Case Nos. 17-17531 and 17-17532

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINDING CREEK SOLAR LLC,

Plaintiff-Appellant/Cross-Appellee,

v.

CARLA PETERMAN, et al.,

Defendants-Appellees/Cross-Appellants.

On Appeal from the United States District Court
for the Northern District of California

Case No. 3:13-cv-04934-JD
The Honorable James Donato, Judge

CALIFORNIA PUBLIC UTILITIES COMMISSION'S SECOND BRIEF ON CROSS-APPEAL

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INTRODUCTION

For nearly forty years, Appellees/Cross-Appellants Commissioners of the California Public Utilities Commission ("CPUC") have been implementing the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"). California was an early accelerator of bringing new PURPA-compliant facilities on line. Today, California is a national leader in realizing a portfolio of electricity generation heavy in renewable power. But California's success has come at financial cost borne by utility ratepayers that at times proved to have been unjust and unreasonable in relation to the benefits received by them. In the past, when the CPUC set PURPA rates administratively using long-term energy forecasts, California ratepayers ended up overpaying for purchasing that energy, resulting in a huge windfall for PURPA producers. Nearly forty years on, California ratepayers find they have been supporting a successful proliferation of PURPA generators, but remain in a sea of exposure to paying excessive avoided-cost rates. Now, with the District Court's order concluding that the CPUC's Renewable Market Adjusting Tariff ("Re-MAT") program is not compliant with PURPA, ratepayers are deprived of the CPUC's most mature attempt to capture the coequal goals under PURPA that are inherently in tension with each other.

PURPA envisions a necessary balancing of goals: ratepayer protections and attraction of investment in PURPA-eligible facilities, known as Qualifying

Facilities ("QFs"). PURPA is a unique statute: it mandates that states are the instruments implementing federal law. Yet Congress recognized that states grapple with uniquely local considerations in the field of electric power procurement: PURPA gives states broad discretion and latitude in setting up their implementation plans, encourages states to act as laboratories in this ambitious endeavor, and thereby sets up a scheme of cooperative federalism that allows states the flexibility to develop programs to meet their particular needs. "Thus, a state commission may comply with the statutory requirements by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other action reasonably designed to give effect to FERC's rules" to implement PURPA. *FERC v. Mississippi*, 456 U.S. 742, 751, 767 (1982).

Well-familiar with California's history of PURPA implementation, the Federal Energy Regulatory Commission ("FERC") calls the CPUC's "Standard Contract for QFs 20 MW or Less" the CPUC's "primary PURPA program." The Standard Contract for QFs 20 MW or Less is one of the products of a comprehensive 2010 settlement between utilities, QFs, and ratepayer representatives to resolve long-outstanding issues that were pending in protracted litigation. When Appellant/Cross-Appellee Winding Creek Solar LLC ("Winding Creek") raised the same issues raised in the case below, alleging that the CPUC's PURPA implementation does not satisfy two provisions of FERC's Subpart C

PURPA regulations (18 C.F.R. § 292.304(d)(2)(i) and (d)(2)(ii)), FERC responded that the Standard Contract for QFs 20 MW or Under is a valid PURPA contract under another, broader PURPA regulation: 18 C.F.R. § 292.301(b). This provision provides,

> *Nothing* in this subpart [C of Part 292 of Title 18] (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart […]

(Emphasis added.)

Winding Creek would have this Court examine one, narrow, technical aspect of the PURPA equation: that it is entitled to a contract at an administrative-determined price based on forecasts at the moment it wants it. Yet Winding Creek's narrow focus does not reference either the coequal Congressional policies, other provisions of FERC's PURPA Regulations, or the United States Supreme Court's sanctioning implementation through "any other action reasonably designed to give effect to FERC's rules" as the CPUC's Standard Contract for QFs 20 MW or Less, the CPUC's "primary PURPA program."

Taken in its totality, PURPA requires that QFs be allowed a contract according to a state's PURPA implementation plan: if the plan offers to pace purchases on a bimonthly basis to balance ratepayer interests, that pacing cannot be in violation of PURPA. If offer prices (once accepted provide a fixed price

contract) fall to reflect the value of the next increment of generation, that is in compliance with PURPA. If the primary, or backstop contracting option, provides a flexible pricing mechanism with enough certainty to attract investors, then the CPUC's implementation plan is in compliance with PURPA.

Inasmuch as PURPA requires states to meet the goals of reducing dependence on foreign oil, promote energy efficiency and non-utility small power production and renewables, California has exceeded those goals. Inasmuch as the Court disagrees with FERC – that the Standard Contract, an agreement available to all QFs negotiated pursuant to 292.301(b) and adopted in a rulemaking (and thus available for modification in a rulemaking) is a program "reasonably designed to implement" the PURPA Regulations – and departs from the U.S. Supreme Court, then the CPUC submits that the appropriate remedy is to limit the District Court's order to enjoining the CPUC to develop 18 C.F.R. § 292.304(d)(2)(i) and (ii) contracts available to QFs like Winding Creek on a prospective basis, while leaving the Re-MAT program undisturbed.

JURISDICTIONAL STATEMENT

The CPUC agrees with Winding Creek that the District Court had jurisdiction over this case under 16 U.S.C. § 824a-3(h)(2) of PURPA, 28 U.S.C. § 1331, and Sections 314 and 317 of the Federal Power Act ("FPA"), 16 U.S.C. § 791a, *et seq*. The CPUC also agrees that this Court has jurisdiction over the cross-

appeals under 28 U.S.C. § 1291. The CPUC also agrees with the dates establishing the timeliness of the appeal and the finality of the District Court's order and judgment that is appealed here, as set forth in Winding Creek's First Brief on Cross Appeal.

