JENNER & BLOCK LLP
MATTHEW PRICE (*pro hac vice admitted*)
1099 New York Avenue NW Suite 900
Washington, DC 20001
Telephone: (202) 639-6873
Facsimile: (202) 639-6066
mprice@jenner.com

THOMAS MELONE (*pro hac vice admitted*)
MICHAEL MELONE (*pro hac vice admitted)*
ALLCO RENEWABLE ENERGY LIMITED
14 Wall St., 20th Floor
New York, NY 10005
Telephone: (212) 681-1120
Facsimile: (801) 858-8818
Thomas.Melone@AllcoUS.com
MJMelone@AllcoUS.com

Attorneys for Plaintiff

FUTTERMAN DUPREE DODD CROLEY MAIER LLP
JAMIE L. DUPREE (158105)
JAIME G. TOUCHSTONE (233187)
180 Sansome Street, 17th Floor
San Francisco, CA 94104
Telephone: (415) 399-3906
Facsimile: (415) 399-3838
jdupree@fddcm.com
jtouchstone@fddcm.com

Local Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WINDING CREEK SOLAR LLC, Plaintiff, v. MICHAEL FLORIO, CATHERINE SANDOVAL, CARLA PETERMAN, MICHAEL PICKER, and LIANE RANDOLPH, in their official capacity as Commissioners of the California Public Utilities Commission, Defendants.	Case No. 3:13-04934-JD **PLAINTIFF'S RESPONSE TO AMICUS BRIEF OF PACIFIC GAS & ELECTRIC CO. ET AL.** [Leave to File Granted by ECF No. 104, Nov. 16, 2015 Order] Judge: Hon. James Donato

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TABLE OF ACRONYMS

CPUC	California Public Utilities Commission
FERC	Federal Energy Regulatory Commission
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
SRAC	short-run avoided cost, which is the pricing formula for the Standard Contract

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

On November 16, 2015, the Court issued an order inviting briefs from potential *amici curiae*. The parties issued the invitation to more than a dozen parties. One brief was filed, by Pacific Gas & Electric Co. ("PG&E"), Southern California Edison Co., and San Diego Gas & Electric Co., collectively, "the Utilities." *See* ECF No. 109 ("Utilities Br."). Pursuant to the Court's order, Plaintiff Winding Creek Solar LLC ("Plaintiff") respectfully submits this response.

INTRODUCTION

As Plaintiff has explained in its other briefs, *see* ECF No. 89 ("Pltf. Mem.") at 2-3, the Public Utility Regulatory Policies Act ("PURPA") and FERC's implementing regulations impose three requirements on California relevant to this case. *First*, the state's rules must require a utility to purchase *any* electricity made available to it by a Qualifying Facility ("QF"). 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.303(a). *Second*, the rate paid by the utility must be equal to its avoided costs—that is, the amount the utility would have spent buying electricity from another source but for its purchase from the QF. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(b)(2); 18 C.F.R. § 292.101(b)(6). *Third*, the QF selling pursuant to a contract must be able to choose between two different ways of calculating the avoided-cost rate. At the "option of the [QF]," the rate may 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).

To be sure, a state may make multiple programs available to QFs, and there is no requirement that each single program must satisfy all of these requirements. But taken as a whole, the state's programs must allow a QF to sell to the utility (1) *any* electricity it produces, (2) *at an avoided-cost rate* that (3) *at the QF's election*, is based on either the avoided costs calculated at the time of delivery or the avoided costs calculated at the time the obligation is incurred. None of this is disputed.

To meet its PURPA obligations, California has made two programs available to QFs like Plaintiff. One program is the Re-MAT; the other is the Standard Contract (also called the Standard Offer Contract). The Standard Contract is uncapped, but—as Plaintiff has explained—

its rate can be calculated only at the time of delivery. As Dr. Jonathan Lesser elaborated in detail, and as Defendants admit, the Standard Contract rate is based on a formula consisting of variables, such as the price of natural gas and the market price of electricity, the values of which fluctuate over time. *See* ECF No. 89-1 ("Lesser Decl.") ¶¶ 63-64, 69-83; ECF No. 90 ("CPUC Opp. Mem.") at 19 (admitting that the "actual values to be applied" under the Standard Contract rate formula "will not be known until delivery of the energy"). Thus, the Standard Contract rate for any particular month cannot be "*calculated*" until the electricity is actually delivered that month. *See* 18 C.F.R. § 292.304(d)(2)(i) (emphasis added).

