPA and that "[t]he availability of Rule 4.100 means that the Standard Offer Program need not comply with PURPA." (Doc. 26 at 5–10.) Defendants' argument relies on the premise that Rule 4.100 complies with PURPA, so the court begins with that issue.

Before reaching the merits, the court considers whether it is appropriate to rule on these issues in the context of a motion to dismiss. The court concludes that it is. Certainly the parties address the alleged violation of PURPA in their motion papers. Whether Rule 4.100 violates PURPA is a legal issue that does not depend on disputed factual allegations in the complaint. Similarly, whether principles of preemption bar the state legislature and the PUC from enacting the Standard Offer program is also a legal issue. Defendants do not object to the court's consideration of the Plaintiffs' extensive submission of exhibits. While these illuminate and develop Plaintiffs' legal arguments, they do not alter the legal contentions in the complaint itself. The court is satisfied that the complaint and the additional materials provide an undisputed factual record providing a sufficient basis for the court to rule on the merits of the preemption issue at this stage of the case.

1. Rule 4.100 Complies with PURPA

Rule 4.100 is a "unique" implementation of PURPA. *Volz*, 2021 WL 12310907, at *2 (quoting *In re Petition of GMPSolar-Richmond, LLC*, 2017 VT 108, ¶ 22, 206 Vt. 220, 179 A.3d 1232). Vermont has long "created statewide rates based on the combined avoided costs of all utilities in Vermont." *In re Investigation of Nov. 15, 1990 Rate Design Filing of Vt. Power Exch.*, 159 Vt. 168, 171 617 A.2d 418, 419 (1992). This practice of creating a state-wide composite rate differs from the FERC regulations governing "rates for purchase" by utilities set by 18 C.F.R. § 292.304(e). Despite this difference, "FERC has found the Rule 4.100 program to be consistent with PURPA." *Volz*, 2021 WL 12310907, at *2 (citing *Otter Creek Solar LLC*, 143 FERC ¶ 61,282, 62,969 (2013), *recons. denied*, 146 FERC ¶ 61,192 (2014)). Plaintiffs contend here that Rule 4.100 does not comply with PURPA for four reasons.[9] The court considers those reasons next.

a. Seven-Year Term for Standard Power Purchase Contracts

Rule 4.104 is entitled "Utility Purchase of Qualifying Facility Output" and includes the following provision:

> A Qualifying Facility may elect to sell its generation output to an Interconnecting Utility under one of the following arrangements:
>
> 1. A standard power purchase contract not to exceed seven years based on as-delivered rates (an "as-delivered contract");
>
> 2. A standard-power purchase contract for a term of seven years based on time-of-obligation Rates (a "time-of-obligation contract"); or

[9] In support of their arguments that Rule 4.100 does not comply with PURPA, Plaintiffs rely on the declarations of Thomas Melone and Ecos Chief Operating Officer Christopher Little. (*See* Doc. 21 at 20; Docs. 21-9, 21-10.) The court can take notice that those declarations were filed in No. 20-cv-103, but the court cannot consider the truth of any statements or assertions in those declarations without converting Defendants' Rule 12(b) motion into a motion for summary judgment. *See* Fed. R. Civ. P. 12(d).

> 3. A negotiated power purchase contract executed between the Qualifying Facility and the Interconnecting Utility.

Vt. Admin. Code 18-1-10:4.104(B). Citing *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861, 865 (9th Cir. 2019), Plaintiffs assert that the seven-year term in Rule 4.104(B) is an unlawful "cap." (Doc. 21 at 22.) Defendants maintain that Plaintiffs' argument on this point "conflates two very different concepts—a cap on energy or capacity that may be sold by a QF, and a temporal contract term that limits the duration of a contract." (Doc. 26 at 10.)

The court agrees with Defendants on this issue. As Rule 4.104 recognizes, "[a]n Interconnecting Utility must purchase the generation output of a Qualifying Facility, to the extent required by 18 C.F.R. § 292.303(a)." Vt. Admin. Code 18-1-10:4.104(A). Thus a "cap on the amount of energy utilities must purchase from QFs is impermissible under PURPA's must-take provision." *Winding Creek*, 932 F.3d at 865. But Plaintiffs cite no authority—and the court has found none—stating that a seven-year contract term under Rule 4.104(B)(1) or (B)(2) constitutes a cap on the amount of energy that utilities must purchase from QFs. Seven years is the "cap" on the length of the contract term under Rule 4.104(B)(1) and (B)(2), but, as Defendants point out, "[w]hen a QF's seven-year contract approaches conclusion, there is nothing preventing the QF from simply entering a new seven-year contract." (Doc. 26 at 10.)

