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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WINDING CREEK SOLAR LLC,

Plaintiff,

vs.

MICHAEL PEEVEY, MICHAEL FLORIO, CATHERINE SANDOVAL, CARLA PETERMAN AND MICHAEL PICKER, in their official capacities as Commissioners of the California Public Utilities Commission,

Defendants.

Case No. 13-04934 JD

NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT COMMISSIONERS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: August 27, 2014
Time: 9:30 a.m.
Courtroom 11, 19th Floor

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NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that on August 27, 2014, at 9:30 a.m., or as soon thereafter as counsel may be heard by the above-entitled Court, located at Courtroom 11, 19th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable James Donato, defendant Commissioners of the California Public Utilities Commission ("CPUC"), in their official capacities ("Commissioners"), will move this Court under the Federal Rules of Civil Procedure ("FRCP"), Rules 12(b)(1) and 12(b)(6), for an order dismissing the Second Amended Complaint ("SAC") of Winding Creek Solar LLC ("Winding Creek").

The Commissioners seek dismissal of the SAC without leave to amend, and dismissal of the action with prejudice. This Motion is based on this Notice, the Memorandum of Points and Authorities, the oral argument of counsel, this Court's two previous orders, and such other documents or information as may come before the Court upon hearing of this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The SAC fails to cure the deficiencies that required dismissal of the prior complaints, and should be dismissed without further leave to amend. The SAC again challenges the CPUC's decisions regarding a renewable energy feed-in-tariff program (the "Re-MAT program"), but abandons Winding Creek's statutory claim for enforcement of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Instead, it alleges one claim, preemption, based on violation of the Supremacy Clause and 42 U.S.C. § 1983, and now seeks attorneys' fees under § 1988 in addition to equitable relief. The SAC also abandons any claims on behalf of facilities other than the 1.0 Megawatt ("MW") solar facility in Lodi, California ("Lodi facility"). The Lodi facility remains unbuilt. As the Court previously ruled, the Lodi facility thus is not a "qualifying small power production facility" as defined

by PURPA and Winding Creek is not a "qualifying small power producer." This means Winding Creek failed to satisfy the exhaustion requirement of PURPA, and Winding Creek lacks the statutory standing required by Congress.

There are additional grounds for dismissal. The SAC does not allege an injury-in-fact because PURPA does not "guarantee" a "long-run" avoided cost rate to qualifying facilities ("QFs") or the ability of a developer to obtain financing for projects. Moreover, Winding Creek's alleged inability to obtain financing based on the "current" Re-MAT price is the result of Winding Creek's own conduct, not the CPUC's. Indeed, Winding Creek admits that the Lodi facility could have entered into a Re-MAT contract at previously higher prices. The SAC also fails to state a claim because it alleges no violation of federal law by the CPUC, which has broad ratemaking discretion under PURPA. Moreover, a § 1983 claim may not be based on violation of a statute, like PURPA, which has its own remedial scheme, or the Supremacy Clause. The SAC should be dismissed without leave to amend.

II. STATEMENT OF ISSUES TO BE DECIDED

The principal issues to be decided are: (1) does the Court lack subject matter jurisdiction because Winding Creek failed to exhaust its administrative remedies or the SAC fails to allege any Article III injury; and (2) does the SAC fail to state claim because Winding Creek lacks statutory standing, and the SAC does not allege a violation of PURPA or 42 U.S.C. § 1983.

III. FACTUAL BACKGROUND

A. PURPA Regulatory Framework

As previously summarized, PURPA requires FERC, in consultation with the states, to adopt rules to encourage small power production, including rules requiring utilities to offer to purchase electricity from QFs. *See* 16 U.S.C. § 824a-3(a). State commissions implement FERC's regulations, and set the rates for utility purchases from QFs. *See* 16 U.S.C. § 824a-3(a)-(b), (f). This rate may not exceed the utility's "avoided" cost: the incremental cost to the utility of the electricity that otherwise would need to be purchased or

generated by the utility to serve retail customers. *Id.*; 18 C.F.R. § 292.101(b)(6) (1980). *See generally Indep. Energy Producers v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 850-52 (9th Cir. 1994) [hereinafter "*IEP*"].