For a QF that wishes to elect a rate that can be calculated at the time the utility's purchase obligation is incurred, that is, when the contract is signed, *see id.* § 292.304(d)(2)(ii), California has offered the Re-MAT program. Under that program, a QF may require a utility to enter a contract for 10, 15, or 20 years at a fixed rate that is known and calculated at the time the contract is signed. The current rate is $61.23/MWh. But the Re-MAT program is capped. Moreover, the Re-MAT rate is not based on the utility's avoided costs. For these two reasons, the Re-MAT program conflicts with the state's obligations under PURPA.

The Utilities' brief is perhaps most remarkable for what it does *not* argue. Like Defendants, the Utilities do not defend the Re-MAT program's caps on their own terms. They do not provide any justification for these caps, or any explanation for why these caps are consistent with the statutory purpose of PURPA, which was to eliminate barriers to renewable generation. Even more strikingly, the Utilities do not even attempt to defend the rate paid by the Re-MAT program as one that is based on their avoided costs. Plaintiff has argued that the Re-MAT rate has nothing to do with how much the utility would have spent from some other source, but for its obligation to buy from QFs. Instead, as Defendants admit, the Re-MAT rate adjusts every two months by a CPUC-determined amount "based on the market response" *by QFs* "to the previously offered price," so that the price drops if QFs are willing to sell more than 5 MW at the previous price. CPUC Opp. Mem. at 10. The Utilities, of course, know what their avoided costs are better than anyone else. If the Re-MAT program's rate were truly based on their

avoided costs, presumably they would say so. Tellingly, *they offer no argument that the Re-MAT price is based on their avoided costs.*

Instead of defending the Re-MAT program on its own terms, the Utilities offer essentially the same defense as Defendants: They ask the Court to ignore the Re-MAT program's illegalities on the ground that Plaintiff can always sell under the Standard Contract. But, as discussed at length in Plaintiff's previous briefs and in Dr. Lesser's report, *see* Pltf. Mem. at 16-18; ECF No. 95 ("Pltf. Reply") at 4-6; Lesser Decl. ¶¶ 63-64, 69-83, the Standard Contract program does not offer a rate that can be "*calculated* at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added). Its rate can be calculated only "at the time of delivery." 18 C.F.R. § 292.304(d)(2)(i). Thus, the Standard Contract alone cannot satisfy California's obligation to give QFs a *choice* between these two types of avoided-cost calculations.

The Utilities claim that Plaintiff is procedurally barred from attacking the Standard Contract rate because Plaintiff did not present any such complaint at FERC. *See* Utilities Br. 1, 8-11. But the Utilities misapprehend the point. Plaintiff is not attacking the Standard Contract rate. There is nothing illegal about the Standard Contract. It is a perfectly acceptable program for those QFs that wish to choose a rate based on avoided costs calculated at the time of delivery. But California still must offer some other program under which QFs may choose a rate calculated at the time the obligation is incurred.

The Re-MAT is designed to be such a program: it offers a rate calculated at the time the obligation is incurred. It pays a fixed dollar amount for the duration of the contract—a rate that is known and calculated when the contract is signed. But in order for the Re-MAT program to satisfy California's PURPA obligations, it must be uncapped. The Re-MAT program, however, not only is capped; it is capped at a mere 5 MW every two months. Moreover, the Re-MAT program's rate must be based on the utility's avoided costs, and it is not. Thus, although the Re-MAT program *does* offer a rate "calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), that rate is not an avoided cost rate, and a QF will not necessarily be able to

1 obtain the rate if the bimonthly or overall caps have already been reached. That is why Plaintiff
2 is challenging the Re-MAT program, and not the Standard Contract.
3 Finally, the Utilities promote the novel theory—never advanced by Defendants—that, as
4 a matter of state law, Plaintiff might not be eligible for a rate under 18 C.F.R. § 292.304(d)(2),
5 which applies to sales pursuant to a "legally enforceable obligation." Utilities Br. 12-16. There
6 is a good reason why Defendants have never made this argument: it is flat wrong. As the
7 Utilities note, under the Fifth Circuit's decision in *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380
8 (5th Cir. 2014), a state may decide whether to impose a legally enforceable obligation on utilities
9 to contract with non-firm resources such as solar generators. Texas made the choice not to
10 impose such an obligation, and the Fifth Circuit upheld that choice as permissible. Even
11 assuming that the Fifth Circuit's decision was correct, California has made a different choice
12 than Texas. Under Section 399.20, the state statute that the Re-MAT program implements, the
13 California legislature mandated that the state's utilities offer contracts "for a period of 10, 15, or
14 20 years, as authorized by the commission." Cal. Pub. Util. Code § 399.20(d)(1). These
15 contracts must be made available to "eligible renewable energy resource[s]," *id.* § 399.20(b)(4),
16 a term that includes non-firm sources such as wind and solar. *See* Cal. Pub. Util. Code
17 § 399.12(e); Cal. Pub. Res. Code § 25741(a)(1). Thus, under California law, the utilities have a
18 legally enforceable obligation to contract with Plaintiff. Plaintiff is therefore eligible for a rate
19 under 18 C.F.R. § 292.304(d)(2).

