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9
 10 **UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN FRANCISCO DIVISION**

13
 14 WINDING CREEK SOLAR LLC,

15 Plaintiff,

16 vs.

17 MICHAEL FLORIO, CATHERINE
 18 SANDOVAL, CARLA PETERMAN,
 MICHAEL PICKER, and LIANE
 19 RANDOLPH, in their official capacities as
 Commissioners of the California Public
 20 Utilities Commission,

21 Defendants.

Case No. 13-04934 JD

**MEMORANDUM OF POINTS AND
 AUTHORITIES OF DEFENDANT
 COMMISSIONERS OF THE
 CALIFORNIA PUBLIC UTILITIES
 COMMISSION IN OPPOSITION TO
 MOTION FOR SUMMARY JUDGMENT**

Date: October 14, 2015
 Time: 10:00 a.m.
 Courtroom 11, 19th Floor

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399.20 FiT: Original feed-in tariff implementing California Public Utilities Code § 399.20, enacted in 2006.

AB 1613 CHP: A certain type of cogeneration facility (combined heat and power system), as defined in California Public Utilities Code § 2840.2.

FiT: A feed-in tariff.

kW: A kilowatt is 1,000 watts of power. A watt hour is the basic unit of measure of electric energy consumption.

kWh: A kilowatt hour is the amount of power necessary to produce 1,000 watts for one hour. For example, ten 100-wattlight bulbs burning for one hour uses 1,000 Wh of electric energy, or 1 kWh.

MPR: The Market Price Referent reflects the construction, operation and maintenance costs of a proxy generator: a new, highly efficient 500 MW capacity combined cycle natural gas turbine.

MW: A megawatt is a million watts of power. For example, a MW is the amount of power needed to light 10,000 100 watt bulbs.

MWh: A megawatt hour is the amount of electric power delivered multiplied by the time over which the energy is consumed (measured in hours). A MWh is the amount of power needed to light 10,000 100 watt bulbs for one hour.

PG&E: Pacific Gas and Electric Company.

PURPA: Public Utility Regulatory Policies Act of 1978, codified generally at 16 U.S.C. § 796 and § 824a-3.

QF: A qualifying facility is an eligible cogeneration or small power production facility that is a qualifying facility under the requirements specified in Subpart B of FERC's regulations (18 C.F.R. § 292.101(b)(1), § 292.203).

QF Settlement: The comprehensive settlement among QFs, utilities, and ratepayer representatives approved by the CPUC in December 2010 in CPUC decision D.10-12-035.

RAM: The Renewable Auction Mechanism was established by the CPUC in D.10-12-048 as the primary contracting tool for utility procurement from smaller renewable energy projects (up to 20MW in size) that are eligible for the California Renewables Portfolio Standard Program.

1 **Re-MAT:** Renewable Market Adjustment Tariff, the revised
2 feed-in tariff program implementing amendments to California Public Utilities § 399.20.

3 **RPS:** The Renewable Portfolio Standard is a utility procurement requirement mandated by
4 California law (Article 16 of the Public Utilities Code, commencing with
5 § 399.11). The RPS requires increasing utility procurement by CPUC-regulated utilities
6 from eligible renewable energy resources.

7 **SCE:** Southern California Edison Company.

8 **SRAC:** Short-Run Avoided Costs are the short-run marginal costs for the production
9 of one additional unit of electricity: fuel costs, and certain operation and maintenance costs.

10 **Standard Contract:** The power purchase agreement approved by the
11 CPUC that California’s regulated utilities must offer QFs of 20 MW or less.
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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

The motion of plaintiff Winding Creek Solar LLC (“Winding Creek”) for summary judgment should be denied and summary judgment entered for the defendant Commissioners of the California Public Utilities Commission (“CPUC”). The Second Amended Complaint (“SAC”) challenges a CPUC’s feed-in tariff¹ program, “Re-MAT,” which requires utility procurement of 750 megawatts (“MW”) of electricity from small renewable energy generators that are strategically located near consumer demand, and alleges Re-MAT is preempted by the Public Utility Regulatory Policies Act of 1978 (“PURPA”). Re-MAT is part of California’s Renewable Portfolio Standard (“RPS”), a state requirement that utilities procure 33% renewable energy to serve their retail customers by December 31, 2020. Participation by qualifying facilities (“QFs”) in the Re-MAT Program is voluntary, and Re-MAT is in addition to the mandatory Standard Contract that California utilities must offer smaller QFs of 20 MW or less generation capacity under PURPA. In a Declaratory Order, FERC rejected Winding Creek’s arguments that the 750 MW state-wide limit of the Re-MAT Program violates PURPA because the Standard Contract offers a long-term rate compliant with 18 C.F.R. § 292.304(d)(2)(ii), and the Standard Contract is available to Winding Creek and any other QF of 20 MW or less. This Court should defer to the Declaratory Order, and FERC’s interpretations of PURPA and FERC’s regulations.

Both the Ninth Circuit and FERC precedent acknowledge the broad ratemaking authority of the CPUC in determining avoided cost rates under PURPA. Ignoring this precedent, Winding Creek argues that the CPUC should have done it differently, based solely on the testimony of its expert witness, Dr. Jonathan Lesser. Not only is Dr. Lesser’s testimony

¹ A feed-in tariff reflects a policy to support new renewable power generation, and typically requires utilities to purchase energy from eligible renewable sources, with guaranteed payments over a long-term contract.

1 inadmissible but, as a matter of law, neither Re-MAT nor the Standard Contract is inconsistent
2 with PURPA or FERC's regulations.

3 **II. STATEMENT OF ISSUES TO BE DECIDED**

4 In addition to the issues identified by Winding Creek, the Court must decide what
5 deference to accord FERC's Declaratory Order and FERC's interpretations of PURPA and
6 FERC's regulations.

7 **III. FACTUAL BACKGROUND**

8 **A. Regulatory Framework**

9 In 1978, Congress enacted PURPA to encourage fuel-efficient cogeneration and small
10 power production facilities (QFs) in order to reduce the reliance of electric utilities on fossil
11 fuels. *See FERC v. Mississippi*, 456 U.S. 742, 745-46, 750-51 (1982). In Section 210(a) of
12 PURPA, Congress required FERC, in consultation with the states, to adopt rules "as necessary
13 to encourage cogeneration and small power production," including rules requiring electric
14 utilities to offer to purchase electricity from QFs. *See* 16 U.S.C. § 824a-3(a)(2). Section 210(f)
15 of PURPA requires State commissions like the CPUC to implement FERC's regulations. *See*
16 *id.* at § 824a-3(f). A State commission may comply "by issuing regulations, by resolving
17 disputes on a case-by-case basis, or by taking any other action reasonably designed to give
18 effect to FERC's rules." *See FERC v. Mississippi*, 456 U.S. at 751; *Indep. Energy Producers*
19 *Ass'n v. Cal. P.U.C.*, 36 F. 3d 848, 856 (9th Cir. 1994) ("*IEP*") (CPUC has broad ratemaking
20 authority under PURPA). In turn, FERC's regulations afford State commissions "wide"
21 discretion, as long as the implementation is consistent with FERC's regulations:

22 In this regard, the determinations that a state commission makes to
23 implement the rate provisions of section 210 of PURPA are by
24 their nature fact-specific and include consideration of many
25 factors, and we are reluctant to second guess the state
26 commission's determinations; our regulations thus provide state
27 commissions with guidelines on factors to be taken into account,
28 "to the extent practicable," in determining a utility's avoided cost
of acquiring the next unit of generation.

1 *See Cal. P.U.C.*, 133 FERC ¶ 61, 059, at P 24 (“CPUC”), *reh’g denied*, 134 FERC ¶ 61,044
2 (2011) (citations omitted).