The CPUC has "broad ratemaking authority under PURPA." *Id.* at 856; *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at P 24 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011) (FERC's regulations afford State commissions a "wide degree of latitude" in determining how to implement PURPA). If an implementation plan is consistent with federal law, FERC does not "second-guess" the State commission. *Id.* FERC's regulations also do not impose any mandatory requirements for avoided cost rates, or require a "long-run" avoided cost rate. *See* 18 C.F.R. § 292.304 (1980). FERC's regulations simply list a number of factors to be considered by a State commission, "to the extent practicable." *See id.* at § 292.304(e); *CPUC*, 133 FERC ¶ 61,059, at P 24. Setting avoided cost rates does not require mathematical precision or an exact correlation with actual costs. *See Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, p. 12,224 (1980) ("*Order 69*"). A State commission also has the discretion to determine what utility cost is being avoided based on utility procurement requirements imposed by the state. *CPUC*, 133 FERC ¶ 61, 059, at PP 26-30.

Section 210 of PURPA sets forth an "elaborate enforcement scheme" defining the roles of the state and federal district courts. *See Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); 16 U.S.C. § 824a-3(g)-(h). In enacting Section 210, Congress stated: "[T]he jurisdiction of the federal courts is limited by this section; review and enforcement is primarily in the state courts. Federal court review can occur in only limited instances described in this section." See H.R. Rep. No. 95-1750 (Conf. Rep.), reprinted in 1978 U.S.C.C.A.N. 7797, 1978 WL 8505, at *7817-18 (Oct.10, 1978) [hereinafter "*Conf. Report*"]. Section 210(h)(2)(B) allows a "qualifying small power producer" to bring an action in district court to enforce Section 210(f), but only after the party files an enforcement

petition with FERC, and FERC declines to take any action on the petition within 60 days. 16 U.S.C. § 824a-3(h)(2)(B). Section 210(h) allows for "injunctive or other relief as may be appropriate," but does not allow for attorneys' fees. *Id.*

B. CPUC Authority Over Utility Procurement

California law requires the CPUC to regulate utility procurement to ensure adequate, safe, and reliable electricity service. *See, e.g.*, Cal. Const., art. XII, §§ 5 & 6; Cal. Pub. Util. Code §§ 451, 454.5. The State has the power to require its regulated utilities to purchase electricity from certain types of generators, such as renewable resources. *See New York v. FERC*, 535 U.S. 1, 24 (2002). However, the CPUC may not set the wholesale price for utility purchases except in compliance with PURPA. *Cal. Pub. Utils. Comm'n*, 132 FERC ¶ 61,047, at PP 64-69, *clarified on reh'g by*, 133 FERC ¶ 61,059, at PP 26-31 (2010).

Independent of the obligations imposed by PURPA, in order to combat climate change and greenhouse gas emissions, California has imposed *additional* state requirements that utilities purchase electricity from renewable resources – including the renewable feed-in-tariff program Winding Creek attacks. *See, e.g.*, Cal. Pub. Util. Code §§ 399.11, 399.15, 399.20, 2840.[1] California has one of the most ambitious renewable energy standards in the country, and by December 31, 2020, 33% of utility purchases must be from renewable sources. *See* Cal. Pub. Util. Code § 399.15(b).[2]

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[1] A feed-in-tariff is a state law requirement that California's regulated utilities purchase electricity from specific types of renewable sources at a certain tariffed rate.

[2] As of 2012, 19.4% of PG&E procurement for retail customers was from renewable sources. *See* http://www.cpuc.ca.gov/PUC/energy/Renewables/compliance.htm. General information regarding the CPUC's renewable energy procurement programs is available at: http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm

C. CPUC PURPA Implementation

Since the early 1980's, the CPUC has approved standard PURPA contracts that utilities must offer to QFs. *See IEP*, 36 F.3d at 852. As Winding Creek acknowledges, for facilities the size of the Lodi facility (20 MW or less), the current standard offer contract has a price based on "SRAC" or short-run avoided cost. *See* SAC, ¶ 41; FAC ¶ 139; Dkt. No. 41; Cmplt., Dkt. No. 1, ¶ 64. The SRAC rate is based on a formula approved by the CPUC, and upheld by the California Courts of Appeal. *See* D. 10-12-035, 2010 WL 5650671, pp. 1, 7, 11-16 (Dec. 16, 2010); *So. Cal. Edison v. Cal. Pub. Utils. Comm'n,* 101 Cal. App. 4th 982, 987-88, 991-93 (2002). The CPUC also has approved negotiated bilateral contracts, feed-in tariffs, and utility competitive solicitations as means to implement PURPA. *See* D.10-12-035, 2010 WL 5650671, at 11. In addition, the CPUC has separate programs for eligible combined heat and power generators, and for retail net metering customers making sales to utilities of surplus electricity from on-site generators. *See* D.11-04-033, 2011 WL 1589687 (Apr. 14, 2011); D.11-06-016, 2011 WL 2587201 (June 9, 2011).