20 **ARGUMENT**

21 **I. THE RE-MAT PROGRAM VIOLATES PURPA BECAUSE IT IS CAPPED AND**
22 **BECAUSE ITS RATE IS NOT BASED ON THE UTILITIES' AVOIDED COSTS.**

23 Strikingly, like Defendants, the Utilities make no effort to defend the Re-MAT program
24 on its own terms. They do not dispute that, under PURPA, a state must implement rules
25 requiring a utility to purchase *any* electricity made available to it by a QF. 16 U.S.C.
26 § 824a-3(a); 18 C.F.R. § 292.303(a). Nor do they dispute that limiting a utility's purchase
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requirement—for example, to 750 MW overall state-wide, or to 5 MW per utility in any two-month period—violates PURPA.[1]

Moreover, like Defendants, the Utilities do not dispute that the rate charged under PURPA must be equal to the utility's avoided costs. 16 U.S.C. § 824a-3(b); 18 C.F.R. § 292.304(b)(2); *id.* § 292.101(b)(6). And, perhaps most strikingly of all, the Utilities—who know what their avoided costs actually are—do not dispute Plaintiff's argument that the Re-MAT rate is ultimately based on QFs' production costs, not the utility's avoided costs. The Utilities offer no defense whatsoever of the Re-MAT rate as an avoided cost rate. *See* Utilities Br. 16 ("The Utilities are not offering an opinion as to whether the ReMAT Program pricing mechanism constitutes an 'avoided cost' rate…"). Thus, the Court can readily conclude based on the undisputed law and facts that, taken by itself, the Re-MAT program violates PURPA.

Rather than defending the Re-MAT program as consistent with PURPA, the Utilities argue that the Re-MAT program was adopted for the purpose of complying with state law, namely, Cal. Pub. Util. Code § 399.20, and not in order to comply with PURPA. Utilities Br. 3 ("Section 399.20 was not intended to be a vehicle for implementation of PURPA.").

That is both incorrect and irrelevant. It is incorrect because, as the CPUC's own Orders make crystal clear, the Re-MAT program was intended to faithfully implement PURPA as well as state law. *See* ECF No. 89-3, Ex. 2 to Decl. of Matthew E. Price ("CPUC May 2012 Order") at 39 (stating that "[t]he pricing methodology we adopt today, Re-MAT, complies with both state and federal law"); *id.* at 11 (stating that "we rely on federal law, specifically, avoided cost requirements under [PURPA]."); *id.* at 105 (acknowledging that "this program is developed to be compliant with PURPA"); *id.* at 117 (stating that the Re-MAT program "compl[ies] with federal law by requiring, among other things, that all FERC jurisdictional generators participating in the

[1] The Utilities question why Plaintiff "does not challenge other limitations on the availability of the ReMAT Program, including the requirement that eligible projects are renewable resources, 3 MW or less, and 'strategically located.'" Utilities Br. 8. Plaintiff satisfies those criteria, so it would have no standing to challenge them. As to whether these eligibility criteria for Re-MAT might also violate PURPA, *see id.*, that depends on what programs California offers for QFs that do not meet these criteria. California has a myriad of PURPA-related programs for different types of QFs, and Plaintiff is not familiar with all of their details. In any event, whether some

program register with the FERC as QFs and by adopting a price consistent with PURPA…"). It is irrelevant because, under the Supremacy Clause, the Re-MAT program *must* comply with PURPA, as the CPUC itself has acknowledged. *See id.* at 105 n.83 ("The fundamental premise of the pricing proposal adopted today is that the prices reflect avoided costs, which the [CPUC] has authority to set under the PURPA for QFs. In the absence of such federal authority, the Commission would not have jurisdiction to establish the wholesale [Re-MAT] prices.").