3 **1. Utility purchase obligation**

4 Section 292.303(a) of FERC’s regulations provides: “Each electric utility shall
5 purchase, in accordance with § 292.304 . . . any energy and capacity which is made available
6 from a qualifying facility. . . .” *See* 18 C.F.R. § 292.303(a). When PURPA was enacted, there
7 was no market for electricity produced by QFs, and *all* QF sales to utilities took place pursuant
8 to a State commission’s implementation of PURPA. *See Revised Regulations Governing Small*
9 *Power Production and Cogeneration Facilities*, 114 FERC ¶ 61,102, at P 95 (2006). However,
10 this changed as a result of PURPA’s success in developing markets for QF power, and the
11 deregulation of the wholesale electricity market. *See id.* In 2005, Congress amended PURPA,
12 and new contracts with QFs over 20 MW are not required if FERC finds there is
13 nondiscriminatory access to specified markets. *See* 16 U.S.C. § 824a-3(m); 18 C.F.R.
14 § 292.309. In June 2011, FERC terminated the purchase obligation for California utilities from
15 QFs over 20 MW. *See Pac. Gas. and Elec. Co.*, 135 FERC ¶ 61,234, at PP 5-6, 23-29 (2011).

16 **2. Avoided cost rates**

17 PURPA and FERC’s regulations similarly provide that rates for utility purchases from
18 QFs may not exceed the utility’s “avoided” cost: the incremental cost to the utility of the
19 electricity that, but for the purchase from the QF, the utility would need to generate or purchase
20 from “another source.” *See* 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. §§ 292.101(b)(6),
21 292.304(a)(2). FERC has specifically clarified that what costs a utility is avoiding can be
22 defined by utility procurement requirements established by state law that require utilities to
23 purchase electricity from certain types of facilities:

24 Where a state requires a utility to procure a certain percentage of
25 energy from generators with certain characteristics, generators with
26 those characteristics constitute the sources that are relevant to the
27 determination of the utility's avoided cost for that procurement
28 requirement.

1 CPUC, 133 FERC ¶ 61, 059, at PP 26, 30.

2 Setting avoided cost rates does not require mathematical precision or an exact
3 correlation with actual costs. *See Small Power Production and Cogeneration Facilities;*
4 *Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45
5 Fed. Reg. 12,214, at p. 12,224 (1980) (“*Rulemaking Order*”). FERC’s regulations do not
6 impose any mandatory requirements for avoided cost rates, but simply list factors to be
7 considered by a State commission, “to the extent practicable,” such as the availability of
8 electricity during daily and seasonal demand peak periods, and the reliability of the facility. *See*
9 18 C.F.R. §§ 292.304(b)(2), (e); CPUC, 133 FERC ¶ 61,059, at P 24. Avoided cost rates are
10 not “one size fits all.” State commissions have the discretion to set “multi-tiered” avoided cost
11 rates for QFs, with different rates for QFs based on their technological capabilities. *See id.* at
12 PP 6-8, 20 & 26; 18 C.F.R. § 292.304(c)(3)(ii).

13 Avoided costs can include both energy costs and capacity costs. Energy costs are the
14 costs associated with the incremental production of electric energy, including the cost of fuel
15 and certain operating and maintenance costs. Capacity costs are the costs of providing the
16 capabilities to meet the demand for electric energy, which could be construction costs,
17 conservation program costs, or wholesale power purchase costs. *See IEP*, 36 F.3d at 851 n.5;
18 *see also Rulemaking Order*, 45 Fed. Reg. at 12,216.

19 Whether a sale of power includes capacity value depends on whether it allows a utility
20 to avoid the costs of the construction or the purchase of new capacity. *See Rulemaking Order*,
21 45 Fed. Reg. at 12,226. A firm sale provides power when the buyer requests, as opposed to a
22 non-firm sale, where the seller sells power “as available.” *See id.* Generally, firm power is
23 more valuable than non-firm power. *See id.* at 12,225-26; *IEP*, 36 F. 3d at 852 n.7. A non-firm
24 sale may provide capacity value, but energy costs ordinarily are the costs associated with
25 non-firm sales. *See Rulemaking Order*, 45 Fed. Reg. at 12,225.

26 PURPA also requires that avoided cost rates be “just and reasonable,” (*see* 16 U.S.C.
27 § 824a-3(b)(1)), and Congress intended that this language be construed to protect consumers’
28

1 interests in equitable rates for electricity. *See* H.R. Conf. Rep. 95-1750, *reprinted in* 1978
2 U.S.C.C.A.N. 7797, 1978 WL 8505, at *7831-32 (Oct.10, 1978). PURPA was not intended to
3 guarantee QFs a rate of return or a subsidy. *See id.*; *Exelon Wind I L.L.C. v. Smitherman*, 766
4 F.3d 380, 384 (5th Cir. 2014). Rates exceeding avoided cost also allow QFs an unfair
5 advantage in the competitive wholesale markets. *S. Cal. Edison Co. (“SCE”)*, 70 FERC
6 ¶ 61,215, at pp. 61,175-76 (1995), *overruled on other grounds by CPUC*, 133 FERC ¶ 61,059,
7 at PP 26-30.

8 **B. State Authority Over Utility Procurement**

9 While the FERC has jurisdiction over the wholesale sale of electricity, the Federal
10 Power Act did not preempt all areas of traditional state regulation. *See* 16 U.S.C.
11 § 824(b)(1); *New York v. FERC*, 535 U.S. 1, 5-6, 23-24 (2002). The states, not the FERC, have
12 jurisdiction over local service issues, which include the composition of utility resource
13 portfolios and utility “buy-side” decisions. *See id.* at 24. The states’ “broad powers to direct
14 the planning and resource decisions” include the power to order state-regulated utilities to
15 purchase renewable energy. *See Entergy Nuclear Vt. Yankee LLC v. Shumlin*, 733 F.3d 393,
16 417 (2d Cir. 2013); *Allco Finance Ltd. v. Klee*, 2014 WL 7004024, at *9 (D. Conn. 2014) (Allco
17 is Winding Creek’s affiliate). While the CPUC can order its regulated utilities to purchase from
18 renewable facilities, the CPUC may not set the wholesale price for these purchases except from
19 QFs and in compliance with PURPA. *See CPUC*, 132 FERC ¶ 61,047, at PP 64-69, *clarified on*
20 *reh’g by*, 133 FERC ¶ 61,059, at PP 26-31 (2010), *reh’g denied*, 134 FERC ¶ 61,044 (2011);
21 *Midwest Power Sys.*, 78 FERC ¶ 61,067, pp. 61,246-48 (1997).

22 Independent of PURPA, California has imposed *additional* state requirements for utility
23 procurement from renewable resources. In 2002, the Legislature enacted SB 1078 (Sher, Stats.
24 2002, ch. 516), to establish the Renewable Portfolio Standard (“RPS”) (Article 16, commencing
25 with § 399.11, of the Public Utilities Code). The RPS currently requires utility procurement of
26 33% from eligible renewable energy resources by December 31, 2020. *See* Pub. Util. Code
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1 §§ 399.11(a); 399.15; *cf. Morgantown Energy Ass'n v. Pub. Serv. Comm'n*, 2013 WL 5462386,
2 at *1 (2013) (West Virginia renewable procurement rules in addition to PURPA).

3 **C. The Market Price Referent**

4 Winding Creek implies that the CPUC's Market Price Referent or "MPR" was
5 developed as measure of avoided cost for PURPA rate-setting. *See* Opening Brief ("OB"), p. 6.
6 This is incorrect. Rather, the MPR initially was adopted because Public Utilities Code
7 § 399.15(c) directed the CPUC to determine the "market price of electricity" to be used as a
8 benchmark for the CPUC to evaluate bids received in renewable power solicitations by utilities
9 to meet the RPS, and to serve as a cost-containment mechanism. *See* D.04-06-015, pp. 1-5,
10 2004 WL 1467057 (June 9, 2004); 2002 Cal. Legis. Serv. Ch. 516 (S.B. 1078); D.12-05-035,
11 p. 16 & n.29; CPUC Resolution E-4442, 2001 WL 6278262 (Dec. 1, 2011) (adopts 2011 MPR
12 values, and the history of the MPR).