In D.07-07-027, the CPUC first established a feed-in-tariff program for certain small, strategically located renewable generators pursuant to California Public Utilities Code § 399.20. *See* 2007 WL 2229386 (July 26, 2007). In 2008 and 2011, the California legislature amended § 399.20. Among other things, these amendments require contracts of ten to twenty years at the "market price" as determined by the CPUC, and the tariff is available on a first-come, first-served basis until each utility meets its proportionate share of a state-wide cap of 750 MW. *See* Cal. Pub. Util. Code § 399.20(d)(1)-(3), (e).

The CPUC issued the "Re-MAT decisions" to address the 2008 and 2011 amendments to § 399.20: (1) D.12-05-035, 2012 WL 2049420 (May 24, 2012); (2) D.13-01-041, 2013 WL 458041 (Jan. 24, 2013); and (3) D.13-05-034, 2013 WL 2446732

(May 23, 2013).[3] D.12-05-035 requires that a generator be a QF in order to participate. D.12-05-035, p.105 nn. 83, 85; SAC, ¶ 47. The initial price for the Re-MAT program was based on the utilities' 2011 Renewable Auction Mechanism or "RAM." *See* D. 12-05-035, pp. 40-41; SAC, ¶ 58. The benchmark starting price is subject to an adjustment mechanism, up or down, depending on market response. *See* D.12-05-035, pp. 45-49. Re-MAT contracts are available to eligible generators up to 3 MW in size on a "first-come, first-served" basis up to a statewide maximum of 750 MW. *Id.* at 62-63, 76-78; SAC, ¶ 50.

D. The Court's Prior Orders

On February 10, 2014, the Court dismissed the Complaint, with leave to amend. *See* Dkt. No. 39. The Court determined, *inter alia*, that the Complaint did not allege actual injury to Winding Creek's unbuilt Lodi facility that was not contingent upon future events; and (2) Winding Creek lacked statutory standing under Section 210(h) as a "qualifying small power producer" because the Lodi facility was not yet producing energy. *See id.* at 6, 8-11. The Court quoted from FERC's disclaimer in FERC's Form 556 that self- certification does not constitute a determination of QF status by FERC. *See id*. at 10.

On June 11, 2014, the Court dismissed the FAC with leave to amend. *See* Dkt. No. 60. The Court determined that the FAC failed to comply with FRCP 8, and also failed to allege that Winding Creek had statutory or constitutional standing as the operator of the Bear Creek 1.5 MW solar facility in Lodi, California. *See id.* at 5-8. With respect to future amendment, the Court questioned: (1) "whether the facility's inability to get the specific contract terms it desires is a cognizable injury under Article III;" and (2) "whether a small

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[3] D.13-01-041 modified D.12-05-035. *See* 2013 WL 458041 (Jan. 24, 2013). The "conformed" D.12-05-035, reflecting modifications on rehearing, is included in the CPUC Appendix as Exhibit Q. CPUC citations are to this conformed decision. Winding Creek erroneously submitted the original decision in its Appendix to the SAC. D.13-05-034 granted in part and denied in part petitions for modification of D.12-05-035 and approved a standard form contract.

power production facility that is not yet producing any electric energy can be deemed a 'qualifying small power production facility' under PURPA." *Id.*

E. Relevant Allegations of the SAC

The SAC alleges that the "Re-MAT decisions" are preempted because these decisions: (1) limit the utilities' obligation to purchase electricity from QFs; and (2) set a purchase price that is "different than the utilities avoided cost." *See* SAC, ¶¶ 7-8. The SAC alleges that Winding Creek is a "qualifying small power producer" as the owner of the Lodi facility, which is a "qualifying small power production facility" because it meets the requirements of 18 C.F.R. § 292.203. *See id.* at ¶¶ 17-23. The SAC further alleges that Winding Creek satisfied PURPA's exhaustion requirement because a petition was filed on behalf of the Lodi facility. *See id.* at ¶ 24. The Lodi facility has not yet been constructed. *See id.* at ¶ 76.