Instead of trying to justify the Re-MAT program as a permissible implementation of PURPA, the Utilities (like Defendants) instead argue that the Re-MAT need not comply with PURPA "because there are other reasonably available means for QFs to sell power." Utilities Br. 4. Specifically, the Utilities argue, "QFs, such as Winding Creek, can sell their capacity under the Standard Contract." *Id.* at 7. Thus, according to the Utilities, it is "irrelevant" that the Re-MAT program is capped and does not offer a rate based on the utility's avoided costs. *Id.* at 16-17. For the reasons discussed below, however, the availability of the Standard Contract program cannot save the Re-MAT from its legal infirmities.

II. THE STANDARD CONTRACT CANNOT CURE THE RE-MAT PROGRAM'S VIOLATIONS OF PURPA.

As Plaintiff has repeatedly explained, *see* Pltf. Mem. at 4, 16; Pltf. Reply at 3-6, under FERC's regulations, a QF is entitled to choose between two types of avoided-cost rates under which it is able to sell any electricity it generates: one that is "calculated at the time of delivery," and the other that is "calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(i)-(ii). The availability of the second type of rate is critically important to many QFs, since a renewable developer can have difficulty obtaining financing for the construction of a renewable generator without having a known and calculable revenue stream in advance of delivery.

Of course, there is no requirement that each and every program offered by a state must allow such a choice. Instead, PURPA only requires that the state's programs, taken together,

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other QF might also have a viable preemption challenge to some other aspect of California's program is irrelevant to Plaintiff's claims in this case.

allow QFs to choose between these rates. Thus, for example, a state could offer two programs to QFs—one that pays a rate "calculated at the time of delivery," and another that pays a rate "calculated at the time the obligation is incurred." To comply with PURPA, however, both programs must be uncapped. If one of the programs were capped, then a QF would not necessarily be able to elect that program's rate to sell its electricity, and thus would not in fact enjoy the choice that the regulations mandate be given to QFs. Additionally, both programs' rates must be based upon the utility's avoided costs, as the regulations and statute make clear. *See* 18 C.F.R. § 292.304(b)(2); 16 U.S.C. § 824a-3(b).

A. The Re-MAT, Not the Standard Contract, Is California's Program Offering a Rate Calculated at the Time the Obligation Is Incurred.

As the Utilities note, in California, there are two programs available for QFs like Plaintiff. Utilities Br. 2-3. One of these programs is the Re-MAT; the other is the Standard Contract approved by the CPUC in 2010. The Re-MAT program purports to offer a lawful rate "calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). Under the Re-MAT, utilities and QFs enter into fixed-price, long-term contracts of 10, 15, or 20 years for a known and calculated rate. *See* CPUC May 2012 Order at 43, 46. In the first bimonthly Re-MAT program period, that rate was $89.23/MWh. *See* Pltf. Mem. at 9. Today, that rate is $61.23/MWh.[2] However, as discussed above and in Plaintiff's previous briefs, the Re-MAT program is capped; and, moreover, the rate it offers is not based on the utility's avoided costs. For these reasons, the Re-MAT does not comply with PURPA.

Under FERC's precedent, that might not be a problem if some other California program also offered a rate "calculated at the time the obligation is incurred," 18 C.F.R. § 292.304(d)(2)(ii), that was uncapped and based on avoided costs. Then, Plaintiff could sell

[2] Pacific Gas & Electric Co., "ReMAT Feed-In Tariff (Senate Bill 32)," Program Period 14 (begins January 4, 2016), http://www.pge.com/en/b2b/energysupply/wholesaleelectricsuppliersolicitation/ReMAT/index.page.

under that other program and the Re-MAT would be merely an "alternative." *See* Utilities Br. 6-7.[3] The problem here is that there is no such other program.

The Utilities, like Defendants, repeatedly point to the Standard Contract program, but that program does not offer a rate "calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). It only offers a rate "calculated at the time of delivery." *Id.* § 292.304(d)(2)(i). Defendants have acknowledged as much. They admit that under the Standard Contract pricing formula, known as the SRAC, "the actual values to be applied … will not be known until delivery of the energy." CPUC Opp. Mem. at 19. Dr. Lesser likewise explained in detail that the Standard Contract pricing formula "applies variables whose values cannot be determined in advance and which are subject to constant change," such as "the price of natural gas at the time the QF's electricity is delivered; electric supply and demand conditions at the time of delivery that determine the wholesale price of electricity at electric market trading hubs; and the locational adjustment between the price at a QF's location and the price at a market trading hub at the time of delivery." *See* Lesser Decl. ¶ 64; *see also id.* ¶¶ 69-83. As a result, "the recipient of a Standard Offer contract cannot calculate the rate it will be paid at the time the contract is entered." *Id.* ¶ 64.