13 The first MPR was adopted in 2003. *See* D.03-06-071, at 16-18 & 67, 2003 WL
14 21501966 (June 19, 2003); D.12-05-035, pp. 7-9 & n.11. In 2003, the MPR did not reflect the
15 market price of renewable energy because most of the existing contracts had been signed by
16 the California Department of Water Resources during the 2000-2002 energy crisis, and there
17 were insufficient comparable contracts to provide a basis for setting a market price. *See*
18 D.03-06-071, at 16-18. Accordingly, the CPUC based the MPR on the long-term costs of the
19 ownership, operation, and fixed-price fuel for a proxy generator: a new, highly efficient, 500
20 MW natural gas-fired combined cycle gas turbine. *See id.* at 15-20, 67; D.12-05-035, pp. 7-8.
21 The MPR has been refined over time, and reflects payment for both energy and capacity by
22 applying time of delivery factors. *See* D.12-05-035, pp. 7-8, 16 & nn.10, 31. Approximately
23 75% of the MPR calculation is driven by the price of natural gas. *See id.* at 9 n.16.

24 **D. The Evolution of the Feed-in Tariff Under Public Utilities Code § 399.20**

25 **1. The original program**

26 In 2006, as part of California's RPS, the legislature added § 399.20 to the Public
27 Utilities Code. *See* 2006 Cal. Legis. Serv. Ch. 731 (A.B. 1969). In 2007, the CPUC
28

1 implemented § 399.20, and established a feed-in tariff program requiring utility purchases
2 from a limited class of public water and wastewater facilities (“399.20 FiT Program”). *See*
3 D.07-07-027, 2007 WL 2229386 (July 26, 2007). The 399.20 FiT Program was later expanded
4 to include renewable generators of 1.5 MW or less. *See* D.12-05-035, p. 7. The pricing for the
5 399.20 FiT Program was based on the MPR because, in 2007, § 399.20 required that the tariff
6 price shall be the market price as determined by the CPUC pursuant to § 399.15(c) (the MPR).
7 *See id.* at 7-8 & 16-17; 2006 Cal. Legis. Serv. Ch. 731 (A.B. 1969), p.3; D.07-07-027, p. 16.
8 The 399.20 FiT Program had a State-wide procurement limit of 250 MW. *See id.* at 4, 8.

9 **2. 2008-2011 amendments to § 399.20**

10 In 2008, 2009, and 2011, the California legislature amended § 399.20. *See* D.12-05-035,
11 pp. 2, 4-7. The most significant amendment eliminated the cross-reference to § 399.15, so the
12 price was no longer tied to the MPR. *See* D.12-05-035, pp. 16-17; 2011 Cal. Leg. Serv. 1st Ex.
13 Sess. Ch. 1 (S.B. 2), p. 34. Section 399.20 directed the CPUC to consider the following: (1) the
14 long-term market price for fixed price products determined by the utilities’ general procurement
15 activities; (2) the long-term ownership, operating and fixed-price fuel costs for fixed-price
16 electricity from new generation facilities; and (3) the value of different products, including
17 baseload, peaking, and as-available electricity.² *See* Pub. Util. Code § 399.20(d)(2)(A)-(C).

18 The amendments also changed the facilities eligible for the tariff. The size of a facility
19 was increased to 3 MW, and the facility must be interconnected to a utility and “strategically
20 located” on the grid to optimize delivery to consumer demand. *See* Pub. Util. Code
21 §§ 399.20(b), 399.12(e); Cal. Pub. Res. Code § 25741. The required procurement was
22 increased to a State-wide cap of 750 MW. *See* Pub. Util. Code § 399.20(e).

23
24 ² For Re-MAT, an as-available facility is one that provides energy during non-peak hours.
25 D.12-05-035, p. 44. Under PG&E’s tariff, “super-peak” hours are hours ending 13-20. *See*
26 Lesser Decl., Exh. 3, p. 69. A peaking facility is also an as-available resource, but generates
27 electricity during peak hours when all other resources are operating at maximum capability.
28 A baseload facility provides firm energy around the clock. *See* D.12-05-035, p. 44.

3. The Re-MAT Decisions

1 3. **The Re-MAT Decisions**
2 The CPUC issued the “Re-MAT Decisions” to implement the 2008-2011 statutory
3 amendments to § 399.20. *See* SAC, ¶ 42. The Re-MAT Decisions adopted a new pricing
4 mechanism, referred to as the “Renewable Market Adjusting Tariff” or “Re-MAT.”
5 *See* D.12-05-035, p. 2. The CPUC evaluated a number of pricing proposals. *See id.* at 19-43.
6 The CPUC explained its decision to not continue using the MPR:

7 Specifically, the MPR does not reflect ongoing changes within the renewable
8 market and, as a result, could potentially result in a price either too low or too
9 high. In addition, the renewable market has evolved since the Commission first
10 established the MPR in 2003 at the beginning of the RPS program. Now the
11 renewable market is sufficiently robust to serve as the point of reference for
establishing the market price for small renewable projects rather than the very
different benchmark used for the MPR, which is based on the costs of a
combined-cycle natural-gas power plant.

12 *See id.* at 32-33.

13 The CPUC expressly relied on FERC’s clarification in *CPUC*, 133 FERC ¶ 61,059, that
14 avoided cost rates could be based on State requirements that utilities procure electricity from
15 particular facilities. *See* D.12-05-035, pp. 11-13. The CPUC found that a price based on the
16 most recent comparable competitive solicitation for renewable generation “more fully reflects
17 the avoided costs under federal law,” and the renewables market is “now sufficiently robust to
18 serve as the benchmark for the market price for small renewable projects.” *Id.* at 40-41 & 44.

19 As the CPUC further explained:

20 The market-based pricing methodology adopted today allows customers to
21 realize the benefits of changing market conditions that result in potentially lower
22 costs. In addition, it allows generators to set the market price through the
23 bidding process, which theoretically will ensure the price is neither too high nor
24 too low but, instead, will be reasonable to cover the generator’s costs and
25 encourage broad participation in the market. In contrast, administratively-
26 determined pricing is static and, as a result, can result in pricing being either too
high, leading to windfalls for project developers and unnecessarily high
procurement costs for customers, or pricing that is too low, preventing program
subscription. These scenarios based on an administratively-determined price do
not achieve ratepayer indifference to the extent achieved by Re-MAT.

27 *See id.* at 64.
28

1 The initial starting price of \$89.23/MWh was based on the weighted average of the
2 highest priced executed contracts of Pacific Gas and Electric Company (“PG&E”), SCE, and
3 San Diego Gas & Electric Company resulting from the CPUC's Renewable Auction Mechanism
4 (“RAM”) held in November 2011.³ See D. 12-05-035, pp. 40-41, 45, 113. This starting price
5 was applied to the three product types referenced in § 399.20: baseload, peaking, and
6 as-available. See SAC ¶¶ 49, 51, 57; D.12-05-35, pp. 2-3. The CPUC did not use a unique
7 starting price for each electricity product type because there was insufficient market information
8 for each product type. See *id.* at 44.

9 The 750 MW program limit was divided among the utilities based on a formula, and
10 PG&E’s initial allocation was 218.8 MW. See D.12-05-035, pp. 80-81. The CPUC required
11 the utilities to allocate equal amounts to each product type over 24 months. See *id.* at 50. This
12 design was an effort to stimulate the market for small renewable distributed generation (power
13 generation at the point of consumption) by providing an adequate supply of available capacity
14 for each product type in response to demand, and to “minimize ratepayer exposure to a large
15 number of non-competitively priced contracts.” See *id.* at 50-51.

16 Participation by a QF in the Re-MAT program is voluntary; a facility must submit a
17 participation request to the utility. Each utility establishes a queue on a first-come, first-served
18 basis for each product type. Every two months, the utility offers a contract at that two-month
19 Re-MAT price in order of the queue. A facility can accept or reject the price. If accepted, the
20 contract price is fixed for the term of contract. If the price is declined, the facility maintains its
21 position in the queue until the next two-month period. See D.12-05-035, pp. 46-47.