Paragraphs 66-77 allege the injuries to be redressed. Paragraphs 68 and 69 allege that Winding Creek rejected long-term contracts offered by PG&E at $77.23 MW/h and $65.23 MW/h for the Lodi facility under the Re-MAT program. Winding Creek claims the contracts offered are lower than PG&E's "long-run" avoided costs, and Winding Creek has been denied the opportunity to enter into a contract on the terms required by federal law. *Id.* at ¶¶ 72-74, 97. Further, the current $65.23 MW/h price is "too low to enable Plaintiff to obtain the financing needed to construct the Lodi facility," and the "low pricing is . . . the only remaining barrier" to obtaining financing. *Id.* at ¶ 76. A favorable ruling is "substantially likely" to allow Winding Creek to obtain financing. SAC, ¶ 77.

IV. STANDARDS FOR MOTION TO DISMISS

In ruling on a motion to dismiss, the Court is not required to accept as true "conclusions, unwarranted deductions of fact or unreasonable inferences." *See Daniels-Hall v. Nat'l Educ. Ass'n,* 629 F.3d 992, 998 (9th Cir. 2010); *Telesaurus VPC, LLC v. Power,* 623 F.3d 998, 1003-05 (9th Cir. 2010). Winding Creek has the burden to establish subject matter jurisdiction, including Article III standing. *See Kokennen v. Guardian Life Ins. Co.*

of Am., 511 U.S. 375, 377 (1994). A Rule 12(b)(6) motion for failure to state a claim will be granted "where there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Rule 12(b)(6) also requires dismissal of a claim where a party lacks statutory standing. *See Vaughn v. Bay Envt'l. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). Leave to amend is futile where, after several opportunities to amend, the deficiencies remain, or allegation of other facts consistent with the challenged complaint will not cure the deficiencies. *See Warth v. Seldin*, 422 U.S. 490, 501-02 (1975); *Telesaurus*, 623 F.3d at 1003.

V. THE SAC SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND

A. Failure to Exhaust Administrative Remedies

The Court lacks subject matter jurisdiction because Winding Creek failed to comply with PURPA's administrative exhaustion requirement. *See Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002). PURPA's exhaustion requirement applies to preemption as well as statutory claims. *Id.* (cannot avoid PURPA's administrative exhaustion requirement simply by restating statutory claim under different heading).

A "qualifying small power producer" must file a petition for enforcement with the FERC before filing an action in federal district court. *See* 16 U.S.C. § 824a-3(h)(2)(B). A "qualifying small power producer" is the owner or operator of a "qualifying small power production facility." 16 U.S.C. § 796(17)(D). The SAC alleges that the exhaustion requirement is satisfied because Winding Creek petitioned the FERC as the owner of the Lodi facility, and the Lodi facility is a "qualifying small power production facility." *See* FAC, ¶¶ 23-24. However, the Lodi facility does not satisfy PURPA's definition of "qualifying small power production facility."

As noted in the June 11, 2014 Order: "[T]he relevant statutory framework resembles nested eggs." *See* Dkt. No. 60, p. 9; *see also* February 10, 2014 Order, Dkt. No. 39, pp. 10-11. Congress specifically defined a "small power production facility" in PURPA. *See* 16 U.S.C. § 796(17)(A)(i). In *Southern California Edison Co. v. FERC*, 195 F.3d 17, 23-27

(D.C. Cir. 1999) ("*SCE*"), the court determined that PURPA's definition of "small power production facility" is unambiguous, traditional rules of statutory construction support this conclusion, and the FERC has no authority to modify this definition in its regulations. Although *SCE* addressed different language of the definition of "small power production facility" regarding the "primary use" of alternative fuels as the means by which the facility produces electric energy, its analysis and holding are equally applicable here.

The starting point of the analysis is the text itself. *See id.* at 22; citing *Chevron, U.S.A., Inc. v. Natural Res. Defense Council,* 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter."). PURPA's definition of "small power production facility," uses the words a "facility . . . which produces electric energy." *See* 16 U.S.C. § 796(17)(A)(i). Congress did not use the words "proposed facility," "designed to produce" or "intended to produce." *See Banko v. Apple, Inc.,* 2013 WL 7394596, at *4 (N.D. Cal. Sept. 27, 2013) (Congress could have used other words, but chose not to do so).