The CPUC does not agree with Winding Creek, however, that the District Court, or even that this Court, has jurisdiction to order the remedy sought: an order on the appropriate avoided-cost rate for Winding Creek. Ratemaking is a legislative function, and federal courts must abstain from ratemaking.

STATEMENT OF ISSUES

1. Did the District Court err in concluding that Re-MAT's statewide and bimonthly procurement limits violate PURPA's mandatory purchase obligation when any QF can avail itself of the Standard Contract for QFs 20 MW or Less at any time?
2. Did the District Court err in disregarding the discretion afforded to the CPUC to set avoided-cost rates by concluding, without citation, that the Re-MAT program does not produce an avoided-cost rate?
3. Did the District Court err in not giving proper *Auer* deference to FERC's determination that the Standard Contract for QFs 20 MW or Less is the CPUC's "primary PURPA program" pursuant to 18 C.F.R. § 292.304(d)(2)(ii)?

4. Did the District Court correctly refrain from engaging in ratemaking in refraining from giving Winding Creek retrospective relief with a contract at a requested price?

STATEMENT UNDER CIRCUIT RULE 28-2.7

Pertinent constitutional provisions, statutes, regulations, and rules are contained in the Addendum to Appellant's First Brief on Cross-Appeal and in the Addendum to this CPUC Second Brief on Cross-Appeal.

STATEMENT OF THE CASE

A. Procedural History

PURPA provides a QF a private right of action against a state for the state's implementation of PURPA only after the QF first seeks enforcement of PURPA against the state at FERC. 16 U.S.C. § 824a-3(h)(2)(B) (2018). On June 13, 2013, Winding Creek filed such a petition for enforcement against the CPUC alleging in pertinent part that the Re-MAT program does not produce a PURPA-compliant avoided-cost rate, the bimonthly limit on procurement violates PURPA's mandatory purchase obligation, and outside of Re-MAT's eligibility criteria and procurement limits, there are no other 292.304(d)(2)(ii) contracting options available to Winding Creek. On August 12, 2013, FERC declined to initiate an enforcement action. *Winding Creek Solar LLC,* 144 FERC ¶ 61,122 (Aug. 12, 2013).

Winding Creek then initiated the underlying action in the District Court below on October 24, 2013.

On February 17, 2015, the District Court granted in part and denied in part the CPUC's Motion to Dismiss Winding Creek's Second Amended Complaint.

On March 9, 2015, Winding Creek filed its second petition for enforcement alleging that the CPUC's Re-MAT program violates PURPA because of the 750 MW statewide cap on procurement. *Winding Creek Solar LLC,* 151 FERC ¶ 61,103, ¶3, 2015 WL 2151303, **1 (May 8, 2015) ("Declaratory Order"). In its Declaratory Order, FERC declined to initiate an enforcement action but issued a declaratory order stating that California's Standard Contract for 20 MW or Under allows a QF to enter into a legally-enforceable obligation at avoided-cost rates. *Id.* at ¶6, **2. Given such a program, the CPUC may have "alternative programs …[that] limit how many QFs, or the total capacity of QFs, that may participate in the [alternative] program." *Id.* FERC distinguished the case of *Hydrodynamics, Inc.*, cited in Winding Creek's petition. In that case, the state of Montana placed an absolute cap of 50 MW on all PURPA procurement, after which point the QF had no other means of obtaining a long-term contract. *Id.* at ¶7. In contrast, once any cap in the Re-MAT program is reached, a QF does have other means of obtaining a long-term contract: California's Standard Contract for QFs 20 MW or Under. FERC found that the Re-MAT program is permissible under PURPA.

Without a showing that the 750 MW cap violated PURPA, FERC declined to initiate enforcement. *Id.*

On June 6, 2015, Winding Creek sought rehearing of FERC's Declaratory Order, raising new issues. Winding Creek alleged that FERC erred by failing to address the separate requirements under 18 C.F.R. § 292.304(d)(2)(i) and (ii), where it alleged that the Standard Contract satisfies only 18 C.F.R. § 292.304(d)(2)(i). Winding Creek also alleged that FERC's decision was arbitrary and capricious because, operating from the assumption (unsupported by a FERC determination) that the Standard Contract was a 18 C.F.R. § 292.304(d)(2)(i) contract, FERC failed to explain why the Standard Contract is an adequate alternative to the Re-MAT's 18 C.F.R. § 292.304(d)(2)(ii) contract.

On October 15, 2015, FERC found that rehearing does not lie with a FERC order declining an enforcement action but treated Winding Creek's request as one for reconsideration, and proceeded to deny Winding Creek's reconsideration request. *Winding Creek Solar LLC,* 153 FERC ¶ 61,027 at ¶ 6, 2015 WL 6083932, *2 (Oct. 15, 2015) ("October 15 Reconsideration Order"). In response to Winding Creek's allegation FERC affirmed that Re-MAT is permissible under PURPA because it is an alternative to the CPUC's "primary PURPA program," which is the Standard Contract for QFs 20 MW or Under. In so finding, FERC cited to 18 C.F.R. § 292.301, which permits negotiated avoided-cost rates that need not meet

the otherwise applicable requirements under Subpart B of the PURPA Regulations. FERC noted that the Standard Contract was adopted by the CPUC as part of a comprehensive settlement negotiated between the electric utilities and the "vast majority of QFs in California. *Id.* at ¶ 7 n.10, *2.

B. Appellees/Cross-Appellants CPUC

The CPUC Commissioners, sued in the underlying District Court action in their official capacities, are Michael Picker, Clifford Rechtschaffen, Carla Peterman, Liane Randolph, and Martha Guzman Aceves. The CPUC is charged with implementing PURPA in accordance with PURPA and FERC's PURPA regulations. The CPUC also adjudicates as-applied PURPA claims, which are claims alleging utility noncompliance with CPUC PURPA implementation plans.