The Utilities' only real engagement with this point is to reprise Defendants' failed argument that the Standard Contract offers a formula rate. *See* Utilities Br. 11-12. Like Defendants, the Utilities claim that the Standard Contract satisfies Section 292.304(d)(2)(ii) because the *formula* is fixed when the contract is entered. *Id.* at 12 (noting that under the Standard Contract, the "fixed energy cost *formula* … [is] known to the QF at the time a contract is executed." (emphasis added)). But, like Defendants, the Utilities simply ignore the plain language of that regulation, which requires a rate that can be *"calculated"* at the time the obligation is incurred. *See* 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added); Pltf. Reply Br. at 4-6. Because the undisputed facts are that the Standard Contract formula includes variables whose values are unknowable until the electricity is ultimately delivered, that formula obviously cannot

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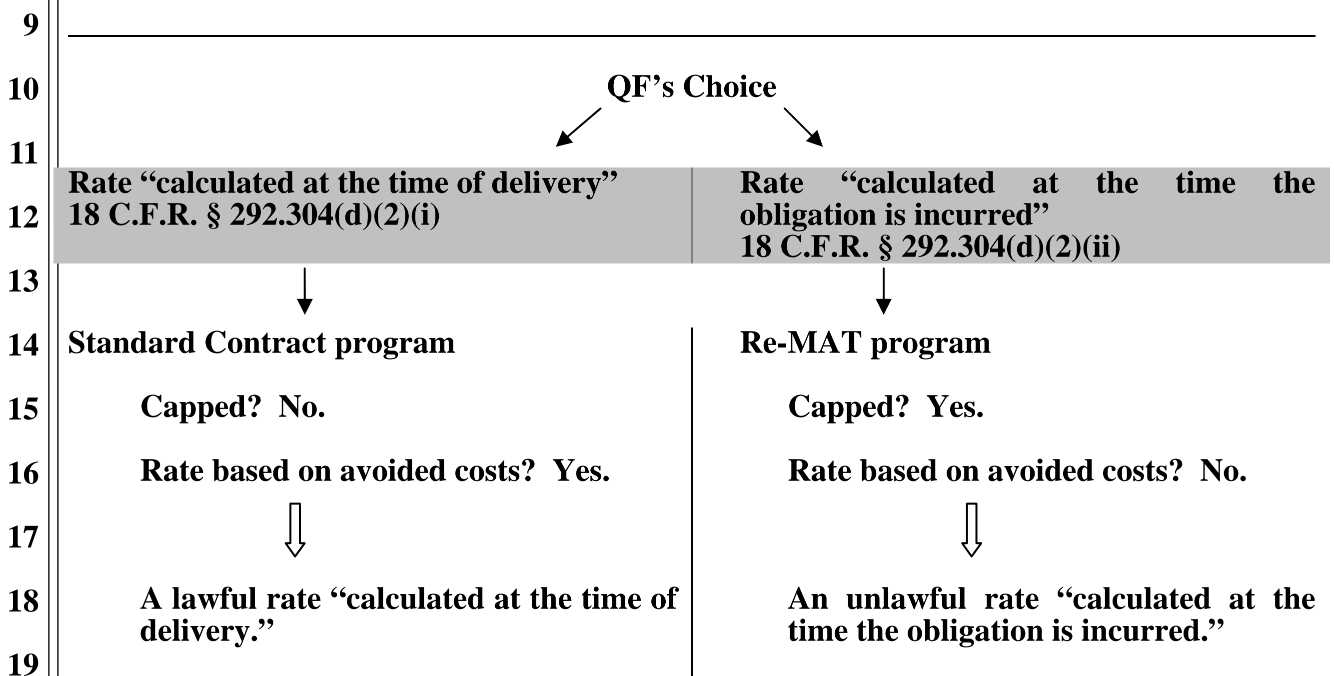
[3] Provided, however, that the other program offering a rate "calculated at the time the obligation is incurred" did not impose other burdens that in effect eliminated it as a genuine option.

constitute a rate that can be "calculated" at the time the obligation is incurred. The Standard Contract therefore cannot satisfy Section 292.304(d)(2)(ii).

