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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

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| WINDING CREEK SOLAR LLC,<br><br>Plaintiff,<br><br>v.<br><br>MICHAEL FLORIO, CATHERINE SANDOVAL, CARLA PETERMAN, MICHAEL PICKER, and LIANE RANDOLPH, in their official capacity as Commissioners of the California Public Utilities Commission,<br><br>Defendants. | Case No. 3:13-04934-JD<br><br>**REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF WINDING CREEK SOLAR LLC'S MOTION FOR SUMMARY JUDGMENT**<br><br>[Fed. R. Civ. P. 56; June 8, 2015 Order]<br><br>**Hearing Date:** October 14, 2015<br>**Time:** 10:00 am<br>**Courtroom:** 11, 19th Floor<br>**Judge:** Hon. James Donato |

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## TABLE OF ACRONYMS

| | |
|---|---|
| CPUC | California Public Utilities Commission |
| FERC | Federal Energy Regulatory Commission |
| MW | megawatt |
| MWh | megawatt-hour |
| PG&E | Pacific Gas & Electric Company |
| PURPA | Public Utility Regulatory Policies Act of 1978 |
| QF | Qualifying Facility |
| Re-MAT | Renewable Market Adjusting Tariff |

2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28

1 **INTRODUCTION**

2 Plaintiff contends that the Renewable Market Adjusting Tariff ("Re-MAT") program
3 violates the requirements of the Public Utility Regulatory Policies Act ("PURPA") in two
4 respects. First, rather than requiring that a utility purchase *any* electricity made available by a
5 Qualifying Facility ("QF"), Re-MAT limits the amount of electricity that a utility must purchase
6 from a QF, both overall and in any two-month period. *See* 16 U.S.C. § 824a-3(a); 18 C.F.R.
7 § 292.303(a). Second, the rate offered by the Re-MAT program is not based on the utility's
8 avoided costs. *See* 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(b)(2).

9 With respect to the first issue, Defendants do not dispute that, under PURPA, state
10 commissions must implement rules that require utilities to purchase *any* electricity produced by
11 QFs – subject only to limited exceptions that Defendants do not claim apply here. Defendants'
12 Memorandum in Opposition ("Opp. Mem.") at 3. Nor do Defendants dispute that the Re-MAT
13 program caps the utility's purchase obligations overall and in each two-month period.
14 Nevertheless, Defendants try to reconcile the Re-MAT program with PURPA's unlimited
15 purchase obligation by arguing that the Re-MAT program is a voluntary "alternative" to
16 California's Standard Offer contract for QFs of 20 megawatts or less. Opp. Mem. at 16-17.

17 The premise of this argument is that California is fully compliant with PURPA by virtue
18 of the Standard Offer program. But that premise is false. When a QF is selling pursuant to a
19 legally enforceable obligation (here, a contract), the Federal Energy Regulatory Commission's
20 ("FERC's") regulations allow the QF to *choose* between a rate "based on *either*: (i) The avoided
21 costs calculated at the time of delivery; *or* (ii) The avoided costs calculated at the time the
22 obligation is incurred." 18 C.F.R. § 292.304(d)(2) (emphasis added). As Defendants readily
23 admit, *see* Opp. Mem. at 19, the Standard Offer rate is a formula containing variables whose
24 values will not be known until the electricity is actually delivered. Thus, avoided costs will not
25 be calculable until after (and, in the case of a long-term contract, many years after) the obligation
26 is incurred. Consequently, the Standard Offer program does not allow a QF to elect a rate based
27 on "avoided costs *calculated* at the time the obligation is incurred." *Id.* § 292.304(d)(2)(ii)
28 (emphasis added). And there is no California program that *both* offers QFs a rate that satisfies

1 Section 292.304(d)(2)(ii) *and* that imposes a unlimited purchase obligation on the utility, *see id.*
2 § 292.303(a). PURPA's requirements are therefore not satisfied.
3 Perhaps recognizing the ultimate weakness of their position on the merits, Defendants
4 focus on red herrings. They argue that the Standard Offer rate is a formula rate, and formula
5 rates are entirely lawful. But Plaintiff does not contend that formula rates are *per se*
6 impermissible. Rather, the problem is that California has offered *only* a formula rate whose
7 value can be calculated when electricity is delivered, rather than *also* giving a QF the option to
8 elect a rate based on "avoided costs calculated at the time the obligation is incurred." 18 C.F.R.
9 § 292.304(d)(2)(ii). Defendants also argue for deference to FERC's "declaratory order." But no
10 deference is due to an order that is inconsistent with the plain language of FERC's regulations.
11 With respect to the second issue, an avoided cost rate must be based on the costs that the
12 utility would incur in obtaining electricity "but for the purchase from the [QF] or [QFs]." *See* 18
13 C.F.R. § 292.101(b)(6). Yet the Re-MAT rate has nothing to do with the cost that the utility
14 would incur but for its PURPA obligation to purchase from QFs. Instead, the Re-MAT price
15 adjusts every two months by a CPUC-determined amount "based on the market response" *by*
16 *QFs* "to the previously offered price." Opp. Mem. at 10.
17 Defendants concede that this is how the Re-MAT program operates, but claim that an
18 avoided cost rate can be based on the costs a utility would incur by buying from one QF instead
19 of another QF. Opp. Mem. at 20-22. That contention is inconsistent with the text of the relevant
20 statutes and regulations, most notably FERC's definition of "[a]voided cost." *See* 18 C.F.R.
21 § 292.101(b)(6). Moreover, as Defendants concede, the utility must purchase *any* electricity
22 made available by a QF. *Id.* § 292.303(a). That is, there is no QF purchase that a utility can
23 avoid – and consequently avoided costs cannot be based on a purchase avoided from another QF.
24 Defendants also rely on the general principle that state commissions have latitude in
25 implementing PURPA. But states obviously cannot contravene the statute or regulations.
26 Finally, throughout their brief, defendants attack the testimony of plaintiff's expert, Dr.
27 Lesser. For the reasons discussed below, Dr. Lesser's testimony is certainly admissible and
28 Plaintiff believes it will be helpful to the Court on both issues in this case. However, the Court