22 Because the RAM auction included generators up to 20 MW, the CPUC adopted a price
23 adjustment mechanism to address the disparity between that market segment and the market
24

25 ³ The RAM is the “primary contracting tool” for utility procurement from renewable facilities
26 under 20 MW. See D.10-12-048, 2010 WL 5650684, at *1 (Dec. 16, 2010). Each utility
27 conducts competitive solicitations based on its portfolio needs.
28

1 segment of small renewables of 3 MW or less that are “strategically located.” *See* D.12-05-035,
2 pp. 41-42. The price adjustment mechanism is based on a proposal by SCE, and allows the
3 price for each product type to increase or decrease every two months based on the market
4 response to the previously offered price. *See id.* at 45 n. 48, 49. A price adjustment will be
5 triggered only after at least five eligible projects by different developers are in the queue, in
6 order to prevent gaming (withholding supply to force an increase in price). *See id.* at 46 n. 49.
7 If there are less than five projects by different developers for any two-month offering, then the
8 Re-MAT price remains the same for the next two-months. *See id.* at 47. If at least five eligible
9 projects are in the queue, the price may increase or decrease based on whether projects accept
10 the Re-MAT price and the subscription level is met. *See id.* at 45-50. If no developer enters
11 into a contract at the two-month price, then a price increase will be triggered for the following
12 two-month period. If the threshold of five eligible projects is achieved and all available
13 capacity is subscribed for in a product type, a price decrease is triggered for the following two-
14 month period. *See id.*

15 For PG&E, the offering price for baseload and peaking products has remained at the
16 initial \$89.23/MWh price. In contrast, the offering price for as-available sales decreased to a
17 low of \$57.23/MWh, but has adjusted upward to \$65.23/MWh for the July 2015 auction. *See*
18 SAC, ¶¶ 58-61, 68-69; Price Decl., Exhs. 6, 7.

19 The offering price alone is not the tariff rate. The offering price is adjusted for time of
20 delivery factors (month and time of day), and also depending on the facility’s actual delivery
21 profile (the firmness or reliability of the power provided). *See* D.12-05-035, pp. 3, 8, 38, 45, 57,
22 113, & 121-22. For example, if the offering price is \$65.23/MWh, PG&E will pay a QF
23 providing as-available energy during July and the super-peak period (hours ending 13-20) the
24 rate of \$75.50/MWh ($\65.23×1.157), as opposed to if the same QF provided the energy at
25 night, when the rate would be \$62.00/MWh ($\$65.23 \times .951$). *See* Lesser Decl., Exh. 3, pp. 11,
26 69. If the QF has full capacity deliverability, then the rates would be \$149.83/MWh ($\$65.23 \times$
27 2.297) and \$52.05/MWh ($\$65.23 \times .798$) for super-peak and night, respectively. *See id.* These
28

1 price adjustment reflect the value of the energy to the utility. *See* D.12-05-035, pp. 8, 45, 121.
2 The CPUC approved tariffs and standard contracts under the Re-MAT Program for each
3 investor-owned utility, with terms of ten, 15 or 20 years. *See* SAC, ¶ 46.

4 **4. The Standard Contract for QFs 20 MW or less**

5 Since the 1980s, the CPUC has approved contracts with administratively set avoided
6 cost rates that California utilities must offer QFs, including a number of “standard offer”
7 contracts. *See IEP*, 36 F.3d at 852 n.7; *Signal Shasta Energy Co.*, 41 FERC ¶ 61,120 (1987).
8 There were “numerous complex and contentious” disputes about these contracts. *See*
9 D.10-12-035, pp. 1, 8, 2010 WL 5650671 (Dec. 16, 2010); *SCE v. Cal. P.U.C.*, 101 Cal. App.
10 4th 982, 991-93 (2002). In 2010, the CPUC approved a comprehensive settlement (“QF
11 Settlement”). *See* D.10-12-035, p. 5. The QF Settlement provides a variety of QF contract
12 options, including a *pro forma* agreement that utilities must offer QFs of 20 MW or less
13 (“Standard Contract”). *See id.* at 5-6, 14-15, 19-21, 25, 39-42 & 44, Exh. 6; excerpts of the
14 PG&E Standard Contract are attached as Exh. 4 to Lesser Decl.

15 The Standard Contract has a 12-year term for new facilities, and provides payments
16 separately for energy and capacity. The energy price uses a complex formula based on a
17 previously-approved CPUC short-run avoided cost (“SRAC”) formula. *See* D.10-12-035,
18 p. 24 & n.31 & Exh. 6 (Lesser Decl., Exh. 5, pp. 45-50); D.07-09-040, 2007 WL 2872674
19 (Sep. 20, 2007), pp. 22-28. Since 1980, the CPUC has used a variation of the SRAC formula.
20 *See* D.07-09-040, p. 22; *SCE*, 101 Cal. App. 4th at 388-89. PG&E’s historical SRAC energy
21 prices are posted on its website. *See* CPUC Request for Judicial Notice (“RJN”), Exh. 2. The
22 separate, additional payment for capacity allows the QF to elect to sell its capacity as firm,
23 as-available, or both firm and as-available. The price for firm capacity is fixed at \$91.97 kw-
24 year. As-available capacity prices are also fixed, and increase for each year from 2010-2028;
25 the 2015 price is \$48.98 kw-year. *See* Lesser Decl., Exh. 4, pp. 10, 14. All contract payments
26 apply time of delivery factors depending on the time of year/day. *See id.* at 11-12.

1 **E. AB 1613 Feed-in Tariff**

2 In 2011, the CPUC established a different feed-in tariff program (“AB 1613 Program”)
3 only for a specific subset of QFs: combined heat and power facilities of 20 MW or less
4 producing thermal heat and electricity from a single fuel output (“AB 1613 CHP”). *See*
5 Assembly Bill 1613, Stats. 2007, ch. 713 (A.B. 1613), codified at Pub. Util. Code §§ 2840-
6 2845; D.11-04-033, pp. 4 n.5, 9-13, 2011 WL 1589687 (Apr. 14, 2011). Winding Creek’s
7 planned solar facility is not eligible for this program. An AB 1613 CHP must meet strict
8 efficiency and emission requirements, and may sell only the “excess electricity” net of what it
9 generates for its own needs. *See* Pub. Util. Code §§ 2840.2(a)-(b), 2841(a) & 2843(e)(1). The
10 avoided cost rate is based on the MPR because AB 1613 CHPs operate continuously and are a
11 firm resource, avoiding procurement or generation costs of a new, highly efficient natural gas
12 combined cycle generator. *See* D.11-04-033, pp. 9-11-13, 21-24. The energy price is higher
13 than the SRAC approved for the Standard Contract because AB 1613 CHPs must satisfy higher
14 efficiency and emissions standards. *Id.* at 16-20. (If these standards are not met, SRAC applies.
15 *See id.* at 26-27.) FERC affirmed that the CPUC may set this avoided cost rate based on State
16 procurement requirements from these particular facilities – as opposed to the cost of any sources
17 available to sell to the utility. *See CPUC*, 133 FERC ¶ 61,059, at PP 26-31. Contrary to ¶ 42 of
18 the SAC, nothing in the Re-MAT Program supersedes or terminates the AB 1613 Program.

19 **F. Winding Creek’s Enforcement Petitions**

20 Winding Creek filed its first petition for enforcement, FERC Docket No. EL13-71, on
21 June 13, 2013. The first petition alleged that the Re-MAT Program violates PURPA because:
22 (1) the price is not the utilities’ full avoided costs; and (2) it “eliminates or restricts” a QF’s
23 option for a “long-run rate” pursuant to 18 C.F.R. §292.304(d)(2)(ii). *See Melone Decl.*, Exh. 2.
24 FERC issued a *Notice of Intent Not to Act* on Winding Creek’s original petition on August 12,
25 2013. *See Winding Creek Solar LLC*, 144 FERC ¶ 61,122 (2013).