C. Regulatory Framework

Prior to 1978, the traditional, vertically-integrated public utility model prevailed. *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir. 2004). A single utility would hold a natural monopoly in that utility's service territory. *See id.* Public utilities sold a bundled service to customers: generation, transmission, and distribution. *See id.* Wholesale sales of electricity rarely occurred because a utility would own most sources of generation, rather than purchase electricity from an independent producer.

1. The Public Utility Regulatory Policies Act of 1978 ("PURPA")

Congress enacted PURPA to combat the nationwide energy crisis of the 1970s by reducing electric utilities' reliance on fossil fuels and to increase the development of alternative energy sources. *FERC v. Mississippi*, 456 U.S. 724, 745-46, 750-51 (1982). In Section 210(a) of PURPA, Congress required FERC, in consultation with the states, to adopt rules "as it determines necessary to encourage cogeneration and small power production," including rules requiring electric utilities to offer to purchase electricity from QFs. *See* 16 U.S.C. § 824a-3(a). Section 210(f) of PURPA requires state commissions like the CPUC to implement FERC's regulations. *See id.* at § 824a-3(f)(1).

PURPA is a program of "cooperative federalism" that allows states to develop regulatory programs designed to meet their particular needs. *FERC v. Mississippi*, 456 U.S. at 767. While Section 210(a) of PURPA, 16 U.S.C. § 824a-3(f), directs FERC to prescribe rules to require utilities to purchase electrical energy from QFs, it's the states that "play the primary role in calculating avoided costs and in overseeing the contractual relationships between QFs and utilities." *Indep. Energy Producers Ass'n v. Cal. P.U.C.*, 36 F.3d 848, 856 (9th Cir. 1994) ("*IEP*"). A state commission may comply with Section 210(f) "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any other

action reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751; *IEP*, 36 F.3d at 856.

Title II of PURPA, 16 U.S.C. § 824a-3, encourages the development of alternative energy sources such as efficient cogeneration and small power production facilities, or QFs. *See* 16 U.S.C. §§ 796(17)(A), (18)(A) & (B). Congress recognized two hurdles to these goals: the reluctance of traditional utilities to purchase power from, and sell power to, QFs, and the financial burden on and consequent discouragement of QF development caused by federal and state regulations (such as traditional utility cost-of-service ratemaking) otherwise applied to generating facilities. *FERC v. Mississippi*, 456 U.S. at 750-51 & n.11. To overcome these hurdles, PURPA requires, among other things, that FERC, in consultation with states, promulgate regulations that require utilities to purchase power from and sell power to QFs. 16 U.S.C. § 824a-3(a) (known as the "mandatory purchase obligation" or "must-buy" requirement). PURPA also requires that rates paid to QFs for their power and capacity "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. § 824a-3(b). To that end, rates may not exceed the purchasing utility's "avoided cost," or the utility's incremental cost of purchasing such electricity that, "but for the purchase from the [QF], such utility would generate

itself or purchase from another source." 16 U.S.C. § 824a-3(d); 18 C.F.R. § 292.101(b)(6).

a) PURPA's Mandatory Purchase Obligation

Section 292.303(a) of FERC's regulations provides: "Each electric utility shall purchase, in accordance with § 292.304 … any energy and capacity which is made available from a qualifying facility …." 18 C.F.R. § 292.303(a). When PURPA was enacted, there was no market for electricity produced by QFs, which was indeed "a primary reason that PURPA was enacted," and *all* QF sales to utilities took place pursuant to a state commission's implementation of PURPA. *See FERC v. Mississippi*, 456 U.S. at 750, n.11; *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, 114 FERC ¶ 61,102, at P 95 (2006) (hereinafter "*Order 671*"). This changed as a result of PURPA's success in developing markets for QF power, and the deregulation of the wholesale electricity market. *See* 114 FERC ¶ 61,102, at P 95.; and *N. Am. Natural Res. v. Strand*, 252 F.3d 808, 810, 814 (6th Cir. 2001). By 2002, utilities no longer dominated the development of new generation resources in California. *See So. Cal. Edison Co. v. Pub. Utils. Comm'n*, 101 Cal. App. 4th 982, 998 (2002). With the Energy Policy Act of 2005, Congress amended PURPA to release electric utilities from the obligation to execute new contracts with QFs over 20 MW if FERC finds there is nondiscriminatory access to specified markets. *See* 16 U.S.C. § 824a-3(m); 18

C.F.R. § 292.309; *Order 671*, 114 FERC ¶ 61,102, at PP 95-96; *Am. Forest & Paper Ass'n v. FERC*, 550 F.3d 1179, 1180 (D.C. Cir. 2008).

In June 2011, FERC terminated the mandatory purchase obligation for California's electric utilities from QFs *over 20 MW*. *See Pac. Gas and Elec. Co.*, 135 FERC ¶ 61,234, at PP 5-6, 23-29 (2011). The mandatory purchase obligation imposed on California utilities continues, however, with respect to QFs 20 MW or under, and PURPA's mandatory purchase obligation is primarily achieved through the Standard Contract for QFs 20 MW or Less. *See id.* at P 5*; see also Solutions for Utilities, Inc. v. Cal. Pub. Utils. Comm'n*, Case CV 11-04975, 2016 WL 7613906, *10-*12 (C.D. Cal. Dec. 28, 2016) ("*SFUI*"), *appeal docketed*, No. 17-55297 (9th Cir. March 7, 2017).

b) Avoided-Cost Rates Under PURPA

PURPA and FERC's regulations provide that rates for utility purchases from QFs many not exceed the utility's "avoided" cost, which is the incremental cost to the utility of electricity that, but for the purchase from the QF, the utility would need to generate itself or purchase from "another source." *See* 16 U.S.C. § 824a-3(b), (d); 18 C.F.R. §§ 292.101(b)(6), 292.304(a)(2). FERC has specifically clarified that, where state statute orders the procurement of electricity from a discrete set of generators, the cost to be avoided can be the next increment of power to be procured such "another source" within that discrete set of generators:

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

Cal. P.U.C., 133 FERC ¶ 61,059, at PP 26, 30 (2010) ("*CPUC*"), *reh'g denied*, 134 FERC ¶ 61,044 (2011). This holds true even when the discrete set of generators is comprised solely of QFs, as is that case of another CPUC PURPA program upheld by FERC in *CPUC*. *See id.*

Under PURPA, states have "broad authority" and "a great deal of flexibility" to set avoided-cost rates in implementing PURPA. *IEP*, 36 F.3d at 856.