need not rely on Dr. Lesser's testimony in order to rule in favor of Plaintiff.

## ARGUMENT

### A. The Re-MAT Program's Caps Violate PURPA.

Defendants acknowledge that, under FERC's regulations, each utility "*shall purchase* … *any energy and capacity* which is made available from a qualifying facility." 18 C.F.R. § 292.303(a) (emphasis added). They note that, in California, this unlimited purchase obligation no longer applies for QFs larger than 20 MW, *see* Opp. Mem. at 3; but that qualification obviously has no bearing on this case, which involves QFs smaller than 20 MW. They also do not dispute that the Re-MAT program imposes a limit, overall and in any two-month period, on the utility's purchase obligation. The legal question before the Court is whether this apparent violation of PURPA's unlimited purchase obligation can somehow be justified.

According to Defendants, the Re-MAT program need not comply with the unlimited purchase obligation because "a State commission may limit the amount of procurement for a particular state program [here, the Re-MAT program], as long as there is available a PURPA-compliant program with no capacity limitation." Opp. Mem. at 16. They identify the Standard Contract program as California's PURPA-compliant program without any capacity limit. *Id.*

Defendants are simply wrong when they assert that California complies with PURPA by virtue of the Standard Contract program. It is undisputed that FERC's regulations allow a QF to elect either of two types of avoided-cost rates when selling to a utility pursuant to a legally enforceable obligation (*e.g.*, a contract): "[T]he rates for such purchases shall, *at the option of the qualifying facility* exercised prior to the beginning of the specified term, be based on *either*: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2) (emphasis added).

In order to fully comply with PURPA, then, a state must offer a program that has no capacity limitation, 18 C.F.R. § 292.303(a), *and* that allows a QF to elect either of these two types of rates. The Standard Contract program falls short of that requirement because it does not make available a rate "based on … [t]he avoided costs *calculated at the time the obligation is incurred*." *Id.* § 292.304(d)(2)(ii) (emphasis added). It only offers a rate "based on … [t]he

1 avoided costs calculated at the time of delivery." *Id.* § 292.304(d)(2)(i). Thus, the existence of
2 the Standard Contract program cannot excuse the Re-MAT program's capacity limits.

3 **1. The Standard Contract Rate Is Not Based On Avoided Costs "Calculated At The**
4 **Time The Obligation Is Incurred," And Therefore Defendants Cannot Rely On The Standard Contract To Demonstrate Full Compliance With PURPA.**

5 Defendants offer no real argument that the Standard Contract program offers a rate based
6 on avoided costs *calculated* at the time the contract is entered. As Defendants admit, "the actual
7 values to be applied under the SRAC formula" – the pricing formula in the Standard Contract –
8 "will not be known until delivery of the energy." Opp. Mem. at 19. Consequently, the avoided
9 costs cannot be "calculated" until delivery. This is clear from the "current and historical SRAC
10 energy payments" set forth on the PG&E website, Opp. Mem. at 20, which Defendants
11 submitted with their brief. *See* ECF No. 92 (CPUC Request for Judicial Notice, Ex. 2). The
12 website lists historical SRAC energy prices for each month from 1980 through August 2015.
13 But it does not (and cannot) list the future energy prices a QF entering a Standard Offer contract
14 would receive next month, let alone for the duration of a multi-year contract.