26 On March 9, 2015, Winding Creek filed a second petition, Docket No. EL15-52,
27 and requested that FERC make declaratory findings. *See Melone Decl.*, Exh. 4, p. 5. On
28

1 May 8, 2015, FERC again issued a *Notice of Intent Not to Act*, and also issued a declaratory
2 order rejecting Winding Creek’s argument. *See Winding Creek Solar LLC*, 151 FERC ¶ 61,103
3 (2015) (“Declaratory Order”). FERC ruled that the 750 MW limit was “not inconsistent” with
4 PURPA or FERC’s regulations because QFs of 20 MW or less could obtain a “PURPA long-
5 term, avoided cost legally-enforceable obligation to sell their net capacity pursuant to
6 California’s Standard Contract.” *See id.* at PP 6-7. Winding Creek filed a request for rehearing
7 on June 8, 2015. Because FERC must act on a rehearing request within 30 days or it is deemed
8 denied, 18 C.F.R. § 385.713, on July 8, 2015, FERC granted rehearing for the “limited purpose
9 of further consideration.” *See Melone Decl.*, Exh. 6.

10 **IV. SUMMARY JUDGMENT STANDARD**

11 FERC’s regulations grant State commissions “great latitude in determining the manner
12 of implementation of the Commission's rules, provided that the manner chosen is reasonably
13 designed to implement the requirements.” *See Exelon Wind 1 L.L.C. v. Smitherman*, 766 F.3d
14 380, 385 (5th Cir. 2014); *IEP*, 36 F.3d at 856. This Court must determine the legal issue of
15 whether the CPUC’s rules, on their face, conflict with federal law. *See Exelon*, 766 F.3d at 380,
16 393, 394-96; *IEP*, 36 F.3d at 858-59; *Exelon Wind 1, L.L.C. v. Nelson*, 2012 WL 4465607, at
17 *5, 7-8 (W.D. Tex. 2012). A State commission’s implementation of PURPA is reviewed with
18 “deference.” *See Exelon*, 766 F.3d at 394-95; *Power Resource Grp. v. P.U.C. of Tex.*, 422 F.3d
19 231, 236 (5th Cir. 2005) (citing *IEP*, 36 F.3d at 856). Such deference is appropriate because
20 ratemaking is a legislative, not judicial, function, “a task of striking a balance and reaching a
21 judgment on factors beset with doubts and difficulties, uncertainty and speculation.” *See United*
22 *States v. Morgan*, 313 U.S. 409, 417 (1941).

23 **V. THE RE-MAT DECISIONS ARE NOT UNLAWFUL**

24 **A. FERC’s Interpretations Warrant Deference**

25 Although Winding Creek requested that the FERC make declaratory findings (*see*
26 *Winding Creek*, 151 FERC ¶ 61,103, at P 5), because the findings were adverse to Winding
27
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1 Creek, Winding Creek now argues that the Declaratory Order is entitled to “no deference.” *See*
2 OB, p. 15. Winding Creek is wrong.

3 First, Winding Creek argues that the Declaratory Order is not FERC’s “final word”
4 because of Winding Creek’s pending request for rehearing. *See* OB, p. 14. Under FERC’s
5 rules, rehearing may be sought only of “final orders,” and a request for rehearing does not stay
6 the order. *See* 18 C.F.R. § 385.713(a), (e). Moreover, FERC did not grant rehearing on the
7 merits, but merely issued a “tolling order” for “the limited purpose of further consideration”
8 because FERC’s rules require action on requests for rehearing within 30 days or the request is
9 denied by operation of law. *See id.* at § 385.713(f); *Kokajko v. FERC*, 873 F.2d 419, 422 (1st
10 Cir. 1989); Melone Decl., Exh. 6.

11 *Chevron* deference is appropriate for FERC’s reasonable interpretation of PURPA if the
12 specific issue is not directly addressed or the statutory provision is ambiguous. *See Fournier v.*
13 *Sebelius*, 718 F.3d 1110, 1118 (9th Cir. 2013) (ambiguous if “fair arguments” on both sides).
14 Courts allow deference to an agency’s reasonable policy choices in “complex and technical
15 areas” unless contrary to the history and purpose of the statute. *See Chevron, U.S.A., Inc. v.*
16 *Natural Res. Defense Council*, 467 U.S. 837, 845, 863 (1984).

17 Winding Creek argues that the Declaratory Order does not command *Chevron* deference
18 because it is an “informal opinion letter that lacks the force of law.” *See* OB, p. 15. Winding
19 Creek’s reliance on *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000), is misplaced. In
20 *Christensen*, the informal opinion at issue was specifically distinguished from “one arrived at
21 after, for example, a formal adjudication.” *See id.* In contrast, the Declaratory Order is a formal
22 FERC order issued pursuant to Section 210(h) of PURPA, after notice, and an opportunity to
23 comment. *See* U.S.C. § 824a-3(h)(2)(A); 18 C.F.R. §§ 385.207, 385.210, 385.211, 385.713 &
24 385.2009; CPUC RJN Exh. 1. The FERC has the power to issue declaratory orders in response
25 to a PURPA enforcement petition to “remove uncertainty,” and such orders represent both the
26 FERC’s exercise of its discretion, and a “statement of the Commission’s position on the matter”
27 in the event a judicial action is filed. *See Hydrodynamics, Inc.*, 146 FERC ¶ 61,193, at P 29 nn.

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1 63-64 (2014). Generally, the FERC’s declaratory orders are entitled to precedential effect. *See*
2 *CPUC*, 134 FERC ¶ 61,044, at P 28 n. 50. Accordingly, they are subject to *Chevron* deference.
3 *See Perfectly Fresh Farms, Inc. v. U.S. Dep’t of Agric.*, 692 F.3d 960, 967 (9th Cir. 2012).

4 Winding Creek’s reliance on *Exelon* is also misplaced. *Exelon* relied on *Christensen*,
5 but also *Industrial Cogenerators v. FERC*, 47 F.3d 1231 (D.C. Cir. 1995), in holding that an
6 informal FERC “letter” was not entitled to *Chevron* deference. *See Exelon*, 766 F.3d at 387,
7 391. Again, in contrast, the Declaratory Order was not informal, but issued as a result of a
8 formal adjudicatory process. Moreover, *Industrial Cogenerators* is inapposite because it
9 addresses whether a FERC declaratory order in response to a Section 210(h) petition is
10 directly reviewable in the United States Courts of Appeal, not whether such an order is
11 entitled to deference – an issue that court identified and expressly left open. *See Indus.*
12 *Cogenerators*, 47 F.3d at 1234-35.

13 FERC’s interpretation of its own regulations is entitled to even greater deference under
14 *Auer v. Robbins*, 519 U.S. 452, 461 (1997). *See Price v. Stevedoring Serv. of Amer.*, 697 F.3d
15 820, 828 (9th Cir. 2013); *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930-31 (9th Cir. 2003). Even
16 informal agency opinions are entitled to *Auer* deference, and an agency’s long-standing
17 interpretation is entitled to “special deference.” *See id.* at 931, 933. Under *Auer*, if a regulation
18 is ambiguous, deference is required to the administering agency’s interpretation unless it is
19 “plainly erroneous or inconsistent with the regulation,” and an “alternative reading is
20 compelled by the regulation’s plain language or by other indications of the [agency’s] intent at
21 the time of the regulation’s promulgation.” *See id.* at 931 (emphasis original; citations
22 omitted); *Pub. Lands for the People, Inc. v. U.S. Dep’t of Agric.*, 697 F.2d 1192, 1199 (9th Cir.
23 2012). A regulation is ambiguous where, although a concept “may seem obvious, the definition
24 is not immediately clear.” *See id.*; *Bassiri*, 463 F.3d at 931 (ambiguous if not “free from
25 doubt”). Finally, even if *Auer* did not apply, as Winding Creek concedes, FERC’s interpretation
26 of its regulations may be accorded “*Skidmore*” deference based on the validity of its reasoning,
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1 its consistency with prior orders, and its “power to persuade.” *See* OB, p. 16, quoting *Skidmore*
2 *v. Swift & Co.*, 323 U.S. 134, 140 (1944).

3 **B. The Utility Purchase Obligation Is Not Restricted**

4 Winding Creek argues at pp. 13-14 that the 750 MW State-wide cap for the Re-MAT
5 Program, and the 5 MW bi-monthly auction cap, violate the utility obligation imposed by 18
6 C.F.R. § 292.303(a) to purchase any energy and capacity made available by a QF. But the
7 CPUC has not limited this purchase obligation. Winding Creek does not argue that PG&E has
8 refused to purchase electricity from Winding Creek. Winding Creek admits that the Standard
9 Contract is available to Winding Creek. *See* OB, p. 14.