Plaintiffs assert that the seven-year contract term means that the contract pricing will "reset" every seven years, "thus preventing a generator from obtaining the forecasted rate required by FERC's regulations, and which is necessary to finance a project, frustrating PURPA's purpose." (Doc. 21 at 22.) Defendants maintain that "Plaintiffs' preference for even greater advance notice of rates in the future with a 25-year contract is not required by PURPA." (Doc. 26 at 10.) The court agrees that Plaintiffs have cited no authority requiring 25-year contracts.

At most, Plaintiffs have cited FERC's statement that "in order to be able to evaluate the financial feasibility of a . . . small power production facility, an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility." Order No. 69, 45 Fed. Reg. 12214, 12218 (Feb. 25, 1980). The court is not persuaded that the possibility of different pricing after the conclusion of a seven-year contract is inconsistent with Order No. 69's expectation of "reasonable certainty" for investors. Plaintiffs have cited no authority interpreting Order No. 69 that way.

Plaintiffs also cite a more recent FERC statement that the Commission has "consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *JD Wind 1, LLC*, 130 FERC ¶ 61,127 (Feb. 19, 2010). But that general statement affirming a right to "long-term" contracts does not specify that only 25-year contracts are sufficiently "long-term." To the contrary, FERC has expressly stated that the regulations "do not . . . specify a particular number of years for such legally enforceable obligations." *Windham Solar LLC*, 157 FERC ¶ 61,134 n.13 (Nov. 22, 2016). The court rejects Plaintiffs' challenge to the seven-year contract terms in Rule 4.104.

b. Energy Rate as a Function of LMP

It is undisputed that PURPA requires electric utilities to purchase the energy and capacity from QFs at rates set at the utility's "avoided cost." Plaintiffs' remaining three arguments against Rule 4.100 are assertions that Rule 4.100's pricing scheme does not provide QFs with the "avoided cost" rate to which they are entitled under PURPA. The court considers these arguments in turn.

First, Plaintiffs argue that the time-of-obligation rates under Vt. Admin. Code 18-1-10:4.104(E)(2) and 4.109(B) are improperly a function of the "locational marginal price" ("LMP").[10] According to Plaintiffs, this is unlawful under FERC regulations because "LMP prices are not a true measure of the long-term avoided costs of incumbent utilities" due to "certain practices" that "artificially depress LMP prices." (Doc. 21 at 23.) Plaintiffs concede that FERC's current regulations establish "a rebuttable presumption that a state regulatory authority . . . may use a Locational Marginal Price as a rate for as-available qualifying facility energy sales to electric utilities located in a market defined in § 292.309(e), (f), or (g)." 18 C.F.R. § 292.304(b)(6). But Plaintiffs assert that this presumption applies only to *as-available* QF arrangements, not *time-of-obligation* rates. (Doc. 21 at 23.) Citing a recent FERC order discussing "LMP as a Permissible Rate for Certain As-Available Avoided Cost Rates, 172 FERC ¶ 61,041, 61,214 (July 16, 2020), Defendants maintain that "the actual costs that utilities face for energy are determined by the market, and the LMP represents the market price for energy." (Doc. 26 at 8.)

Like 18 C.F.R. § 292.304(b)(6), the July 2020 FERC ruling discusses using LMP only in connection with as-available rates, not time-of-obligation rates. Those authorities, therefore, do not necessarily approve the use of LMP for calculating time-of-obligation rates. On the other hand, Vermont's regulations allow QFs seeking time-of-obligation rates to elect "either standard rates or index rates." Vt. Admin. Code 18-1-10:4.104(E)(2). The index rates are a function of

[10] The regulations define LMP in pertinent part as "the clearing price for energy in the day-ahead or real-time Energy Market that is determined for sub-hourly, hourly, monthly, and yearly intervals at ISO-NE delivery nodes, zones, and hubs." Vt. Admin. Code 18-1-10:4.103(A)(17). "ISO-NE" means ISO New England, Inc., *id.* § 4.103(A)(13), and "Energy Market" means "the bid-based energy market administered by ISO-NE where market participants purchase and sell electric energy," including "both a day-ahead market and a real-time market." *Id.* § 4.103(A)(10).