15 Though nothing further is needed to reject Defendants' reliance on the Standard Offer
16 contract, Plaintiff also provided the Declaration of Jonathan A. Lesser ("Lesser Decl."). *See*
17 ECF No. 89-1 ¶¶ 63-64, 69-83. Dr. Lesser confirms that the Standard Offer pricing formula
18 "applies variables whose values cannot be determined in advance and which are subject to
19 constant change," such as "the price of natural gas at the time the QF's electricity is delivered;
20 electric supply and demand conditions at the time of delivery that determine the wholesale price
21 of electricity at electric market trading hubs; and the locational adjustment between the price at a
22 QF's location and the price at a market trading hub at the time of delivery." *Id.* ¶ 64. As a
23 result, "the recipient of a Standard Offer contract cannot calculate the rate it will be paid at the
24 time the contract is entered." *Id.* This opinion is one of fact, not law, based on the complex
25 operation of the Standard Offer pricing formula, which Dr. Lesser explains in detail. *See* Lesser
26 Decl. ¶¶ 69-83.[1] Plainly, it is admissible. *See* Fed. R. Evid. 702 (expert testimony admissible
27
28

[1] Defendants argue that Dr. Lesser contradicts himself because he elsewhere opines that a rate can be "calculated at the time the obligation is incurred" even when "time of delivery" factors

when it "help[s] the trier of fact to understand the evidence or to determine a fact in issue").

Of course, it is ultimately a legal question for the Court to decide whether a rate can be "calculated at the time the obligation is incurred" within the meaning of the regulation, 18 C.F.R. § 292.304(d)(2)(ii), when it consists of a formula applying variables whose values cannot be known until later. But that is not a hard question. Defendants muster only that the term "calculated" is not defined in FERC's regulations. Opp. Mem. at 17-18. But when a word is not defined, "it is appropriate to accord the term its ordinary meaning." *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (quotation marks omitted); *Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002-03 (2012). And in ordinary usage, the phrase "calculated at the time the obligation is incurred" cannot plausibly refer to a formula consisting of variables whose values cannot be known at the time the obligation is incurred. The ordinary meaning of the term "to calculate" is "[t]o ascertain by computation." *The American Heritage Dictionary of the English Language* 262 (4th ed. 2000). One cannot "ascertain by computation" when there are not yet any numbers to compute. Thus, under the plain terms of the regulation, the Standard Offer contract does not offer a rate compliant with 18 C.F.R. § 292.304(d)(2)(ii). Defendants therefore cannot justify the Re-MAT program's caps on the theory that California is fully compliant with PURPA through the Standard Offer program.

The ordinary meaning of Section 292.304(d)(2)(ii), moreover, is consistent with the purpose of PURPA, which is to encourage and remove barriers to QF generation. *See generally Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 404-05 (1983). FERC has explained that its regulations, "from the beginning, have given QFs the option of choose to have rates calculated at the time the obligation is incurred," because "'an investor needs to be able to estimate, with reasonable certainty, the expected return on a potential investment before construction of a facility.'" *JD Wind 1 LLC*, 130 FERC ¶ 61,127, at para. 23 (2010) (quoting 45

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will be applied, which inflate or reduce a base rate by a predetermined amount based on the time of day or year that electricity is ultimately delivered. Opp. Mem. at 18-19 *see* Pltf. Mem. at 6-7 n.6 (explaining "time of delivery" factors). There is no contradiction, because the "time of delivery" factors *are* known, and thus the rate applicable to deliveries at various times can be calculated, at the time the contract is entered. *See, e.g.*, Lesser Decl. Ex. 3 at 69. "Time of delivery" factors are thus very different from the Standard Offer formula, which consists of

1 Fed. Reg. at 12,218). For many investors, being "able to evaluate the financial feasibility" of a
2 QF in this manner, *id.* (quoting 45 Fed. Reg. at 12,218), is a critical prerequisite for moving
3 forward with a project. That purpose is frustrated when the only available rate is a formula
4 consisting of variables whose values will not be known until years after an investment is made.

5 Defendants contend that formula rates of the kind offered by the Standard Offer program
6 are commonplace and have been accepted as valid for decades. Opp. Mem. at 18-19. That is
7 true, but misses the point. Plaintiff does not dispute that the Standard Offer formula rate is a
8 valid and lawful rate "based on … [t]he avoided costs calculated at the time of delivery,"
9 consistent with 18 C.F.R. § 292.304(d)(2)(i). But, as discussed above, while such a formula rate
10 might be lawful under Section 292.304(d)(2)(i), a state does not comply with its PURPA
11 obligations unless it *also* offers a rate consistent with Section 292.304(d)(2)(ii).

12 Defendants also note that, according to FERC, the phrase "calculated at the time the
13 obligation is incurred" means "the rate in effect at the time the contract was signed, … regardless
14 of whether the actual avoided costs at the time of delivery are different." Opp. Mem. at 19.
15 Defendants' point is difficult to discern, because this is entirely consistent with Plaintiff's
16 position: a QF should be able to sign a contract with a rate based on the avoided costs calculated
17 at the time the contract is entered, and should receive that rate regardless of whether the avoided
18 costs calculated at the time of delivery are higher or lower.