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

CPUC, 133 FERC ¶ 61,059, at P 24 (citations omitted)(emphases added).

PURPA also requires that avoided-cost rates be "just and reasonable," *see* 16 U.S.C. § 824a-3(b)(1), and Congress intended that this language be construed to protect consumers' interests in equitable rates for electricity. *See* H.R. Conf. Rep. 95-1750, *reprinted in* 1978 U.S.C.C.A.N. 7797, 1978 WL 8505, at *7831-32 (Oct.

10, 1978). PURPA was not intended to "guarantee" QFs a rate of return or to "subsidize" QFs. *See id.*; *Exelon Wind 1 L.L.C. v. Nelson*, 766 F.3d 380, 384 (5th Cir. 2014). Rates that exceed a utility's avoided cost would allow a QF an unfair advantage in the competitive wholesale markets. *S. Cal. Edison Co.*, 70 FERC ¶ 61,215, at 61,675-76 (1995) ("*SCE*"), *overruled on other grounds by CPUC*, 133 FERC ¶ 61,059, at PP 26-30.

c) PURPA's Comprehensive Enforcement and Remedial Scheme

Section 210 of PURPA has an "elaborate enforcement scheme" defining the roles of the state and federal district courts. *See Conn. Valley Elec. Co. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1233, 1235-36 (D.C. Cir. 1995). In enacting Section 210, Congress stated: "[T]he jurisdiction of the federal courts is limited by this section; review and enforcement is primarily in the state courts. Federal court review can occur in only limited instances described in this section." *See* Conf. Report, 1978 WL 8505, at *7817-18; *FERC Policy Statement*, 23 FERC ¶ 61,304, at 61,644. Section 210(g) defines the jurisdiction of the state courts ("as-applied" claims), and Section 210(h) defines federal court jurisdiction ("implementation" claims). *See* 16 U.S.C. §§ 824a-3(g), (h)(2)(B).

(1) State Court Judicial Review And Enforcement

Section 210(g) of PURPA, 16 U.S.C. § 824a-3(g), is entitled "Judicial Review and Enforcement." Under Section 210(g)(1), state courts may review state commission proceedings implementing PURPA. Section 210(g)(2) also allows "[a]ny person" to bring an action in state court against any electric utility or QF (but not a state commission) to enforce a requirement of a state commission. Enforcement actions under § 210(g)(2) are commonly referred to as "as applied" claims. *See, e.g., Power Res. Group, Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.2d 231, 234-36 (5th Cir. 2005). These include claims a utility refuses to contract with a particular QF, or a state commission's rule is unlawful with respect to the particular QF. *See FERC Policy Statement* at 61,643-45; *Power Res.*, 422 F.2d at 235.

(2) Limited Federal Jurisdiction

Section 210(h) is entitled "Commission Enforcement," 16 U.S.C. § 824a-3(h), and enforcement actions are referred to as "implementation claims." Section 210(h)(2)(B) allows an electric utility or a QF to bring an action in federal district court to enforce Section 210(f) after first exhausting administrative remedies at FERC. *Id.* at § 824a-3(h)(2)(B). Congress restricted remedies in the federal district court to "such injunctive or other relief as may be appropriate" in order "to require such State regulatory authority … to comply with such

requirements." *Id.* at § 824a3-(h)(2)(B). Section 210(h) does not allow for damages or attorneys' fees. *Id.* at § 824a-3(h).

Implementation claims allege that a state commission has failed to implement PURPA, either by not promulgating rules under Section 210(f) or by promulgating rules that do not comply with federal law. *See, e.g., Power Res.*, 422 F.2d at 235; *IEP*, 36 F.3d at 856.

2. Competition and Deregulation Promoted by FERC and the CPUC

Beginning in the early 1990s, FERC began promoting competition in the generation market by enlarging independent generators' access to the public utilities' electric transmission systems so these generators can sell directly to third-party buyers. *See Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 536-37 (2008). Congress passed the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 (codified at 42 U.S.C. § 13201) and FERC promulgated Order 888 in 1996. Order 888's goal is to remove impediments to competition in the wholesale bulk power marketplace and to enable consumer better access to more efficient, lower cost power. FERC also encouraged the establishment of independent system operators ("ISOs") (or regional transmission organizations ("RTOs")) that would control and operate utility-owned transmission lines, and many such ISOs and RTOs have been realized nationally. *See, e.g., Ill. Commerce Comm'n v. FERC*, 721 F.3d 764, 769 (7th Cir. 2013); *Midwest ISO Transmission*

Owners, 373 F.3d at 1364. Eventually, in Order 2000-A, FERC required utilities to make decided steps toward establishing ISOs or RTOs.

California too moved toward competition in both the wholesale and retail electricity markets. As this Court is all too aware, the California Energy Crisis of 2000 and 2001 imposed hard lessons learned from the design of California's deregulated market design and the damage wrought by third-party market manipulation. Although California's reaction was to retrench from such aggressive deregulation, since that time, California has again been moving decidedly in the direction of increasing competition – pacing itself and experimenting with different tools and programs under a regime of cooperative federalism.