10 PURPA allowed the FERC to create rules “as necessary” requiring utilities to offer to
11 purchase electricity from QFs. *See* 16 U.S.C. § 824a-3(a)(2). Accordingly, Congress allowed
12 FERC to “fill in the gaps.” *See King v. Burwell*, 135 S. Ct. 2480, 2488 (2015). Nothing in
13 PURPA or 18 C.F.R. § 292.303(a) require that every state utility procurement program must
14 have an unlimited purchase obligation from QFs. Winding Creek does not dispute FERC’s
15 interpretation in the Declaratory Order that a State commission may limit the amount of
16 procurement for a particular state program (an “alternative program”), as long as there is
17 available a PURPA-compliant program with no capacity limitation. *See* OB, pp. 14-15.
18 Although at p. 16 Winding Creek criticizes the term “alternative program,” this term is
19 consistent with FERC’s long-standing interpretation that states have “numerous ways outside of
20 PURPA to encourage renewable resources,” and may order regulated utilities to purchase a
21 certain amount of energy from QFs as long as the price is set at avoided cost. *See Midwest*
22 *Power*, 78 FERC ¶ 61,067, at pp. 61,245-48; *Otter Creek Solar LLC*, 146 FERC ¶ 61,128, at
23 PP 3-4 (2013), *reconsideration denied* at 146 FERC ¶ 61,192 (2014) (rejecting challenge by
24 Winding Creek’s affiliate to Vermont feed-in tariff because other state PURPA program
25 available). FERC precedent also specifically affirms that the CPUC can order utilities to
26 purchase from renewable facilities, but may not set the price except for purchases from QFs in
27 compliance with PURPA. *See CPUC*, 132 FERC ¶ 61,047, at PP 64-69.

1 The Declaratory Order expressly rejected Winding Creek’s argument that the 750 MW
2 capacity limit for the Re-MAT Program restricts the ability of Winding Creek to obtain a legally
3 enforceable obligation at a rate calculated at the time the obligation is incurred as allowed by
4 18 C.F.R. § 292.304(d)(2)(ii) because of the availability of the Standard Contract to Winding
5 Creek. *See Winding Creek*, 151 FERC ¶ 61,103, at PP 5-7. FERC’s reasoning applies equally
6 to Winding Creek’s challenge to the bi-monthly cap of 5 MW. The Declaratory Order is
7 consonant not only with FERC precedent, but the wide latitude afforded states to implement
8 PURPA, and the states’ traditional powers to direct utility procurement and encourage
9 renewable resources independent of PURPA. *See CPUC*, 133 FERC ¶ 61,059, at P 24; *FERC v.*
10 *Mississippi*, 456 U.S. at 851; *New York v. FERC*, 535 U.S. at 24; Sections II.A, B, *supra*.

11 Finally, conflict preemption only occurs when there is an “actual conflict” between
12 federal and state law, or where state law hinders accomplishment and execution of the federal
13 law’s purposes and objectives. *See Whistler Inv., Inc. v. Depository Trust & Clearing Corp.*,
14 539 F.3d 1159, 1166 (9th Cir 2008); *IEP*, 36 F.3d at 853. There is no conflict preemption
15 because the Re-MAT Program is in addition to the Standard Contract, and furthers PURPA’s
16 objectives to encourage renewable generation by imposing an additional state requirement for
17 renewable procurement. There is no conflict where state law works toward the same goal as
18 federal law. *See Oxygenated Fuels Ass’n v. Davis*, 331 F.3d 665, 672-73 (9th Cir. 2003).

19 **C. The Challenge to the Standard Contract Fails**

20 Given the adverse ruling in the Declaratory Order, although not alleged in the SAC,
21 Winding Creek now argues that “the Standard Contract does not excuse the Re-MAT’s
22 violation of PURPA” because the Standard Contract does not allow Winding Creek to elect the
23 option of a rate calculated at the time the obligation is incurred pursuant to 18 C.F.R.
24 § 292.304(d)(2)(ii). *See OB*, pp. 14-19. Section 292.304(d)(2) allows a QF the option to sell
25 “energy and capacity pursuant to a legally enforceable obligation over a specified term” with
26 the rate based on “avoided costs calculated” either at “the time of delivery” or “the time the
27 obligation is incurred.” *See* 18 C.F.R. § 292.304(d)(2)(i)-(ii). These terms are not defined in
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1 FERC's regulations. Winding Creek relies on the opinion of its expert witness, Dr. Jonathan
2 Lesser, who concludes that the rate is calculated at the time of delivery because the SRAC
3 formula applies variables whose values will only be known at the time the electricity is
4 delivered. *See* OB, p. 17, citing Lesser Decl., ¶¶ 63, 64. Not only is Dr. Lesser's interpretation
5 of 18 C.F.R. § 292.304(d)(2) inadmissible, but this conclusion is erroneous as a matter of law.

6 Expert testimony is admissible only to assist the trier of fact to understand the evidence
7 or to determine a factual issue. *See Maffei v. N. Ins. Co.*, 12 F.3d 892, 897 (9th Cir. 1993).
8 Expert testimony is not admissible to interpret a regulation, which is a legal issue for the Court.
9 *See Aguilar v. Int'l Longshoremen's Union*, 966 F.2d 442, 447 (9th Cir. 1992); *United States v.*
10 *E. Mun. Water Dist.*, 2008 WL 4755428, at *2 (C.D. Cal. 2008). Dr. Lesser admits his opinion
11 is based on his personal interpretation. *See* Lesser Decl., ¶¶ 28-29, 63-64; Lesser Dep.,
12 pp. 131:9-133:4 (McQuillan Decl., Exh. A). Unsupported conclusory opinions not based on
13 admissible extrinsic evidence, such as industry custom or usage, are inadmissible. *See Maffei*,
14 12 F.3d at 898-99; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-51, 156-58 (1999) (expert
15 testimony unreliable because it lacks any showing of general acceptance or peer review). Dr.
16 Lesser's opinion also is unreliable because it contradicts his other testimony that the Re-MAT
17 Program complies with § 292.304(d)(2)(ii), even though the rate paid depends on the
18 application of time of delivery factors to the contract price which vary depending on when the
19 energy is actually delivered. *See* Lesser Dep., p. 173:2-174:15 (McQuillan Decl., Exh. A).

20 Significantly, Dr. Lesser's opinion also is based on a fundamental misunderstanding of
21 the legal concept of a formula rate. Dr. Lesser agrees that a rate is "fixed" if the components of
22 the formula are defined with reasonable certainty at the time the contract is signed, and also that
23 the SRAC energy formula of the Standard Contract is fixed at the time of the contract. *See* OB,
24 p. 17; Lesser Dep., pp. 68:9-71:21 (McQuillan Decl., Exh. A). However, contrary to Dr.
25 Lesser's opinion, *the formula agreed to by the parties is the rate*, and periodic adjustments to
26 the amount paid based on the formula do not constitute changes in the rate itself. *See P.U.C. of*
27 *Cal. v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001). Formula rates, which fluctuate based on the
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1 cost components of the rate, have been accepted as valid since the 1970's. *See id.* Accordingly,
2 the fact that the actual values to be applied under the SRAC formula (*e.g.*, actual fuel cost) will
3 not be known until delivery of the energy does not mean that the rate – the formula – was not
4 fixed at the time the obligation was incurred.