19 **2. The Court Should Not Defer to FERC's "Declaratory Order."**

20 At bottom, Defendants' main defense is that this Court should defer to the "declaratory
21 order" issued by FERC in response to Plaintiff's petition for enforcement. Opp. Mem. at 14-15
22 (citing *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 (2015) (attached as Ex. 5 to Declaration
23 of Thomas M. Melone, ECF No. 89-2). However, this Court is not required to defer to a terse
24 and sparsely reasoned order that conflicts with the plain language of FERC's regulations.

25 *a.* Chevron *Deference Is Not Warranted.*

26 Defendants first claim that the declaratory order warrants deference under the *Chevron*
27 doctrine. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).
28

variables whose values cannot be known until the time of delivery.

1 That is incorrect. *Chevron* applies when a court is "analyzing an agency's interpretation of a
2 statute." *King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). The issue here is not the agency's
3 interpretation of the statute – Plaintiff agrees that Section 292.304(d)(2) is a permissible
4 interpretation of PURPA – but instead whether the agency has faithfully applied the plain text of
5 its own regulation. *Chevron* is not relevant to that question.

6 But in any event, *Chevron* would not apply to the "declaratory order." The Supreme
7 Court has held that *Chevron* applies only to agency decisions that carry the "force of law,"
8 *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)[2] – that is, decisions that "either
9 determine 'rights or obligations' or result in discernible 'legal consequences' for regulated
10 parties." *Devon Energy Co. v. Kempthorne*, 551 F.3d 1030, 1039 (D.C. Cir. 2008) (quoting
11 *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)).[3] Accordingly, the Supreme Court has explained
12 that "[i]nterpretations such as those in opinion letters …, policy statements, agency manuals and
13 enforcement guidelines, all of which lack the force of law… do not warrant *Chevron*-style
14 deference." *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

15 The "declaratory order" on which Defendants rely does not have the force of law.[4] It
16 does not "fix[] the rights of any party, or, indeed, do[] anything more than state how the FERC
17 interprets its own regulations." *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1234 (D.C. Cir.
18 1995); *accord Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 391 (5th Cir. 2014). Instead, it is
19 "much like a memorandum of law prepared by the FERC staff in anticipation of a possible
20 enforcement action; the only difference is that the Commission itself formally used the document
21 as its own statement of position." *Indus. Cogenerators*, 47 F.3d at 1235. Such an order is "of no
22 legal moment. [FERC] nowhere purported to make the Declaratory Order binding … nor can we
23
24 [2] *See Mead*, 533 U.S. at 221 (refusing to give *Chevron* deference to agency ruling where there was "no indication that Congress intended such a ruling to carry the force of law"); *id.* at 227.
25 [3] *See also River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1072 (9th Cir. 2010) ("whether an agency pronouncement affects individual rights and obligations 'is an important
26 touchstone for distinguishing those rules that may be binding or have the force of law'" (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979))); *id.* at 1073-74.
27 [4] Under PURPA, a private party must petition FERC to enforce the statute before bringing a private enforcement claim against a state commission. If FERC declines to act, then the
28 petitioning party may sue in federal district court. 16 U.S.C. § 824a-3(h); *Indus. Cogenerators*, 47 F.3d at 1234. Occasionally, FERC will decline to initiate its own enforcement action, but

1 imagine how it could." *Id.*; *Exelon Wind*, 766 F.3d at 391-94.[5]

2 *b.* Auer *Deference Is Not Warranted.*

3 Defendants also claim that deference to the declaratory order is warranted under *Auer v.*
4 *Robbins*, 519 U.S. 452 (1997) (cited by Opp. Mem. at 15). *Auer* provides that an agency
5 receives deference "when it adopts a reasonable interpretation of regulations it has put in force."
6 *Federal Exp. Corp. v. Holowecki*, 552 U.S. 389, 397 (2008) (citing *Auer*).[6] But deference is not
7 owed when "there is no reasoned agency reading of the text to which [the court] might defer."
8 *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 211-12 (2011) (quoting *Smith v. City of*
9 *Jackson*, 544 U.S. 228, 248 (2005) (O'Connor, J., concurring in judgment)). Here, FERC's
10 declaratory order does not interpret the text of Section 292.304(d)(2)(ii) at all, let alone explain
11 how the Standard Offer rate could possibly be based on avoided costs "calculated at the time the
12 obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). Accordingly, no deference is required.
13 *See Chase Bank*, 562 U.S. at 211-12 (refusing to defer when agency "offers us nothing to which
14 we can defer with respect to the precise interpretive question before us").