3. CPUC's Implementation of PURPA Through to 2010

The CPUC was an early success story under PURPA. By 1990, possessing only one-third of the West's total existing electric capacity, California had eighty-five percent of the West's capacity from QFs. *See* Cal. Energy Comm'n, Pub. No. 106-90-002, Electricity Report 24 (1990) (Docket No. 88-ER-8, Sacramento, California). Whereas no market for QF power existed prior to PURPA's implementation, California had a well-established QF market when so many QFs came on line. *See, e.g.*, *Re Pac. Gas & Elec. Co.*, CPUC Decision 85-07-021, 18 CPUC 2d 315, 1985 WL 1204866 (July 10, 1985). The CPUC followed the model of using long-term forecasts – advocated still in the instant appeal by

Winding Creek – to establish avoided-cost rates available to QFs. *See IEP*, 36 F.3d at 852 & n.7 (describing the "third type of standard offer contract" with rates "fixed over a long time period based on forecasted avoided energy costs"). It offered four types of standard offer contracts in order to alleviate the need for individual QFs and utilities to negotiate terms of power purchase agreements. *Id.*

The use of long-term forecasted avoided cost rates in long-term contracts resulted in holding ratepayers captive to paying rates that ultimately proved to exceed the utility's avoided costs. *Id.* at 852 and n.8 (noting the "many states that developed fixed-price standard offer contracts encountered the same problem"); *see also id.* at 858. The CPUC attempted to remedy this mistake by invoking PURPA's efficiency standards to justify adjusting prices downward. *Id.* at 858. In *IEP*, the Ninth Circuit held that the CPUC improperly usurped FERC's exclusive authority over certifying a QF's efficiency standards to effect price reductions. *Id.* The Ninth Circuit exhorted the CPUC to instead seek "more flexible pricing mechanisms" to prevent a recurrence of holding ratepayers captive to paying rates that exceeded the utility's avoided costs. *Id.* at 858-59.

Through the 1990s, the CPUC struggled with identifying a just and reasonable avoided cost rate after suspending the standard offer contracts with long-run forecasted rates in the mid-1980s. *Re Pac. Gas & Elec. Co.*, CPUC Decision 86-05-024, 21 CPUC 2d 124, 1986 WL 1300368 (May 7, 1986). Nearly

two decades of litigation followed over widely varied issues such as "disputes over pricing and ability to execute PPA [power purchase agreement] extensions, motions for prospective QF PPA options, short-run avoided cost ("SRAC") disputes dating back to the 2000-2001 energy crisis, disputes concerning administrative heat rates used to calculate SRAC…" Cal. P.U.C. Decision D.10-12-035, 2010 WL 5650671 (Dec. 16, 2010), slip op. at 5-6. Any pretense of a straightforward implementation of PURPA evaporated.

4. CPUC's Implementation of PURPA Since 2010: The Comprehensive QF and CHP Settlement.

Beginning in 2008, settlement discussions commenced between California utilities, QFs, and consumer groups to resolve ongoing litigation. *Pac. Gas and Elec. Co.*, 135 FERC ¶ 61,234, P 5, 2011 WL 2418554, **2 (June 16, 2011); Cal. P.U.C. Decision D.10-12-035, 2010 WL 5650671, slip op. at at 2. What resulted was a settlement setting forth a comprehensive QF PURPA program and path forward for the CPUC, utilities, a "substantial majority" of QFs in California, and ratepayers that was aligned with the national goals of competitive generation, open access transmission, and California's greenhouse gas ("GHG") emissions reduction goals. *Pac. Gas and Elec. Co.*, 135 FERC ¶ 61,234, PP 11, 13. This "QF Settlement" was presented by the settling parties in a rulemaking proceeding for adoption by the CPUC. The CPUC did adopt the QF Settlement as the CPUC's "comprehensive" implementation of PURPA in 2010. Winding Creek ER 108.

The QF Settlement included a number of *pro forma* power purchase agreements, including the Standard Contract for QFs 20 MW or Less, which is available at any time to small QF regardless of whether the QF is a natural-gas fired QF or renewable QF. *See* D.10-12-035, slip op. 5, 41-42, 2010 WL 5650671. The Standard Contract for QFs 20 MW or Less has a term of years for new facilities and its single rate is comprised of two components: capacity and energy. Winding Creek ER 108-109, ¶¶ 37, 39. The price for firm capacity is fixed at about $92 per kw-year and, critically, *does not change over the term of the contract*. Winding Creek ER 109, ¶40. As-available capacity prices are also fixed and increase each year from 2010 to 2028. Winding Creek ER 109, ¶41.

The Standard Contract for QFs 20 MW or Less also provides a price for energy using a formula called SRAC. Winding Creek ER 110, ¶ 43. The SRAC formula has three market-based variable inputs: a market heat rate, a gas index, and a location adjustment factor. Winding Creek ER 110-12, ¶¶ 43-45. While the precise dollar amount paid under SRAC will not be known at the time of the contract's execution, the formula itself is fixed, *id.*, and the capacity payment remains fixed. The D.C. Circuit, which has the most experience of all Circuit Courts in FERC ratemaking matters, has upheld FERC's determination that a formula rate *is* a rate, for FERC ratemaking purposes where all of the inputs to the formula are identified at the time of the contract execution. *P.U.C. of Cal. v.*

FERC, 254 F.3d 250, 254 (D.C. Cir. 2001). Such rates have been valid since the 1970s. *Id.* And since 1980, the CPUC has used a variation of the SRAC formula. *See* CPUC Decision D.07-09-040, slip op. 22, 2007 WL 2872674 (Sept. 20, 2007); *S. Cal. Edison Co. v. Cal. P.U.C.*, 101 Cal. App. 4th 982, 388-89 (2002).