In sum, the Re-MAT is the *only* program available to Plaintiff that purports to offer a rate that can be "calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). Thus, notwithstanding the Standard Contract, California still needs a lawful Re-MAT program in order to comply with PURPA. But, as discussed above, the Re-MAT program violates PURPA in two different ways: it is capped, and the rate is not based on avoided costs. Accordingly, the Re-MAT program violates PURPA.



The Utilities (Br. at 4-6, 16-17) also rely heavily on *Otter Creek Solar LLC*, 143 FERC ¶ 61,282 (2013), but that case is no help to them and in fact supports Plaintiff. As Plaintiff explained in its reply brief, *see* Pltf. Reply at 9 n.7, *Otter Creek* involved a challenge to a Vermont program known as the SPEED program. FERC rejected the challenge, reasoning that the SPEED program was merely an "alternative" program made available to QFs. Vermont's main program, the "Rule 4.100 Program," sufficed to meet the state's PURPA obligations. *Otter Creek*, 143 FERC ¶ 61,282, at paras. 3-4.

Critically, however, the Rule 4.100 Program—*unlike* California's Standard Contract program—allows QFs to choose a rate under Section 292.304(d)(2)(ii). Specifically, Vermont's

Rule 4.100 program allows QFs to elect a long-term contract with a rate "based on projected avoided energy costs associated with various levels of purchases from qualifying facilities …." *See* Vt. Admin. Code 18-1-10:4.104(E)(2).[4] That rate is calculated at the time the contract is entered. It is to be determined on a "levelized … basis," *id.* 10:4.104(E)(5), which means a rate that is the equivalent of "an … annuity." Vt. Admin. Code 18-1-10:4.103(A)(7) (defining "levelized rate"). To implement the Rule 4.100 program, the Vermont Public Service Board publishes a rate sheet which shows the levelized rate that a QF can receive each month for the duration of a 5, 10, 15, 20, or 30-year contract.[5] Thus, the Rule 4.100 program allows QFs to select a Section 292.304(d)(2)(ii) rate; it does not have any cap; and that rate is based on the utility's avoided costs. Against that backdrop, FERC ruled that the SPEED program was merely an "alternative."

The situation here could not be more different. There is no similar rate sheet under the Standard Contract program, because the rate that a QF will be paid in the future cannot be calculated now. Thus, the "current and historical SRAC energy payments" set forth on the PG&E website, CPUC Opp. Mem. at 20,[6] which Defendants submitted with their brief, *see* ECF No. 92 (CPUC Request for Judicial Notice, Ex. 2), lists *historical* SRAC energy prices for each month from 1980 through August 2015. But it does not (and cannot) list the price that a QF will receive in the future, because the SRAC formula includes variables whose values cannot be known until the electricity is ultimately delivered.

Consequently, the Re-MAT program is not an "alternative" like Vermont's SPEED program; rather, the Re-MAT is the *only* means by which California purports to comply with the requirement to make a Section 292.304(d)(2)(ii) rate available to QFs like Plaintiff. Plaintiff pointed out this distinction between this case and *Otter Creek* in its reply brief, *see* Pltf. Reply Br. at 9-10 n.7, and tellingly, the Utilities did not address it.

[4] The relevant Vermont regulations can be found at http://www.state.vt.us/psb/rules/4100boun.htm.

[5] The most current rate sheet is available at http://static1.1.sqspcdn.com/static/f/424754/26398028/1437057517847/Attachment+1+RATES.pdf and is attached as Exhibit A for the Court's convenience.

Also telling is the fact that, when the Re-MAT program was adopted by the CPUC, it was never described as an "alternative." Instead, the CPUC believed that it offered an avoided-cost rate consistent with Section 292.304(d)(2)(ii). The CPUC stated that the Re-MAT's "pricing methodology *must* also be consistent with federal law on avoided costs for wholesale transactions under PURPA." CPUC May 2012 Order at 39 (emphasis added); indeed, the CPUC said it was a "fundamental premise" of the Re-MAT "that the prices reflect avoided costs," because otherwise the CPUC "would not have jurisdiction to establish the [program's] prices." *Id.* at 105 n.83. The Court should not be fooled by the Utilities *post hoc* attempt to salvage the Re-MAT program by recharacterizing it.

B. Plaintiff Is Not Attacking the Legality of the Standard Contract, and Thus the Utilities' Exhaustion Argument Is Misplaced.