15 Moreover, *Auer* deference also does not apply when "the regulation in question [is]
16 unambiguous," *Chase Bank*, 562 U.S. at 211, or when the agency interpretation would be
17 "plainly erroneous or inconsistent with the regulation" in question. *Id.* (quoting *Auer*, 519 U.S.
18 at 461). Here, Section 292.304(d)(2)(ii) unambiguously requires that a QF be given the option to
19 choose a rate based on the utility's avoided costs "*calculated* at the time the obligation is
20 incurred," 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added). As discussed above, a rate formula
21 consisting of variables whose values cannot be known until delivery, years *after* the obligation is
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23 nevertheless will provide its views in a so-called "declaratory order."
24 [5] Defendants claim that *Industrial Cogenerators* is inapposite because the ultimate issue in that case is whether a "declaratory order" issued by FERC in response to a PURPA petition for enforcement could be reviewed by the D.C. Circuit. Opp. Mem. at 15. But Defendants ignore
25 the reason why the D.C. Circuit held it had no jurisdiction to review such an order: namely, that it is "legally ineffectual," *Indus. Cogenerators*, 47 F.3d at 1235, and that in a PURPA
26 enforcement action brought by a private party, Congress has called upon the *district court*, not FERC, "to interpret the Act and the agency's regulations." *Id.* Moreover, Defendants make no
27 meaningful effort at all to account for the Fifth Circuit's decision in *Exelon Wind*.
[6] Several justices have suggested that *Auer* should be revisited. *See, e.g.*, *Perez v. Mortgage*
28 *Bankers Ass'n*, 135 S. Ct. 1199, 1210-11 (2015) (Alito, J., concurring in part and concurring in the judgment); *id.* at 1211-12 (Scalia, J., concurring in the judgment); *id.* at 1214 (Thomas, J.,

1 incurred, obviously cannot satisfy the plain terms of that regulation.
2 Finally, "an agency's interpretation of a … regulation that conflicts with a prior
3 interpretation is entitled to considerably less deference than a consistently held agency view."
4 *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (citing *INS v. Cardoza-Fonseca*,
5 480 U.S. 421, 446 n.30 (1987)). Here, Plaintiff explained in its opening brief why FERC's
6 declaratory order cannot be squared with the agency's earlier and more thoroughly reasoned
7 ruling in *Hydrodynamics*. *See* Pltf. Mem. at 18. In that case, FERC recognized that "[u]nder
8 section 292.304(d) …, a QF … has the unconditional right to choose whether to sell its power
9 … at a forecasted avoided cost rate." *Hydrodynamics*, 146 FERC ¶ 61,193, at para. 31 (2014).
10 And FERC held unlawful a Montana program that (like the Re-MAT program) capped the
11 amount of capacity that the utility was obligated to purchase, because once that cap was reached,
12 the only remaining options for QFs seeking to sell their capacity through long-term contracts
13 were programs (like the Standard Offer program) offering "variable, market-based rates." *Id.*, at
14 para. 34. As a result, FERC explained, "when the … capacity limit is reached," those QFs
15 "cannot obtain forecasted avoided cost rates, which is inconsistent with the Commission's
16 regulations, which entitle a QF with a legally enforceable obligation to rates that, at the QF's
17 option are forecasted avoided cost rates." *Id.* (citing 18 C.F.R. § 292.304(d)(2)). Plaintiff
18 argued in its opening brief that "this case is materially identical to *Hydrodynamics*." Pltf. Mem.
19 at 18. Defendants have said nothing in response. To the extent that the Court defers at all, it
20 should defer to the carefully reasoned interpretation in *Hydrodynamics*, which engages the text
21 of the regulations at issue, rather than the cursory and illogical statement in *Winding Creek*.[7]
22

23 concurring in the judgment). Plaintiff preserves that argument.
[7] Defendants cite *Otter Creek Solar LLC*, 143 FERC ¶ 61,282 (2013) (*see* Opp. Mem. at 16,
24 which mis-cites the case), but that case is entirely consistent with *Hydrodynamics* and supports
Plaintiff's argument. There, FERC rejected a challenge to a Vermont program because the state
25 fully complied with PURPA through the state's "Rule 4.100 Program." *Id.*, at paras. 3-4. The
Rule 4.100 Program – *unlike* California's Standard Offer program – allows QFs to elect a rate
26 "based on projected avoided energy costs" that is converted into a levelized rate calculated at the
time the contract is entered and applied for the duration of the contract. *See* Vt. Admin. Code
27 18-1-10:4.104(E)(2)-(3) (setting forth pricing options); Vt. Admin. Code 18-1-10:4.103(A)(7)
(defining "levelized rate"), *available at* http://www.state.vt.us/psb/rules/4100boun.htm; *see also,*
28 *e.g.*, Order, Docket No. 8010, Vt. Pub. Serv. Bd. (Feb. 9, 2015) at 23-24 (establishing rates under
Rule 4.100 and stating that "[t]he Department has developed Vermont-specific avoided-cost rate

In sum, Defendants do not dispute that the Re-MAT program caps a utility's purchase obligation. Defendants' only defense is that those caps are permissible because California fully complies with PURPA through its Standard Offer program. But, for the reasons discussed above, the Standard Offer program does *not* fully satisfy California's PURPA obligations. Thus, Defendants cannot rely on it to justify the capacity limits under the Re-MAT program.