In its Declaratory Order on Winding Creek's first enforcement petition, FERC upheld SRAC as a PURPA-compliant avoided cost rate. Declaratory Order, 151 FERC ¶ 61,103, slip op. 6 n.9, 2015 WL 2151303, **2. *See also Energy Producers and Users Coalition*, 149 FERC 61,251, P 162014 WL 7205371, **4, *citing Southern California Edison Co.*, 143 FERC ¶ 61,222 ("In *Southern California Edison Co.*, we determined that a Transition PPA which is priced using SRAC and entered into pursuant to the QF/CHP Settlement reflects the obligation of the electric utility to purchase pursuant to PURPA, and was entered into pursuant to the state regulatory authority's implementation of PURPA."); *Southern California Edison Co.*, 143 FERC ¶ 61,222, P 18, 2013 WL 2477179, **4. Two state court of appeals decisions also recognized that the SRAC was PURPA compliant. *See So. Cal. Edison Co. v. Pub. Utils. Comm'n*, 128 Cal. App. 4th 1, 10-11 (2005); and *Sol Cal. Edison Co. v. Pub. Utils. Comm'n,*101 Cal. App. 4th at 988-89. And a federal court recently found that the CPUC's Standard Contracts (with the SRAC) for 20 MW or Less, among other CPUC programs, complied with PURPA. *See SFUI*.

The QF Settlement was one of the bases that FERC granted the California utilities' application to suspend the mandatory purchase obligation for QFs greater than 20 MW, discussed above. *See Pac. Gas and Elec. Co.*, 135 FERC ¶ 61,234, *supra*.

5. California's Renewables Portfolio Standard and Other Renewable Energy Programs

a) California's Renewables Portfolio Standard

Independent of, yet dovetailing with, PURPA's purchase obligations and alternative power goals, California statutorily imposed a mandatory requirement that utilities procure their electrical supply from renewable resources. In 2002, the Legislature enacted SB 1078 (Sher, Stats. 2002, ch. 516) to establish California's Renewables Portfolio Standard ("RPS") (Article 16, commencing with § 399.11 of the California Public Utilities Code). The RPS originally required regulated utilities to procure 33% of their generation portfolios from renewable energy resources by December 31, 2020. *See* Cal. Pub. Util. Code §§ 399.11(a); 399.15(b)(2)(B). The Legislature has since amended the law to require a 50% RPS by 2030. *See id.* Today, CPUC-regulated utilities have met their 2020 targets, and are on track to reach their 2050 targets. *See* Cal. Pub. Util. Comm'n, *California Renewables Portfolio Standard Annual Report – November 2017*, 1.[1]

[1] This Report is an official report of the CPUC prepared for the California Legislature as required by Cal. Pub. Util. Code § 913.4.

Utilities are largely achieving their RPS goals through procurement of renewable power from large-scale renewable facilities greater than 20 MW. Re-MAT represents a small yet significant portion of California's RPS because it targets small generators selling up to 3 MW of electrical capacity.

b) The CPUC's Net Energy Metering ("NEM") Program

Titles I and III of PURPA encourages, but does not require, net energy metering as part of PURPA's overall package of promoting small renewable generation. 16 U.S.C. § 2621(d)(11). The CPUC's NEM program was established in 1995 by Cal. Pub. Util. Code § 2824. It provides utility customers with eligible renewable generation facilities located at the same site receiving utility service, *e.g.*, rooftop solar, the ability to offset their retail electric utility charges with bill credits so far as their demand is met by their own generating facilities. *See* D.16-01-044, 2016 WL 537768, at *7-*8 (January 28, 2016). Where a NEM customer generator's electric generation is used to offset its own demand for power or to offset electric utility bills, the bill credit program is a state program concerning the regulation of retail rates. Cal. P.U.C. D.11-06-016, 2011 WL 2587201, citing *MidAmerican Energy Co.*, 94 FERC ¶ 61,340 at 62,262-63, 2001 WL 306484

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http://www.cpuc.ca.gov/uploadedFiles/CPUC_Website/Content/Utilities_and_Industries/Energy/Reports_and_White_Papers/Nov%202017%20-%20RPS%20Annual%20Report.pdf

(2001) and *SunEdison LLC*, 129 FERC ¶ 61,146, at P 18, 2009 WL 2923884 (2009).

Where a NEM customer generates power in excess of its needs, the electricity delivered is considered a wholesale sale to the utility, and the customer is compensated at a wholesale market rate. *See* Cal. P.U.C. D.11-06-016, 2011 WL 2587201 (June 9, 2011). The compensation – known as the net surplus compensation rate – is the short-term energy cost the utility would otherwise be paying to the day-ahead market for the time that the NEM customers are likely to produce the excess power (between 7 a.m. and 5 p.m.), known as the "default load aggregation point" ("DLAP"). It is thus the utility's avoided cost. *See* Cal. P.U.C. D.11-06-016, 2011 WL 2587201. Moreover, NEM customers are paid for Renewable Energy Credits ("RECs," defined in Cal. Pub. Util. Code § 399.12(h)(1)) arising from the surplus energy after the California Energy Commission approves metering and tracking requirements. *See* Cal. P.U.C. D.11-06-016, 2011 WL 2587201.