PURPA also defines a "qualifying small power production facility" as "a small power production facility that the Commission determines, by rule, meets such requirements." *See* 16 U.S.C. § 796(17)(C). However, this does not create ambiguity or negate the requirement that the facility be a "small power production facility." Such an interpretation would "ignore the two separate definitions . . . that make 'qualifying small power production facilit[ies]' under paragraph (C) a subset of 'small power production facilit[ies]' defined in paragraphs (A) and (B)." *See SCE,* 195 F.3d at 25; *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at pp. 61,277-78 (1990); *see also Negrete-Ramirez v. Holder,* 741 F.3d 1047, 1053 (9th Cir. 2014) (nullification of language is contrary to fundamental principle of statutory construction); *Banko,* 2013 WL 7394596, at *4-5, citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word is superfluous, void, or insignificant.")

Moreover, although in § 796(17)(C) Congress delegated to FERC the authority to issue regulations regarding the requirements for a "qualifying small power production facility," Congress did not grant FERC the authority to modify the definition of "small power production facility." *See* 16 U.S.C. § 796(17)(C); *SCE,* 195 F.3d at 24, 26 (contrary interpretation would mean Congress intended to delegate authority to FERC so as to nullify specific proscriptions set by Congress and would allow FERC "'virtually limitless hegemony'" to define the facilities eligible for benefits under PURPA); *see also Elec. Power Ass'n v. FERC,* ___F.3d___, 2014 WL 2142113, at *6 (D.C. Cir. May 23, 2014) (FERC only has power conferred by Congress).

Even if FERC had the authority to do so, FERC's regulations do not change PURPA's definition of "small power production facility." *See SCE,* 195 F.3d at 27. FERC's regulations specifically provide that "terms defined in [PURPA] shall have the same meaning for purposes of this part as they have under PURPA, unless further defined in this part." *See* 18 C.F.R. § 292.101(a). FERC's regulations define "qualifying facility," as used in its regulations, as a "small power production facility that is a qualifying small power production facility under Subpart B of this part." *See id.* at § 292.101(b). FERC's regulations do not redefine "small power production facility" or eliminate the requirement that a small power production facility produce energy. *See id.* at § 292.202.

In sum, because the SAC alleges that the Lodi facility is not constructed, Winding Creek is not a "qualifying small power producer," and filing a petition at the FERC on behalf of the Lodi facility did not satisfy PURPA's administrative exhaustion requirement.

B. No Article III Injury

The SAC also fails to allege any Article III injury to Winding Creek as the owner of the Lodi facility. Winding Creek must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

No injury to a "legally protected interest" is alleged because the Lodi facility is not eligible for benefits under PURPA. *See Warth v. Seldin*, 422 U.S. at 500, 504, 509 (1975) (standing depends on source of claim asserted); *Bova v. City of Medford*, 564 F.3d 1093, 1096-97 (9th Cir. 2009) (no standing to challenge retirement benefits because plaintiffs not yet retired or denied benefits). PURPA's mandatory purchase obligation under Section 210(a)(1) only applies to utility purchases from "qualifying small power production facilities." *See* 16 U.S.C. § 824a-3(a)(1). Similarly, under FERC's regulations, only a "qualifying facility" is entitled to a "legally enforceable obligation." *See* 18 C.F.R. § 292.304(d). Again, the Lodi facility is not a "small power production facility," and thus is not a "qualifying small power production facility" under Section 210(a) or a "qualifying facility" under 18 C.F.R. § 292.203(a). *See* § V.A., *supra*.

Winding Creek claims injury because the Re-MAT pricing is not based on PG&E's "long-run avoided costs" ("LRAC"). *See* SAC, ¶ 73. But contrary to ¶ 97, federal law does not "guarantee" a contract based on LRAC. In fact, the term "long-run" rate or words to that effect are not used in 18 C.F.R. § 292.304(d) or anywhere in PURPA or FERC's regulations. Winding Creek's allegations in ¶ 37 regarding purported "industry" interpretation of 18 C.F.R. § 292.304(d) as requiring an LRAC rate have no legal effect, and also mischaracterize this regulation. As explained by FERC, § 292.304(d)(2) simply allows a QF to establish a fixed price at the outset of its obligation, or to receive the avoided cost at the time of delivery. *See Order 69*, 45 Fed. Reg. 12,214, at 12,224. Moreover, the CPUC has broad discretion in setting avoided cost rates. *See IEP*, 36 F. 3d at 856; *CPUC*, 133 FERC ¶ 61,059, at P 24; 18 C.F.R. § 292.304(e).