LMP. *See id.* § 104(E)(2)(b) (index rates for load reducers is "MA Forward Price" multiplied by "(VT LMP/MA LMP)"). But the standard rates are "based on the Interconnecting Utility's Avoided Costs for energy, as provided pursuant to Paragraph 4.109 and after consideration of the factors set forth in 18 C.F.R. § 292.304(e)." *Id.* § 104(E)(2)(a). Nothing in the description of the standard rates indicates that LMP is used to calculate those rates. Therefore, QFs that object to the use of LMP in the time-of-obligation rate calculation can elect a standard rate.

c. Variable Rate for Capacity Payments

Second, Plaintiffs assert that Rule 4.100 improperly provides a "variable" rate rather than "a time-of-obligation forecasted rate for capacity." (Doc. 21 at 23.) In support, Plaintiffs rely on the April 2024 declaration of Ecos Chief Operating Officer Christopher Little. (Doc. 21-9.) Defendants do not challenge that declaration as impermissible for purposes of a Rule 12(b) analysis. *See* Fed. R. Civ. P. 12(d). In any case, the court concludes that Mr. Little's declaration does not affect the analysis on this issue.

Rule 4.100 provides that, for time-of-obligation contracts, capacity payments made to QFs that are "load reducers"[11] are "based on the value of the Qualifying Facility's output, if any, during the annual maximum hourly peak load for the ISO-NE system used to calculate the Interconnecting Utility's capacity load obligation." Vt. Admin. Code 18-1-10:4.104(F)(2)(b). Plaintiffs assert that "[b]ecause the annual maximum hourly peak in ISO-New England varies from year to year, the compensation provided under [Rule 4.100] is variable and is not a forecasted rate." (Doc. 21 at 23–24.) The court accepts that the annual maximum hourly peak in

[11] The regulations define a "load reducer" as "a generation resource that delivers electricity directly to an Interconnecting Utility without using the transmission system or another Interconnecting Utility's distribution system; that is not registered with ISO-NE; and that does not report its output to ISO-NE." Vt. Admin. Code 18-1-10:4.103(16). There appears to be no dispute that Plaintiffs' proposed solar facilities meet these requirements.

ISO-NE varies from year to year. But that does not make the capacity rate under Vt. Admin. Code 18-1-10:4.104(F)(2)(b) a "variable" rate. To the contrary, Rule 4.104(F)(2) specifically states that "[r]ates for capacity shall be determined at the start of the contract period and remain unchanged over the term of the time-of-obligation contract." The court rejects Plaintiffs' argument to the contrary.

d. Compensation for Network Service Costs, Ancillary Services, and Avoidable REC Requirements

Finally, Plaintiffs assert that Rule 4.100 "fails to provide compensation equal to avoided costs (forecasted or time-of-delivery) for [i] ISO-New England avoided regional network service costs, [ii] local network service costs, [iii] ancillary services, and [iv] avoided renewable energy credit [REC] requirements from a reduced load." (Doc. 21 at 24.) Defendants maintain that PURPA contains "no requirement that the specific factors described by Plaintiffs be included in an avoided cost rate." (Doc. 26 at 9–10.)

In support of their contention that PURPA requires compensation for factors [i]–[iv], Plaintiffs cite *Windham Solar LLC*, 156 FERC ¶ 61,042 (July 21, 2016), and *Windham Solar LLC*, 157 FERC ¶ 61,134 (Nov. 22, 2016). But neither of those orders support Plaintiffs' position. Regarding RECs, the July 2016 order states that "avoided cost rates are, in fact, compensation just for energy and capacity"—i.e., the rates do not include environmental attributes that are accounted for in a REC. 156 FERC ¶ 61,042. And while the November 2016 order states that the regulations "allow state regulatory authorities to consider a number of factors in establishing an avoided cost rate," 157 FERC ¶ 61,134, that order does not state that the rate must account for any of the other costs that Plaintiffs have listed.

2. The Standard Offer Program Need Not Comply with PURPA

Because the court rejects Plaintiffs' arguments that Rule 4.100 violates PURPA, it remains to consider the effect of that PURPA-compliant program on the preemption question as to the purportedly non-compliant Standard Offer program.[12] Based on their contention that Rule 4.100 complies with PURPA, Defendants maintain that Plaintiffs' "failure to allege that Vermont does not offer any type of PURPA-compliant program is fatal to Plaintiffs' preemption claim." (Doc. 11 at 19.) Using the language of "field" preemption, Plaintiffs insist that "[t]here is no room in the statutory scheme for 'alternative' state regulation of wholesale sales that do not comply with PURPA." (Doc. 21 at 25.) Defendants disagree, asserting that "because Vermont's Rule 4.100 is compliant with PURPA, Vermont may go further by implementing programs such as the Standard Offer Program." (Doc. 26 at 7.)