The Utilities' argument that Plaintiff failed to exhaust its administrative remedies with respect to the Standard Contract, *see* Utilities Br. 10-11, is equally without merit. Plaintiff does not contend that the Standard Contract is illegal. The Standard Contract formed no part of Plaintiff's complaint. There was nothing for Plaintiff to exhaust with respect to the Standard Contract, because Plaintiff is seeking no relief or remedy with respect to the Standard Contract. It is Defendants and the Utilities that have injected the Standard Contract into this case, in an effort to recharacterize the Re-MAT program as a mere "alternative" that was never intended to comply with PURPA's requirements.[7]

[6] SRAC, or "short run avoided costs," is the name of the pricing formula for the Standard Contract. *See* CPUC Opp. Mem. at 11.

[7] The Utilities are also incorrect that the Standard Contract was never considered by FERC. As intervenors before FERC, the Utilities raised the same argument regarding the Standard Contract that it makes here, and Plaintiff addressed that argument in its brief. *See* Answer of Winding Creek Solar LLC, *In re Winding Creek Solar LLC*, Docket EL13-71 at 5 (FERC July 18, 2013) ("The QF all-source program [i.e., Standard Contract] to which the CPUC and the California Utilities point does not provide a QF with the long-run rate mandated by 18 C.F.R. §292.304(d)(2)(ii)."), http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=13309014. FERC later addressed that argument in its "Declaratory Order" declining to initiate an enforcement action, stating—without any analysis, discussion of its regulations, or engagement with Plaintiff's arguments—that "Winding Creek … may obtain a PURPA long-term, avoided cost legally-enforceable obligation to sell [its] net capacity to [its] host utility pursuant to California's Standard Contract for QFs 20 MW or Under. Given the availability of [that contract], Winding Creek has not demonstrated that [CPUC's] implementation of PURPA … is inconsistent with PURPA and our regulations." *Winding Creek Solar LLC*, 151 FERC ¶ 61,103,

1 In truth, the Standard Contract is simply a red herring. The Standard Contract is a
2 perfectly valid rate under 18 C.F.R. § 292.304(d)(2)(i). But the Standard Contract does not offer
3 a rate under Section 292.304(d)(2)(ii). Thus, Defendants and the Utilities cannot point to the
4 Standard Contract program in order to excuse the Re-MAT's legal infirmities. The CPUC
5 offered the Re-MAT program as a rate under Section 292.304(d)(2)(ii), but it capped the
6 program and set the rate in a manner having nothing to do with the utility's avoided costs. That
7 is why the Re-MAT program is illegal, and that is why Plaintiff is challenging the Re-MAT
8 program, and not the Standard Contract.

9 **C. Plaintiff Is Entitled to a Rate Under 18 C.F.R. § 292.304(d)(2).**

10 Finally, the Utilities raise the question of whether Plaintiff is entitled to a rate under 18
11 C.F.R. § 292.304(d)(2) as a matter of state law. Utilities Br. 12-15. They stop short of arguing
12 that Plaintiff is *not* entitled to such a rate; they say merely that it is an open question that the
13 CPUC needs to decide. *Id.* at 13 (asserting that the issue is "less clear"). The CPUC, however,
14 did not make this argument in opposing summary judgment, and for good reason. The relevant
15 statute, Cal. Pub. Utils. Code § 399.20, makes unmistakably clear that Plaintiff is entitled to a
16 rate under 18 C.F.R. § 292.304(d)(2).

17 In suggesting otherwise, the Utilities draw on the Fifth Circuit's decision in *Exelon Wind*,
18 766 F.3d 380. As the Utilities recount, that case held that a state may decide whether non-firm
19 resources like wind or solar generation facilities should be able to sell their power to utilities
20 under a legally enforceable obligation (that is, pursuant to a contract) and receive their choice of
21 rate under 18 C.F.R. § 292.304(d)(2)(i)-(ii), or instead should be permitted to sell to utilities only
22 under 18 C.F.R. § 292.304(d)(1). Under Subsection (d)(1), a QF and utility have no contractual
23 obligations to one another; the QF is allowed simply to sell to the utility whatever power it
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para. 7 (2015). For the reasons Plaintiff has already given in its other briefs, that conclusion by FERC is flatly contradicted by the plain language of 18 C.F.R. § 292.304(d)(2)(ii), which requires that the state make available a rate "calculated at the time the obligation is incurred," and the admission by the CPUC and the testimony by Dr. Lesser that the Standard Offer rate cannot be *calculated* at the time the obligation is incurred. Accordingly, FERC's conclusion on this issue deserves no deference whatsoever from this Court. *See* Pltf. Mem. at 15-16; Pltf. Reply at 6-10.