5 FERC regulations do not prohibit an avoided cost rate based on a formula rate. Indeed,
6 although it has evolved over time, an SRAC formula has been used in California for over 30
7 years to set avoided cost rates in PURPA standard contracts. *See* D.07-09-040, pp. 22-28; *IEP*,
8 36 F.3d at 852 n.7. The FERC recently affirmed that two other QF standard contracts with
9 energy prices based on SRAC approved by the CPUC in D.10-12-035 along with the Standard
10 Contract are part of the CPUC's implementation of PURPA. *See Energy Producers and Users*
11 *Coalition*, 149 FERC ¶ 61,251, at PP 2, 16 (2014); *SCE*, 143 FERC ¶ 61,122, at PP 6-8, 17-18
12 (2013); D.10-12-035, pp. 41-42 (SRAC pricing for various PURPA contracts). The California
13 Courts of Appeal also have upheld CPUC SRAC formulas as compliant with PURPA. *See SCE*
14 *v. Cal. P.U.C.*, 128 Cal. App. 4th 1, 10-11 (2005); *SCE*, 101 Cal. App. 4th 982, 991-93.

15 Winding Creek's interpretation also is contrary to how FERC has interpreted
16 § 292.304(d)(2)(ii). A rate "calculated at the time the obligation is incurred" means the rate in
17 effect at the time the contract was signed, which includes a contract pre-approved by a State
18 commission, regardless of whether the actual avoided costs at the time of delivery are different.
19 *See Signal Shasta*, 41 FERC ¶ 61,120, at *1-2. On this basis the FERC determined that one of
20 California's initial PURPA standard contracts, the "SO4" contract, which used an SRAC
21 formula, complied with § 292.304(d)(2), noting that neither party retained the right to
22 renegotiate the contract rate in the future. *See id.*; *see also JD Wind I LLC*, 130 FERC ¶ 61,127,
23 at P 23 (2010) (rate set at time obligation incurred is valid regardless if differs from actual
24 avoided costs at time of delivery); *Rulemaking Order*, 45 Fed. Reg. at 12,224 (§§ 292.304(b)(5)
25 and 292.304(d)(2)(ii) allow a QF to preserve the benefit of its commitment because contract
26 rates are "based, by necessity, on estimates of avoided cost" which may deviate from the actual
27 avoided cost at the time of delivery).

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1 Finally, the statement in FERC’s Rulemaking Order that an investor needs to be able
2 to estimate the expected return on investment with “reasonable certainty” to evaluate the QF’s
3 financial feasibility does not support Winding Creek’s interpretation. *See* OB, pp. 18-19,
4 citing *Rulemaking Order* 45 Fed. Reg. at 12,218. FERC’s statement actually relates to a
5 different regulation, 18 C.F.R. § 292.302, which prescribes the requirements for the
6 availability of utility cost system data for present and anticipated energy and capacity costs.
7 *See id.* Regardless, Winding Creek does have this information. The Standard Contract
8 capacity payments are stated as fixed numbers for each year, and PG&E’s website posts
9 current and historical SRAC energy payments. *See* Lesser Decl., Exh. 4, pp. 10, 14; CPUC
10 RJN, Exh. 2. Thus, there is no basis for Winding Creek’s conclusion that the rate paid cannot
11 be estimated with reasonable certainty and a “QF will have *no idea* what rate it would receive
12 until it actually delivers electricity.” *See* OB, p. 18 (emphasis added).

13 **D. The Re-MAT Pricing Is Lawful**

14 **1. Non-QF sources**

15 Winding Creek does not dispute that the initial Re-MAT offering price, which was based
16 on the RAM competitive solicitation that included QF sources, “arguably complies with
17 PURPA. *See* OB, p. 21. Nonetheless, without legal authority, Winding Creek argues that the
18 Re-MAT price adjustment mechanism cannot be based on QF response to the offering price and
19 must be based on non-QF sources. *See id.* at 19-20.

20 PURPA does not address whether avoided costs must be based solely on non-QF
21 sources. Section 210(b)(2) of PURPA provides that no rule prescribed by FERC “shall provide
22 for a rate which exceeds the incremental cost to the electric utility of alternative electric
23 energy.” *See* 16 U.S.C. § 824a-3(b)(2). In turn, Section 210(d), 16 U.S.C. § 824a-3(d), defines
24 “incremental cost of alternative electric energy” as “the cost to the electric utility of the electric
25 energy which, but for the purchase from such cogenerator or small power producer, such utility
26 would generate or purchase from another source.” The legislative history does not indicate that
27 the “incremental cost of alternative energy” must be from a non-QF source. *See* H.R. Conf.
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1 Report 95-1750, 1978 WL 8505, at *7832-7833. FERC’s regulation is similar to Section
2 210(d), and defines avoided costs as: “the incremental costs to an electric utility of electric
3 energy or capacity or both which, but for the purchase from the qualifying facility or qualifying
4 facilities, such utility would generate or purchase from another source.” *See* 18 C.F.R.
5 § 292.101(b)(6).

6 Winding Creek argues that “another source” in 18 C.F.R. § 292.101(b)(6) must, “as a
7 matter of logic,” be a non-QF source based solely on the opinion of Dr. Lesser. *See* OB,
8 pp. 19-20; Lesser Decl., ¶¶ 33, 36. Again, expert opinion on legal issues, such as the
9 interpretation of a regulation, is inadmissible. *See Aguilar*, 966 F.2d at 447; *East Municipal*,
10 2008 WL 475542, at *2. Dr. Lesser characterized his conclusion as a “layman’s opinion” at
11 deposition. *See* Lesser Dep., 112:16-19 (McQuillan Decl., Exh. A). Accordingly, Dr. Lesser’s
12 opinion also is inadmissible because it does not reflect any specialized knowledge, and is not
13 supported by admissible extrinsic evidence. *See Kumho*, 526 U.S. at 156-58; *Maffei*, 12 F.3d at
14 897; *East Municipal*, 2008 WL 4755428, at *1. Moreover, Dr. Lesser’s graph, supposedly
15 depicting the demand curve for the market established by PURPA (*see* OB, p. 20, Lesser Decl.,
16 ¶ 33), has nothing to do with what constitutes “another source.” Finally, Dr. Lesser’s opinion is
17 unreliable because it contradicts his opinion that the initial pricing benchmark for Re-MAT
18 from the RAM auction “arguably” complies with PURPA even though that solicitation was not
19 limited to non-QF sources. *See* OB, p. 21; Lesser Decl., ¶ 45.

20 In contrast to Winding Creek’s arguments, which lack citation to authority and are based
21 solely on inadmissible expert testimony, the CPUC’s position is supported by a FERC decision
22 that is directly on point. The FERC recently construed Section 210(d) of PURPA and 18 C.F.R.
23 § 292.101(b)(6) in affirming that the CPUC may set an avoided cost rate for a different State
24 feed-in tariff (the AB 1613 Program) based on the utility costs of procurement from these
25 particular generators as required by State law. *See CPUC*, 133 FERC ¶ 61,059, at PP 26-30.
26 *CPUC* explicitly overruled *SCE*, 70 FERC ¶ 61,215, which held that avoided cost cannot be
27 based on bidding limited to QFs, and must be based on all sources available to sell to the utility.
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1 *See id.* at P 30. As FERC explains, the issue is “what costs the electric utility is avoiding,”
2 which can be based on the “actual procurement requirements, and resulting costs, imposed on
3 utilities in California.” *See id.* at P 26. FERC’s construction of Section 210(d) and
4 § 292.101(b)(6) is reasonable, and consonant with the wide latitude afforded states to
5 implement PURPA and to set avoided cost rates. *See id.* at P 24; *FERC v. Mississippi*, 456 U.S.
6 at 851. Applying FERC’s construction to the Re-MAT Program, the costs avoided are defined
7 by Public Utilities Code § 399.20 and D.12-05-035, which require utilities to purchase
8 electricity from a specific class of QFs of 3 MW. *See* Sections II.D.2-.3, *supra*. Accordingly,
9 these are facilities that constitute “another source.”

10 **2. Price adjustment mechanism**

11 Winding Creek’s arguments challenging the Re-MAT price adjustment mechanism are
12 simply disagreement with the CPUC’s broad ratemaking discretion under PURPA and FERC’s
13 regulations, and do not mean that Re-MAT is unlawful. *See IEP*, 36 F.3d at 852; *CPUC*, 133
14 FERC ¶ 61,059, at P 24, *reh’g denied*, 134 FERC ¶ 61,044, at P 36 (FERC’s regulations provide
15 guidance to be considered by State commissions “to the extent practicable,” and rate-setting is
16 fact-specific). Based on Dr. Lesser’s testimony, Winding Creek argues that the price
17 adjustment mechanism is “arbitrary” because it has no relationship to utility avoided costs, and
18 is designed to determine the lowest price. *See OB*, pp. 21-25.