Since 1995, over 600,000 California ratepayers have enrolled in the NEM program, with over 4,800 MW of generating capacity interconnected to CPUC-regulated utilities. *See California Solar Initiative Annual Program Assessment –*

June 2017, CPUC, at 19.[2] The United States Energy Information Administration reported on June 1, 2017 that "California is by bar the leading state for small-scale PV [solar photovoltaic ("PV") generation], with 43% of the nation's total small-scale PV output in 2016." *See* www.eia.gov/todayinenergy/detail.php?id=31452. "Small-scale" solar PV generation ranges in size from about 5 kilowatts ("kW") for residential systems to about 200 kW for commercial small-scale installations. *Id.*

c) The CPUC's Re-MAT Program

California began experimenting with feed-in tariffs in 2006, when the California Legislature added § 399.20 to the Public Utilities Code. *See* 2006 Cal. Legis. Serv. Ch. 731 (A.B. 1969). The CPUC established a feed-in tariff program in 2007 targeting water and wastewater facilities, *see* Cal. P.U.C. D.07-07-027, 2007 WL 2229386 (July 26, 2007), and later expanded it to include renewable generators up to 1.5 MW, *see* Cal. P.U.C. D.12-05-035, 2012 WL 2049420 (May 24, 2012); Winding Creek ER 179. The pricing for this early feed-in tariff was based on the Market Price Referent because in 2007 § 399.20 specifically referenced the Market Price Referent under § 399.15(c). *See id.* at 7-8, Winding Creek ER 179-80; 2006 Cal. Legis. Serv. Ch. 731 (AB 1969), slip op. 3; Cal.

[2] This Report is an official report of the CPUC prepared for the California Legislature as required by Cal. Pub. Util. Code § 2851(c)(3). http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442454026

P.U.C. D.07-07-027, 2007 WL 2229386, Winding Creek ER 177. Utilities were required to procure up to 250 MW statewide. *See* Cal. P.U.C. D.07-07-027, 2007 WL 2229386.

The California Legislature amended § 399.20 in 2008, 2009, and 2011. Most significantly, the amendments eliminated the cross-reference to § 399.15, so that the price was no longer tied to the Market Price Referent. *See* D.12-05-035, slip op. 16-17; 2011 Cal. Leg. Serv. 1st Ex. Sess. Ch. 1 (S.B. 2), 34. Instead, the amendments directed the CPUC to consider the following: (1) the long-term market price for fixed price products determined by the utilities' general procurement activities; (2) the long-term ownership, operating, and fixed-price fuel costs for fixed-price electricity from new generating facilities; and (3) the value of different products, including baseload, peaking, and as-available capacity. *See* Cal. Pub. Util. Code § 399.20(d)(2)(A)-(C). The amendments also increased the size of eligible facilities to 3 MW and increased to statewide procurement cap to 750 MW. Cal. Pub. Util. Code § 399.20(b) and (e). In 2016, the California Legislature added Cal. Pub. Util. Code § 399.20.5 to allow conduit hydrogenation facilities with a generating capacity up to 4 MW to participate in the Re-MAT program and sell up to 3 MW of power. Cal. Assembly Bill 1979 (Bigelow), Stats. 2016, ch. 665.

To implement the 2008-2011 amendments to § 399.20, the CPUC created the Re-MAT program. Discussing the flaws in using the Market Price Referent to

set prices, the CPUC explained that its "does not reflect ongoing changes within the renewable market," which was then "sufficiently robust to serve as the point of reference for establishing the market price for small renewable project rather than the very different benchmark used for the [Market Price Referent], which is based on the costs of a combined-cycle natural gas power plant. *See* D.12-05-035, slip op. 32-33. The Commission further explained,

> The market-based pricing methodology adopted today allows customers to realize the benefits of changing market conditions that result in potentially lower costs. In addition, it allows generators to set the market price through the bidding process, which theoretically will ensure the price is neither too high nor too low, but instead, will be reasonable to cover the generator's costs and encourage broad participation in the market. In contrast, administratively-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 indifferent to the extent achieved by Re-MAT.

D.12-05-035, slip op. 64. The initial starting price of $89.23/MWh was based on the weighted average of the *highest* priced executed contracts of the three large electric utilities, Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and San Diego Gas & Electric Company ("SDG&E") resulting from the CPUC's Renewable Auction Mechanism program (a non-PURPA program) held in November 2011. *See id*. slip op. 40-41, 45, 113. But

because the RAM program was available only to generators up to 20 MW, the CPUC did not keep the offer price static at $89.23/MWH. Instead, the price adjustment mechanism rectifies the difference between the RAM market segment and the niche Re-MAT market segment. The price adjustment mechanism is based on a proposal by SCE, and allows the price (for different product types) to increase or decrease every two months based on the market response to the previously offered price. *See id.* slip op. 45 n.48, 49. Additional factors informing the price adjustment mechanism was intended to prevent gaming and a single investor with multiple QFs to withhold supply and improperly force an increase in the price. *See id.* slip op. 46 n.49.

The 750 MW statewide procurement requirement was allocated among the utilities based on their respective loads (demand). Thereafter, each utility's total allocation was equally broken up for procurement over 24 months. *Id.* slip op. 50, 80-81. This design was an effort to stimulate the market for small renewable distributed generation by providing an adequate supply of available capacity for each product type in response to demand, and to "minimize ratepayer exposure to a large number of non-competitively priced contract." *Id.* slip op. 50-51. In other words, because the initial starting price was high, i.e., the weighted average of the *highest* priced executed contracts in another RPS program, failure to pace

procurement would give investors ready to commence project development an unfair advantage over newer or yet-to-be-formed market entrants.

Facilities interested in participating in the Re-MAT program must so indicate, at which point they would be placed in a queue for each utility. The QF may accept an offer price on a first-come, first-served basis, up to 5 MW for each bimonthly program period. A facility at the top of the queue – eligible to commit up to 5 MW of generation – can accept or reject the offered price. Once accepted, the contract price is fixed for the term of the contract. If the price is declined, the facility maintains its priority position in the queue, and if the next facility would like to accept the offer price, it becomes eligible to do so as long as the utility does not procure more than 5 MW total (for each product type) in that program period.

As of November 2017, PG&E, SCE, and SDG&E have collectively procured 255.7 MW of renewable power under Re-MAT, requiring them to procure an additional 238 MW to meet their portion of the statewide procurement target. *See Renewables Portfolio Standard Annual Report – November 2017*, CPUC, at 24-25.