**B. The Re-MAT Program Does Not Offer An Avoided Cost Rate.**

Defendants do not dispute that, when setting wholesale rates like those at issue in the Re-MAT program, "the CPUC may not set the wholesale price for these purchases except … in compliance with PURPA." Opp. Mem. at 5. Defendants also agree that PURPA requires rates to be set based on the purchasing utility's "'avoided' cost: the incremental cost to the utility of the electricity that, but for the purchase from the QF, the utility would need to generate or purchase from 'another source.'" Opp. Mem. at 3. The legal issue for the Court to decide is whether the Re-MAT pricing scheme is based on the utility's avoided costs.

The answer is that it is not. As Defendants themselves note, "[Re-MAT] allows generators to set the market price through the bidding process, which theoretically will ensure the price is neither too high or too low but, instead, will be reasonable to cover the generator's costs and encourage broad participation in the market." Opp. Mem. at 8 (quoting D.12-05-035 at 64). Yet, FERC has stated that "the basis for the determination of rates for purchases should be *the utility's* avoided costs and should not vary on the basis of the costs of the particular qualifying facility." PURPA Rulemaking, 45 Fed. Reg. 12,214, 12,222 (emphasis added) (attached to Pltf. Mem. at App. 15-App. 38); *Indep. Energy Prods. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 857 (9th Cir. 1994) ("[T]he rate to be paid by utilities for electricity energy [is to] be determined according to the avoided cost of the *utility* of generating that energy or purchasing it elsewhere, and not according to the QF's efficiency.").

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schedules based on projections of the energy and capacity prices established in the wholesale electric market"), *available at* http://psb.vermont.gov/sites/psb/files/orders/2015/2015-02/8010%20Order%20Re%20Rate%20schedules.pdf. Defendants also cite *Midwest Power Sys., Inc.*, 78 FERC ¶ 61,067 (1997) (cited at Opp. Mem. at 16), but that case does not bear on the issue here. It simply holds that state commissions cannot require utilities to purchase electricity from QFs at a price in excess of avoided cost. *Id.* at p. 61,248.

1 Notwithstanding FERC's directives, CPUC has created a market consisting solely of
2 QFs, and every two months, selects the QFs willing to provide up to 5 MW of capacity at the
3 offer price for that program period. As explained at length in Plaintiff's Opening Memorandum,
4 whenever QFs offer to sell more than 5 MW of capacity to PG&E at a given offer price, PG&E
5 will purchase no more than 5 MW at that offer price, and the offer price for the next Re-MAT
6 program period will adjust downward by a predetermined and arbitrary amount bearing no
7 relationship to what the utility would otherwise have paid a non-QF source. If PG&E is unable
8 to purchase more than 1 MW of capacity at an offer price, then the offer price for the next Re-
9 MAT program period will adjust upward by a predetermined and arbitrary amount bearing no
10 relationship to what the utility would otherwise have paid a non-QF source. Pltf. Mem. at 22-23.

11 Defendants' defense of this scheme boils down to the proposition that the utility is
12 avoiding the purchase of electricity *from other QFs* that are either further down in the Re-MAT
13 queue, and thus do not have the opportunity to sell if the bimonthly cap is reached, or are
14 unwilling to sell at the price in a given program period. They say that the Re-MAT adjustment
15 mechanism is intended to identify the price at which these other QFs are willing to sell, and
16 thereby reflects the costs the utility avoids by purchasing from one QF instead of another. *See*
17 Opp. Mem. at 22 ("[T]he costs avoided are defined by Public Utilities Code § 399.20 and D.12-
18 05-035, which require utilities to purchase electricity from a specific class of QFs of 3 MW…
19 Accordingly, *these are the facilities that constitute 'another source.'*" (emphasis added)).[8]

20 However, PURPA and FERC's regulations make clear that avoided costs *must* be based
21 on *non-QF* sources. Defendants claim that "PURPA does not address whether avoided costs
22 must be based solely on non-QF sources." Opp. Mem. at 20. They are wrong. FERC has
23 defined a utility's "[a]voided costs" to be "the incremental costs to an electric utility of electric
24 energy or capacity or both which, *but for the purchase from the qualifying facility or qualifying*
25

26 [8] Under the Re-MAT program, if there are fewer than five unrelated QFs in the queue, the price will not move up even if none of the generators is willing to sell. *See* Opp. Mem. at 10. Thus,
27 even under Defendants' own logic, in that situation the Re-MAT price cannot be an avoided cost rate, since no other QFs are willing to take it. Defendants' explanation also begs the question of
28 what the avoided costs would be for a QF of 3.1 MW – just slightly too big to participate in the Re-MAT program. Defendants offer no reason why the costs avoided by the utility would be

1 *facilities*, such utility would generate itself or purchase *from another source*." 18 C.F.R.
2 § 292.101(b)(6) (emphasis added). FERC could not have been clearer that the appropriate point
3 of comparison is non-QF sources.[9] Moreover, the structure of the statute compels a utility to
4 purchase *all* electricity made available by QFs, *id.* § 292.303(a), so long as the utility pays no
5 more than it would pay to another source. Thus, a utility is *not allowed* to avoid the purchase of
6 electricity from one QF in favor of another QF – it must purchase electricity from both.