The Supreme Court has addressed the potential conflict between requirements imposed by FERC and programs developed under state law to shape the generation and delivery of electricity. In *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150 (2016), the Court struck down a Maryland law that "disregard[ed] an interstate wholesale rate required by FERC." *Id.* at 166. The Court acknowledged that "[n]othing in this opinion should be read to foreclose Maryland and other State from encouraging production of new or clean generation through measures [that did not violate FERC requirement]." The *Hughes* case did not concern PURPA or the enactment of state law offering alternatives to the PURPA requirement that small-scale alternative energy producers have a market for their electricity.

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[12] Defendants assert that "the Standard Offer Program is harmonious with PURPA's objectives." (Doc. 11 at 17.) Defendants also argue that "[t]he availability of Rule 4.100 means that the Standard Offer Program need not comply with PURPA." (Doc. 26 at 5.) The court focuses here on the latter argument, assuming—without deciding—that the Standard Offer Program (standing alone) does not comply with PURPA.

On this issue, Defendants rely on the Ninth Circuit's statement agreeing that "FERC has concluded that an alternative program may exist if a state otherwise satisfies its obligations to QFs under PURPA." *Winding Creek*, 932 F.3d at 865 (citing *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 (May 8, 2015)). Plaintiffs do not dispute that FERC took that position in its May 2015 order. Indeed, that was FERC's position two years earlier when FERC stated that "[n]othing in the Commission's regulations limits the authority of either an electric utility or a QF to agree to rates for any purchases or terms or conditions relating to any purchases which differ from the rates or terms or conditions which would otherwise be required by the Commission's regulations." *Otter Creek Solar LLC*, 143 FERC ¶ 61,282, 62,969 & n.10 (June 27, 2013) (citing 18 C.F.R. § 292.301(b)).

But Plaintiffs assert that FERC's order in *Winding Creek* should receive no deference because the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), overruled the deference previously afforded to administrative agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Plaintiffs further contend that "[e]ven if *Chevron* had not been overruled, as the Ninth Circuit in *Winding Creek* stated, that FERC order is 'unreasoned' and not at all persuasive." (Doc. 21 at 21.) The court considers these arguments in turn.

a. *Loper Bright*

In *Loper Bright*, the Supreme Court overruled *Chevron* and held that "courts need not and under the APA [Administrative Procedure Act, 5 U.S.C. § 551 et seq.] may not defer to an agency interpretation of the law simply because a statute is ambiguous." 144 S. Ct. at 2273. But here, FERC's June 2013 order in *Otter Creek* and its May 2015 order in *Winding Creek* did not purport to interpret a statute that is ambiguous in any relevant respect. The *Otter Creek* order

cited only FERC regulations—not any statute—for the proposition that QFs can agree to rates, terms, and conditions that differ from those required under FERC's regulations implementing PURPA. *Otter Creek*, 143 FERC ¶ 61,282, 62,969 & n.10 (citing 18 C.F.R. § 292.301(b)). And nothing in *Loper Bright* purports to disturb the decision in *Kisor v. Wilkie*, 588 U.S. 558 (2019), upholding the deference owed to agency interpretations of their own regulations.

The overarching statutory scheme grants FERC with broad authority to issue rules "as it determines necessary to encourage . . . small power production" with provisos that the rules must require electric utilities to offer to purchase electric energy from QFs at nondiscriminatory "just and reasonable" rates and that "[n]o such rule . . . shall provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(a), (b). Plaintiffs have identified nothing in the statutory scheme—and the court has not found anything—creating an ambiguity as to whether state utility regulators that offer a PURPA-complaint program can also offer voluntary, alternative programs. The broad statutory authorization in this area does not appear to raise any ambiguity relevant to the issues here.

At best, Plaintiffs appear to rely on the fact that PURPA is an exception to the FPA's general rule granting to FERC exclusive authority to regulate the sale of electric energy at wholesale in interstate commerce. Thus, in Plaintiffs' view, if any program administered by a state regulator is not PURPA-compliant, the program falls outside of PURPA's exception and infringes on FERC's exclusive authority under the FPA. Plaintiffs assert that states cannot "freely invade [FERC's] exclusive regulatory authority over wholesale sales (completely unbounded by any rules) simply because the State implements FERC's PURPA rules through a different program for some wholesale sales." (Doc. 27 at 1.)