The SAC also alleges that Winding Creek has been injured because the "current" Re-MAT price of $65.23/MWh "is too low to enable Plaintiff to obtain financing." *See* SAC, ¶ 75. This, too, fails to allege any injury-in-fact. Whether Winding Creek can obtain

financing for the Lodi facility is not the test for avoided cost, and indeed, Winding Creek's costs are irrelevant. *See* 18 C.F.R. § 292.101(b)(6). PURPA was not intended to subsidize QFs or guarantee a profit. *See Conf. Rep.*, 1978 WL 8505, at *7831-32; *Greensboro Lumber Co. v. Ga. Power Co.*, 643 F. Supp. 1345, 1369 n.30, 1372 n.39 (N.D. Ga. 1986); *aff'd* 844 F.2d 1538 (11th Cir. 1988).

Allegations in the SAC and the FAC contradict Winding Creek's alleged inability to obtain financing, which is the result of Winding Creek's own business decisions or the actions of third parties, and not the conduct of the CPUC. *See Warth*, 422 U.S. at 505-09; *see also Huey v. Honeywell, Inc.*, 82 F.3d 327, 333 (9th Cir. 1996) (allegations in pleadings superseded by amendment are admissions). Paragraph 68 of the SAC alleges that in March 2014, Winding Creek declined a Re-MAT contract with PG&E at the previous rate of $77.23/MWh, but the SAC is silent as to whether that price would have allowed financing for the Lodi facility. Previously, the FAC, ¶ 158, alleged that "if it is shown that the [original Re-MAT starting price of] $89.23/MWh was a proper rate, Plaintiff's projects would have entered into a PPA [contract] at that rate." Accordingly, the reasonable inference is that Winding Creek could have obtained financing based on the earlier program prices, but elected not to participate. *See Telesaurus*, 623 F.3d at 1004-05 (court is not required to accept as true unreasonable inferences or unsupported conclusions). In addition, any inference that financing is not feasible because the current price is too low is not reasonable based on the allegations that the Re-MAT program is "oversubscribed," even as the price decreased. *See* SAC, ¶¶ 7, 53.

The SAC also alleges that the CPUC has approved a standard offer contract using an SRAC avoided cost rate. *See* SAC, ¶ 41, *see also* FAC, ¶ 139; Cmplt., ¶ 64. Any inference that the SRAC rate does not allow financing is unreasonable, as the CPUC's SRAC formula has been used since the 1980's. *So. Cal. Edison*, 101 Cal. App. 4th at 987-88. Finally, the allegation in ¶ 77 that a favorable ruling will make it "substantially likely" that Winding Creek could obtain financing for the Lodi facility is pure speculation and it is equally

plausible that Winding Creek would be denied financing for independent reasons. *See Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 42-46 (1976); *Warth*, 422 U.S. at 505-09. In sum, the SAC fails to injury-in-fact caused by the CPUC.

C. Failure to State a Claim

1. No statutory standing

Congress intended to restrict the jurisdiction of the federal district courts, and Section 210(h)(2)(B) restricts standing to "qualifying small power producers." *See Conf. Rep.*, 1978 WL 8505, at *7817-18; 16 U.S.C. § 824a-3(h)(2)(B).[4] PURPA's statutory standing requirement applies regardless of whether Winding Creek's claim is alleged as preemption or as a statutory enforcement claim. *See Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 344-48 (1984) (allowing challenge to administrative action by parties not defined by the statute would disrupt the statute's complex administrative scheme, and allow parties "a convenient device" to evade statutory requirements); *United Dairymen of Ariz. v. Veneman*, 279 F.3d 1160, 1163-66 (9th Cir. 2002) (same); *cf. Niagara Mohawk*, 306 F.2d at 1270 (PURPA's statutory exhaustion requirement applies to preemption claim). As demonstrated above in § V.A., *supra*, the SAC establishes that Winding Creek is *not* a "qualifying small power producer." Accordingly, Winding Creek has no statutory standing to bring a claim for preemption. *See also Mid-South Cogeneration, Inc. v. Tenn. Valley Auth.*, 926 F. Supp. 1327, 1336-38 (E.D. Tenn. 1996) (facility has no claim under PURPA if it was not ready, willing, and able to sell electric energy); *cf. Banko*, 2013 WL 7394596, at * 5 (claim dismissed where plaintiff failed to satisfy statute's definition of "whistleblower").