7 The statutory purpose – to encourage QF generation – equally compels this conclusion.
8 If a state could artificially limit the amount of QF generation it purchases, and then claim that the
9 costs avoided by the utility when buying from one QF is the amount that it would have paid
10 another QF, that would not "accelerate the development of renewable … energy sources and
11 convert the national economy to alternative fuel resources…" H.R. Rep. No. 95-496(IV), at 14
12 (1977), *reprinted in* 1978 U.S.C.C.A.N. 8454, 8466. PURPA is intended to achieve this purpose
13 by paying renewable resources at a rate equal to the costs of the traditional generation it
14 displaces—thereby leaving ratepayers indifferent, but "provid[ing] a significant incentive for a
15 higher growth rate" of QF generation. *Am. Paper Inst.*, 461 U.S. at 415.

16 Rather attempting to reconcile their position with the statutory text, structure, and
17 purpose, Defendants instead rely solely on a FERC decision they misinterpret. Opp. Mem. at 21-
18 22. In *Southern California Edison*, FERC ruled that "regardless of whether the State regulatory
19 authority determines avoided cost administratively, through competitive solicitation (bidding), or
20 some combination thereof, it must in its process reflect prices available from *all sources* able to
21 sell to the utility whose avoided cost is being determined." *S. Cal. Edison*, 70 FERC ¶ 61,215, at
22 p. 61,677 (1995) ("*SCE*"), *clarified on reh'g*, 71 FERC ¶ 61,269 (1995). FERC subsequently
23 clarified this holding in the case relied upon by Defendants, *Cal. Pub. Utils. Comm'n*, 133 FERC
24 ¶ 61,059, at paras. 26-30 (2010) ("*CPUC*"), *reh'g denied*, 134 FERC ¶ 61,044 (2011). In that
25

26 different depending on whether a QF was 2.9 MW or 3.1 MW in size.

[9] FERC likewise explained that avoided costs should be based on the cost of the incremental
27 purchase of non-QF electricity that is avoided: "At any given time, an economically dispatched
utility can avoid operating its highest-cost units as a result of making a purchase from a
28 qualifying facility. The utility's avoided incremental costs (and not average system costs) should
be used to calculate avoided costs." PURPA Rulemaking, 45 Fed. Reg. at 12,216.

1 case, which involved gas-fired "combined heat and power" facilities, FERC explained that when
2 it used the term "all sources" in *SCE*, it meant all sources "able to sell to the utility." *CPUC*, 133
3 FERC ¶ 61,059, at para. 30. Thus, FERC stated in dicta, "if a state required a utility to purchase
4 10 percent of its energy needs from renewable resources, then a natural gas-fired unit … would
5 not be a source 'able to sell' to that utility for the specified renewable resources segment of the
6 utility's energy needs, and thus would not be relevant to determining avoided costs for that
7 segment of the utility's energy needs." *Id.* at para. 27.

8 In those circumstances, the highest marginal costs avoided by the utility might be its
9 purchases from other renewable generation able to satisfy the state's renewable procurement
10 requirement – if, for example, other renewable generation is the utility's most costly source of
11 power. That was the case in *CPUC*, but is not the case here.[10] Importantly, moreover, these
12 other renewable generators include non-QFs. Thus, for example, the Renewable Auction
13 Mechanism – which Defendants describe as "the primary contracting tool for utility procurement
14 from smaller renewable energy projects," Opp. Mem. at vi, and the results of which provided the
15 initial Re-MAT price – is open to both QFs and non-QFs. *See* Pltf. Mem at 9 n.9. FERC has
16 *never* held that a state may base its avoided cost calculations solely on purchases avoided *from*
17 *other QFs*, and if it had, such a ruling would flatly violate the statute and regulations.

18 The bulk of Defendants' arguments on the issue of avoided costs is devoted to attacking
19 Dr. Lesser's qualifications and the admissibility of his testimony. For the reasons already given,
20 the Court need not rely on Dr. Lesser's testimony in order to rule in Plaintiff's favor.
21 Nevertheless, Dr. Lesser's testimony is helpful to the Court in explaining and understanding the
22 issues in the case, and is therefore admissible. *See* Fed. R. Evid. 702; *Maffei v. N. Ins. Co.*, 12
23 F.3d 892, 897 (9th Cir. 1993) (cited by Opp. Mem. at 18, 21-22) ("[I]t is reversible error in a
24 summary judgment proceeding to exclude expert testimony … if the exclusion deprives the
25

26 [10] When FERC decided *CPUC*, renewable generation was more expensive than fossil generation.
27 Since then, the price of renewable generation has fallen. In many places today, it is less expensive than fossil generation. Thus, today, fossil generation can be the incremental
28 generation avoided by a QF purchase, even in states with renewable energy mandates. Oddly, Defendants' interpretation of PURPA would make a QF worse off in a state *with* renewable energy mandates than in one without. In the latter, there could be no argument that a QF's long-

1 plaintiff of a permissible inference that could be drawn by the finder of fact on that issue.”).