The court disagrees because describing PURPA as an "exception" to the FPA does not answer the specific question here. And there is no invasion of FERC's authority where a state offers more than one program, at least one of which complies with PURPA, because by doing so the state ensures that PURPA's "minimum standards" are available to QFs. Meanwhile, FERC itself perceives no intrusion on its authority. *See infra*.

b. The Ninth Circuit's *Winding Creek* Decision

In *Winding Creek*, the Ninth Circuit considered PURPA as implemented by the California Public Utilities Commission ("CPUC"), which had established two programs regulating the terms under which electric utilities purchase power from QFs: (1) the Renewable Market Adjusting Tariff ("Re-MAT") program, and (2) the "Standard Contract." 932 F.3d at 863–64. The Ninth Circuit concluded that the Re-MAT program violates PURPA. *Id.* at 865. The Ninth Circuit also concluded that—even granting deference to FERC's interpretation of its regulations allowing "alternative" programs if the state otherwise satisfies its obligations to QFs—"the Standard Contract cannot save Re-MAT because the Standard Contract also violates PURPA." *Id.* The court explained that the Standard Contract improperly "fails to give QFs the option to calculate avoided cost at the time of contracting." *Id.*[13] Thus the court concluded that "[b]ecause neither option offered by the CPUC is PURPA-compliant, California's regulatory scheme is preempted by federal law." *Id.* at 865–66.

[13] Although Plaintiffs emphasize the *Winding Creek* court's statement that FERC had reached an "unreasoned" conclusion in prior agency decisions, the only conclusion that the Ninth Circuit described as "unreasoned" was the agency's conclusion that California's Standard Contract complies with PURPA. *Id.* at 865. The *Winding Creek* court's statement was not an indictment of FERC's interpretation of its regulations allowing "alternative" programs if the state otherwise satisfies its obligations to QFs.

Winding Creek is distinguishable because, unlike California's Standard Contract, Vermont's Rule 4.100 complies with PURPA. *See supra*. The availability of that PURPA-compliant program therefore raises an issue here that the *Winding Creek* court did not decide: can that PURPA-compliant program "save" an alternative program that is arguably not PURPA-compliant? FERC has answered that question in the affirmative. *Winding Creek*, 932 F.3d at 865 (citing *Winding Creek Solar LLC*, 151 FERC at ¶ 61,103). If that conclusion is based on regulations that are ambiguous, it would likely be entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). *See Winding Creek*, 932 F.3d at 865; *see also Kisor*, 588 U.S. at 563 (plurality opinion) (declining to overrule *Auer* deference).

Here, however, the court can discern no ambiguity in 18 C.F.R. § 292.301(b), which plainly states that "[n]othing in this subpart . . . [l]imits the authority of any electric utility or qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart." In the court's view, that pronouncement regarding the scope of the applicable regulations is unambiguous, and authorizes QFs to agree to rates, terms, or conditions that differ from those that would otherwise be required. Thus there is no reason to resort to *Auer* deference at all in this case. *See Kisor*, 588 U.S. at 574 (plurality opinion) ("First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous.").

IV. Takings (Count II)

For the reasons above, the court concludes that Plaintiffs have failed to state a preemption claim in Count I. Count II—Plaintiffs' claim under the Takings Clause—is entirely derivative of the preemption claim in Count I. (*See* Doc. 1 ¶¶ 78–79.) Defendants make that point in their

brief (Doc. 11 at 19) and Plaintiffs do not challenge it. Therefore, because Plaintiffs have failed to state a claim as to Count I, they have also failed to state a claim under Count II.

Furthermore, Plaintiffs have previously sought unsuccessfully to characterize the PUC's regulation of power production and sale as a "taking." This court has previously ruled that in the absence of a physical invasion of the site or a confiscatory regulation of Plaintiffs' business, the regulatory system developed by the Vermont legislature and the PUC do not reach the level of an unconstitutional "taking." *See PLH Vineyard Sky LLC v. Vt. Pub. Util. Comm'n*, No. 23-cv-154, 2024 WL 1072017 (D. Vt. Mar. 12, 2024), *reconsideration denied*, 2024 WL 4198455 (D. Vt. Sept. 16, 2024).

Conclusion

Defendants' Motion to Dismiss (Doc. 11) is GRANTED.

Dated at Burlington, in the District of Vermont, this 19th day of November, 2024.

/s/ Geoffrey W. Crawford
District Judge
United States District Court