[4] In contrast to Section 210(h), Section 210(g)(2) of PURPA allows "any person" to bring an action in state court to enforce State commission requirements under PURPA. *See* 16 U.S.C. § 824a-3(g)(2).

2. No violation of PURPA

Winding Creek's preemption theory is: (1) the Re-MAT program unlawfully sets the avoided cost price because a market-based price reflects a QF's costs (SAC, ¶¶ 65, 86- 88, 95); and (2) the 750 MW limit is unlawful because the utility purchase obligation is mandatory (¶ 85). These allegations fail as a matter of law. The starting Re-MAT price was based on the average weighted price from the utilities' RAM auctions in 2011. *See* SAC, ¶ 58; D.12-10-035, p. 44. Avoided cost rates may be based on market-based rates. *See Revised Regulations Governing Small Power Production and Cogeneration Facilities,* 114 FERC ¶ 61,102, at P 99 (2006); *N. Little Rock Cogeneration v. Entergy Serv.*, 72 FERC ¶ 61,263, at pp. 62,173-74 (1995). The CPUC also has discretion to determine the purchases avoided based on State procurement requirements, such as a feed-in-tariff program. *See CPUC,* 133 FERC ¶ 61,059, at 26-30.

The Re-MAT program's 750 MW limit also does not violate federal law. Winding Creek alleges that the CPUC also has approved an "all-source" standard offer contract with a rate based on short-run avoided cost or SRAC. *See* Cmplt., ¶ 64; FAC, ¶ 139; SAC, ¶ 41. Winding Creek does not challenge this SRAC contract, and the California Court of Appeal has upheld the CPUC's SRAC formula. *See So. Cal. Edison,* 101 Cal. App. 4th at 991-93; *see also So. Cal. Edison Co.,* 143 FERC ¶ 61,122, at P 18 (2013) (SRAC contract approved pursuant to CPUC implementation of PURPA). Indeed, given the availability of a mandatory QF program, the FERC rejected Winding Creek's substantially identical challenge to Vermont's feed-in tariff as not allowing a "long-run" avoided cost rate:

> The standard offer SPEED program is an optional program available to certain small renewable QFs. QFs also may participate in the Vermont Commission's longstanding Rule 4.100 program. The Vermont Commission's Rule 4.100 program is the Vermont Commission's implementation of PURPA and Rule 4.100 has been found by the Commission to be consistent with PURPA. In Vermont, QFs thus still have the option to participate in a program that has been found consistent with PURPA. Those Vermont QFs that choose to

> participate in the SPEED program are agreeing to the rates that result from that program . . . .

Otter Creek Solar LLC, 143 FERC ¶ 61,282 (2013), *reh'g denied*, 146 FERC ¶ 61,192 (2014).

3. No § 1983 claim

There is no mention of 42 U.S.C. § 1983 in the preemption claim, other than the caption and a reference to attorneys' fees in the Prayer for Relief. *See* SAC, p. 24. However, any claim under § 1983 fails for three reasons. First, a § 1983 claim requires an "enforceable" statutory right. *See Alliance of Nonprofits for Ins., Risk Retention Group v. Kipper*, 712 F.3d 1316, 1325-27 (9th Cir. 2013). As demonstrated above, the Lodi facility has no enforceable rights under PURPA. Second, a § 1983 claim cannot be based on denial of rights under a federal statute, like PURPA, that has a specific remedial scheme because there exists no private right of action other than as expressly authorized by statute. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121- 22 (2005); *Buckley v. City of Redding*, 66 F.3d 188, 190-91 (9th Cir. 1995); *N. Am. Natural Res. v. Strand*, 73 F. Supp. 2d 804, 810 (W.D. Mich. 1999) (no PURPA claim under §1983), *vacated on other grounds*, 252 F.3d 808, 816 (6th Cir. 2001); *see also Mun. Elec. Utils. Ass'n v. Conable*, 577 F. Supp. 158, 164 (D.D.C. 1983) (no § 1983 claim based on the Federal Power Act). Third, the Supremacy Clause cannot be the basis of a § 1983 claim. *See Kipper*, 741 F.3d at 1325.

VI. CONCLUSION

Plaintiff's third attempt is as deficient as the prior complaints, despite repeated and specific guidance from this Court. Further amendment is futile, and the SAC should be dismissed without leave to amend.

Dated: July 9, 2014

Respectfully submitted,

By: /s/ ELIZABETH M. MCQUILLAN

Elizabeth M. McQuillan