2 Defendants make essentially four arguments concerning Dr. Lesser. First, they contend
3 that his opinions are inadmissible legal opinions. Opp. Mem. at 21, 22-23. That is incorrect.
4 Dr. Lesser draws on his substantial expertise in the field of energy economics to explain how the
5 market would operate if a utility had an obligation to purchase an unlimited quantity of QF
6 generation at a rate equal to its avoided costs, *see* Lesser Decl. ¶¶ 33-36 & Fig. 1; how the
7 market established by the Re-MAT program differs, *see id.* ¶¶ 42-62 & Fig. 2; and the complete
8 disconnect between the Re-MAT price adjustment mechanism and the amount that the utility
9 would pay *non*-QFs but for its Re-MAT purchases. *Id.* ¶¶ 54, 59. This is economics, not legal
10 analysis. The fact that Dr. Lesser “refer[s] to the law in expressing an opinion” does not
11 “render[] the testimony inadmissible… [A] witness may … aid … in understanding the facts in
12 evidence even though reference to those facts is couched in legal terms.” *See Hangarter v.*
13 *Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir. 2004) (quotation marks omitted).

14 Second, reversing course, Defendants attack Dr. Lesser for issuing a “layman’s opinion.”
15 Opp. Mem. at 21. But Dr. Lesser used that terminology when asked whether his understanding
16 of PURPA was a “legal understanding.” Lesser Dep. at 112 (attached as Ex. A to Declaration of
17 Elizabeth M. McQuillan, ECF No. 93). Dr. Lesser appropriately answered that he had a
18 “layman’s understanding of PURPA,” that is, a non-lawyer’s understanding. *Id.*; *see also id.* at
19 35:24-36:3. His *analysis* of how the Re-MAT program differs from PURPA (as he understands
20 it) is firmly grounded in his expertise as an economist.

21 Third, Defendants attack Dr. Lesser’s expertise and background. Opp. Mem. at 22-23.
22 However, during Dr. Lesser’s 30-year career in the industry, he has “evaluated avoided cost
23 methodologies,” ECF No. 89-3, Ex. 1 at 21:17; *id.* at 186:14-188:4; consulted to the California
24 Energy Commission on the development of renewable generation, including issues related to the
25 calculation of avoided costs, *id.* at 188:21-190:2; and has published peer-reviewed articles on
26 avoided-cost rules. *Id.* 17:5-19:5; *see generally* Lesser Decl. ¶¶ 3-5 & Ex. 1. He is plainly
27 qualified to opine on the economic frameworks of the Re-MAT program and PURPA.

28

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term rate should be determined by reference to the cost of renewable generation.

1 Finally, Defendants argue that Dr. Lesser's conclusions are unreliable. Opp. Mem. at 23.
2 Their reasons, however, are difficult to discern. They say that Dr. Lesser "concedes that … a
3 'rational' facility … will … not accept a price which causes it to lose money." *Id.* It is unclear
4 how that is a concession. Defendants also note that Dr. Lesser agrees that a "feed-in tariff" can
5 be designed in different ways, and that projections involve guesswork. Opp. Mem. at 23. It is
6 unclear how that undermines his conclusions or Plaintiff's case. While tariffs can be designed in
7 different ways, they still must be based on the utility's avoided costs. And projections may be
8 inexact, but FERC's regulations nevertheless allow a QF to elect a rate based on projected
9 avoided costs calculated at the time the obligation is incurred. To the extent that Defendants
10 argue that the Court must approve the Re-MAT program because of the wide discretion given to
11 state commissions, that is incorrect: any such discretion obviously is bounded by the text of the
12 statutes and regulations and Congress and FERC's purpose in enacting them.
13 Finally, Defendants note that Dr. Lesser agrees that the CPUC can "use market pricing to
14 set avoided cost rates." Opp. Mem. at 24. As Dr. Lesser explains, a market-based benchmark
15 reflecting the cost of purchasing from *non-QFs* – for example, the real-time energy market price,
16 or the prevailing market price for forward contracts – can be used in order to determine avoided
17 costs. Lesser Decl. ¶¶ 23-27. However, the Re-MAT program does neither. Instead, it
18 determines an "avoided cost" rate based on QFs' own willingness to sell, where the cost avoided
19 by contracting with one QF is the amount that would have been paid instead to another QF. That
20 approach conflicts with the statute, regulations, and legislative purpose, and it is preempted.
21 **CONCLUSION**
22 Summary judgment should be granted in favor of Plaintiff.
23 Dated: September 14, 2015 Respectfully submitted,
24 JENNER & BLOCK LLP
25 By: /s/ Matthew E. Price
26 Matthew E. Price (*admitted pro hac vice*)
*Counsel for Plaintiff Winding Creek Solar LLC*
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