1 happens to make available at the prevailing price at the time of sale.[8] The Fifth Circuit held in
2 *Exelon Wind* that Texas law did not impose on utilities any legally enforceable obligation to
3 contract with non-firm QFs. Instead, those resources were allowed to sell only under Subsection
4 (d)(1). And the Fifth Circuit upheld that arrangement as consistent with PURPA. *Exelon Wind*,
5 766 F.3d at 395-97.[9]

6 The Fifth Circuit's holding in *Exelon Wind* simply has no bearing here, because
7 California has made a different choice than Texas. As the state statute authorizing the Re-MAT
8 program makes unmistakably clear, under California law, non-firm QFs *may* impose legally
9 enforceable obligations on utilities. The California legislature mandated that the state's utilities
10 enter contracts "for a period of 10, 15, or 20 years, as authorized by the commission." Cal. Pub.
11 Util. Code § 399.20(d)(1). These contracts must be made available to "eligible renewable
12 energy resource[s]." *Id.* § 399.20(b)(4). That term is elsewhere defined to include non-firm
13 sources such as wind and solar. *See* Cal. Pub. Util. Code § 399.12(e); Cal. Pub. Res. Code
14 § 25741(a)(1). Indeed, that is the entire predicate of the Re-MAT program, which involves a
15 regulatory requirement imposed on utilities to enter contracts with non-firm QFs. Thus, under
16 California law, the utilities have a legally enforceable obligation to contract with Plaintiff, and
17 Plaintiff is therefore eligible for a rate under 18 C.F.R. § 292.304(d)(2). The Utilities simply
18 miss the mark when they assert that "the CPUC has not yet addressed [this] question." Utilities
19 Br. 15. Indeed, PG&E itself has acknowledged that Plaintiff is entitled to such a rate as a matter
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[8] From the standpoint of the QF, pricing under Subsection 292.304(d)(1) has advantages and disadvantages relative to pricing under Subsection 292.304(d)(2)(i). Both pay a price based in avoided costs calculated at the time of delivery. However, under Subsection (d)(1), the QF is not contractually bound to sell its output to the utility, and instead may sell its output to a third party willing to pay more. But Subsection (d)(2)(i) has the advantage of requiring the utility to pay for both energy (that is, the actual electricity produced) and capacity (which is the capability of producing electricity of called upon). Although resources like wind and solar are considered non-firm, they still do have some capacity value and, accordingly, do receive some capacity payments under Subsection (d)(2)(i).

[9] For the reasons given by the thoughtful opinion dissenting in part, the Fifth Circuit erred in reaching that conclusion. FERC's regulation is crystal clear that *all* QFs have the option to elect a rate under (d)(1) or under (d)(2) (and if they choose (d)(2), to then elect a rate under (d)(2)(i) or (d)(2)(ii)). 18 C.F.R. § 292.304(d); *Exelon Wind*, 766 F.3d at 403-05, 409-11, 412 (Prado, J., concurring in part and dissenting in part). That regulation preempts contrary state law. However, in this case, it is unnecessary for the Court to decide whether the Fifth Circuit was

of state law by accepting Winding Creek into the Re-MAT queue, where it still sits in the number one position. ECF No. 89-2 (Decl. of Thomas Melone) ¶¶ 7, 11.

Accordingly, even accepting the holding of *Exelon Wind*, Plaintiff would be entitled to a rate under Section 292.304(d)(2), and thus entitled to choose between a rate under Section 292.304(d)(2)(i) and a rate under Section 292.304(d)(2)(ii).

Finally, contrary to the Utilities' assertion at the very end of its brief, *see* Utilities Br. 15-16, Plaintiff does not rely on *JD Wind 1, LLC*, 130 FERC ¶ 61,127 (2010), for any proposition later undercut or overruled by the Fifth Circuit in *Exelon Wind*.

CONCLUSION

Summary judgment should be granted in favor of Plaintiff.

Dated: January 29, 2016

Respectfully submitted,

JENNER & BLOCK LLP

By: /s/ Matthew E. Price
Matthew E. Price (*admitted pro hac vice*)
Counsel for Plaintiff Winding Creek Solar LLC

right or wrong. As explained above, California has made a different choice than Texas, and allows its non-firm QFs to impose legally enforceable obligations on utilities.