19 Again, Dr. Lesser’s testimony is inadmissible. Whether the pricing mechanism is
20 consistent with PURPA and FERC’s regulations is a legal question for the Court. *See Exelon*,
21 766 F.3d at 393, 394-96. While Dr. Lesser attempts to couch his opinions as a “matter of
22 economics,” his opinions are inadmissible legal conclusions. *See, e.g., Lesser Decl.*, ¶¶ 56, 61;
23 *Aguilar*, 966 F.2d at 447. Dr. Lesser’s testimony also is not necessary to understand the
24 evidence, as the Court is fully capable of reading the Re-MAT decisions and understanding how
25 the adjustment mechanism works. *See Maffei*, 12 F.3d at 897; *East Municipal*, 2008 WL
26 4755428, at *1. Dr. Lesser also has no special expertise with avoided cost ratemaking. *See*
27 *Maffei*, 12 F.3d at 897. Dr. Lesser has never submitted any testimony or comments in any State
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1 commission or FERC proceeding or provided formal advice regarding PURPA or avoided cost
2 rate design, never authored any article regarding setting avoided cost rates under PURPA, and
3 has not made it a practice to follow developments in avoided cost ratemaking in California. *See*
4 Lesser Dep., pp. 11:8-16:24; 18:11-21:3; 24:7-14; 57:8-58:1; 191:3-193:2 (McQuillan Decl.,
5 Exh. A). Dr. Lesser’s experience in mathematically computing avoided cost rates, to show that
6 a PURPA contract price was incorrectly paid or that energy efficiency programs avoided certain
7 utility procurement costs, is irrelevant to the specific issues in this case. *See Kumho*, 526 U.S.
8 at 153-54.

9 Even if admissible, Dr. Lesser’s conclusions are flawed and unreliable. Indeed, Dr.
10 Lesser concedes that facilities do not compete against each other to win the auction at the lowest
11 price, and that a “rational” facility participating in the auction will seek “the highest possible
12 price above its cost” and not accept a price which causes it to lose money. *See Lesser Dep.*,
13 120:6-122:2 (McQuillan Decl., Exh. A). Dr. Lesser wholly ignores the explanation in D.12-05-
14 035 that the price adjustment mechanism was designed to estimate the market price for a
15 smaller segment than the RAM market (renewable facilities of 20 MW or less) that constitutes
16 the State-required procurement under Public Utilities Code § 399.20, to stimulate market
17 supply, to ensure that procurement occurred over time to protect ratepayers from overpriced
18 contracts, and to prevent gaming. *See D.12-05-035*, pp. 45-51. It is irrelevant that Dr. Lesser
19 believes his method is “more accurate” or he would have designed the auction process
20 differently. *See Lesser Dep.*, pp. 150:6-22; 181:2-12 (McQuillan Decl., Exh. A). Dr. Lesser
21 does not dispute that from an “economic standpoint,” a feed-in tariff “can be designed in many
22 different ways.” *See id.* at 111:12-112:1. Dr. Lesser also agrees that ratemaking, in general,
23 involves “significant guesswork” that is “fraught with uncertainty and error,” and that PURPA
24 does not prescribe any particular ratemaking methodology. *See id.* at 37:20 41:13; 43:24-44:8;
25 47:17-25, Exh. 3, pp. 12, 207. Indeed, FERC’s regulations allow the states wide discretion, and
26 do not require any specific ratemaking method, mathematical precision, or an exact correlation
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1 with actual costs. *See Rulemaking Order*, 45 Fed. Reg. at 12,224; *CPUC*, 133 FERC ¶ 61,059,
2 at P 24; 18 C.F.R. § 292.304(e).

3 Similarly flawed is the argument that it makes “no economic sense” to compensate
4 solar facilities differently less than wind facilities. *See OB*, p. 23. The FERC has affirmed
5 that the CPUC has the discretion to differentiate avoided cost rates for different types of
6 renewable technologies depending on their supply characteristics. *See CPUC*, 133 FERC
7 ¶ 61, 059, at PP 26-30; 18 C.F.R. § 292.304(c)(2)(ii). Winding Creek relies on *IEP*, 36 F.3d
8 at 857, but *IEP* speaks to whether the CPUC can prescribe a different rate for a facility that
9 does not satisfy PURPA’s efficiency requirements for qualification as a QF, a completely
10 different, and irrelevant, issue. Re-MAT is based on market response, and the purpose of Re-
11 MAT is to incent different types of generation near consumer electricity demand. This
12 geographic constraint, technology prices and development, and economic and environmental
13 factors all can affect the market response. Moreover, even if the offering price is higher, a
14 wind facility may receive less monthly compensation than a solar facility, depending on the
15 amount of electricity delivered and the application of time of delivery factors. *See Pub. Util.*
16 *Code* § 399.20(a)(3); Lesser Decl., Exh. 3, pp. 10, 69; *see examples* at p. 10, *supra*.

17 Finally, Winding Creek’s argument that Re-MAT pricing is unlawful because it
18 represents a QF’s production costs has no merit. *See OB*, pp. 23-25. Re-MAT Program pricing
19 is not based on quantifying QF costs, but on market prices, which are assumed to reflect all of
20 the generators’ costs. *See D.12-05-035*, pp. 43, 63. Dr. Lesser agrees that the CPUC can use
21 market pricing to set avoided cost rates. *See Lesser Dep.*, pp. 45:21-24; 99:3-14 (McQuillan
22 Decl., Exh. A). Indeed, Dr. Lesser’s own proposal for a California feed-in tariff was based on a
23 competitive auction model because he could not accurately forecast solar prices 10-20 years in
24 the future, and he believed “that mechanism would lead to more efficient pricing and better
25 market signaling for renewable developers than an administratively set alternative.” *See id.* at
26 108:22-110:10; 182:10-184:21, Exh. 8, pp. 986-990. FERC’s explanation in the *Rulemaking*
27 *Order* (which Winding Creek acknowledges was promulgated long before market-based
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1 pricing) that avoided costs are to be based on utility avoided cost, not QF costs, is taken out of
2 context. Avoided cost rates are not based on an analysis of QF costs because PURPA did not
3 intend QFs to be subject to cost of service ratemaking like utilities, and also to ensure that an
4 individual QF obtain the benefit of any excess of full avoided costs over its costs. *See*
5 *Rulemaking Order*, 45 Fed. Reg. at 12,222. Re-MAT is consistent with both these objectives.

6 **VI. CONCLUSION**

7 Summary judgment should be entered in favor of the CPUC Commissioners. Even if
8 the Court were to find in favor of Winding Creek, this Court cannot summarily declare
9 executory contracts entered into pursuant to the Re-MAT Program “null and void.” QFs
10 voluntarily participate in the Re-MAT Program. No contracting party has sought abrogation of
11 its Re-MAT contract, and QFs may agree to rates other than an avoided cost rate. *See* 18 C.F.R.
12 § 292.301(b)(1); *Otter Creek Solar LLC*, 146 FERC ¶ 61,192, at P 8 (2014). In addition,
13 because of the importance of contract sanctity and rate stability, voluntary wholesale electricity
14 contracts may be abrogated only in cases of “unequivocal public necessity,” which requires a
15 finding of “serious harm” to the consuming public, not present here. *See NRG Power*
16 *Marketing v. Maine P.U.C.* 558 U.S. 165, 171-76 (2010); *cf. United States v. Jones, Receiver*
17 *No. 135*, 336 U.S. 641, 671-73 (1949) (jurisdiction of federal court is limited to setting aside or
18 enjoining rate order and remanding cause to specialized agency for further consideration).

19
20 Respectfully submitted,

21 By: /s/ ELIZABETH M. MCQUILLAN
22 ELIZABETH M. MCQUILLAN

23 August 31, 2015
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