SUMMARY OF THE ARGUMENT

Over the course of the extensive and protracted litigation below, it appears ultimately that what Winding Creek seeks out of this litigation is a contract at a rate that is above utilties'avoided-cost for power they can procure in the Re-MAT program from other generators. *See* generally CPUC ER 252-64, 268-69, 270,

272, 274. Winding Creek's desired price of $89.23/MWh being well above the utilities' avoided cost, it is thus unjust and unreasonable Winding Creek is a single, as-yet undeveloped one megawatt (MW) solar photovoltaic QF that desires to participate in PG&E's Re-MAT program. Indeed, in its appeal, Winding Creek asks this Court to compel the CPUC to order PG&E to execute a Re-MAT contract with it, despite all of Winding Creek's arguments that Re-MAT violates PURPA. Winding Creek's only real complaint appears to be that the Re-MAT program has not offered it a price that it desires. Unlike Winding Creek, other QFs have already accepted Re-MAT price offers far lower than those offered to Winding Creek. Even now, dozens of QFs desire a Re-MAT contract but for the CPUC's suspension of the program as ordered by the District Court.

The District Court's order at issue in these cross-appeals concludes that the CPUC does not provide sufficient contracting *options* to QFs as required by PURPA. The District Court concludes that the CPUC does not offer a type of contract required by 18 C.F.R. § 292.304(d)(2)(i) – where the avoided-cost rate is "calculated at the time of [energy] delivery." The CPUC readily conceded in the case below that it does not offer such a standard form contract because no QF has ever sought such a contract. The District Court further concluded that the Re-MAT program may provide the other type of contracting option – one in which the avoided-cost rate is calculated at the tiem the [legally enforceable obligation to

purchase] is incurred," as required by 18 C.F.R. § 292.304(d)(2)(ii). Nevertheless, the District Court found that the Re-MAT program is not in compliance with PURPA and FERC's PURPA regulations because (i) the utilities' procurement caps and bimonthly procurement limits violate PURPA's mandatory purchase obligation, and (ii) Re-MAT's adjusting pricing mechanism "strays too far" from a utility's avoided costs without citing to authority to support that conclusion.

Decades of U.S. Supreme Court, Ninth Circuit, district court, state court, and FERC decisions and orders support the CPUC's implementation of PURPA and the Re-MAT program. States have "broad authority" and "great deal of flexibility" to set avoided-cost rates and in overseeing the contractual relationships between utilities and QFs, *IEP*, 36 F.3d at 856, including the use of competitive market-based pricing to establish a utility's avoided cost. The District Court acknowledges that the CPUC's argument – that the Standard Contract for QFs 20 MW or Less available to all QFs without limit obviates Re-MAT's procurement cap and limits – "makes some analytical sense, and for summary judgment purposes the Court accepts it [the premise of the argument] as true." Winding Creek ER 15. However, the District Court found that the Standard Contract for QFs 20 MW or Less does not by itself offer a QF the pricing options required by 18 C.F.R. § 292.304(d)(2)(i) and (ii). Winding Creek ER 18.

The District Court's order rejects as binding FERC's declaratory orders on Winding Creek's petitions interpreting FERC's PURPA regulations that rejected the same legal arguments that Winding Creek makes here. One of these orders, *Winding Creek Solar LLC*, 151 FERC ¶ 61,103, had already been relied upon by the District Court for the Central District of California in interpreting FERC's PURPA regulations. The District Court thus did not accord the proper deference to FERC's declaratory orders merited here.

Not only is the CPUC's implementation of PURPA – through the Re-MAT program, the Standard Contract for QFs 20 MW or Less, and through other programs – legally sound, they are successful. Even now, dozens of QFs stand by frustrated by the District Court's order enjoining further operation of the Re-MAT program. As the District Court did not give FERC the proper *Chevron* and *Auer* deference, the District Court's order should be reversed.

STANDARDS OF REVIEW

Following a bench trial, a District Court's findings of fact are reviewed for clear error. *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1088 (9th Cir.2002). "'This standard is significantly deferential, and we will accept the lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been committed.'" *N. Queen Inc. v. Kinnear*, 298 F.3d 1090, 1095 (9th Cir.2002) (quoting *Allen v. Iranon*, 283 F.3d 1070, 1076 (9th Cir.2002)).

However, where factual findings are made under an erroneous legal standard, they are not accorded any deference by this Court and are reviewed *de novo*. *See Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 855 n.15 (1982); and *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 195 no.9 (1963).

The District Court's conclusions of law following a bench trial are reviewed *de novo*. *Brown v. United States*, 329 F.3d 664, 671 (9th Cir.2003). A District Court's grant of partial summary judgment is reviewed *de novo*. *See Orr v. Bank of America*, 285 F.3d 764, 772 (9th Cir.2002).

ARGUMENT

A. The District Court Erred In Concluding that the CPUC's Re-MAT Program Is Not Compliant With PURPA

1. Re-MAT's Program Cap Is Mandated By State Law Which the CPUC Must Implement.

The District Court erroneously concludes that the "CPUC imposed a 750 MW statewide cap for the program overall…" Winding Creek ER 13. It is undisputed that the 750 MW statewide cap on procurement under the Re-MAT program is capped pursuant to state statutory law, not by the CPUC. Cal. Pub. Util. Code § 399.20(f)(1). The CPUC is charged with implementing this statutory mandate and cannot shirk that charge absent an appellate court's determination. The California Constitution provides:

> An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

Cal. Const., art. III, § 3.5. The CPUC cannot at this point simply set aside the statutory cap on Re-MAT procurement as required by Cal. Pub. Util. Code § 399.20.

2. Re-MAT's Bi-Monthly Program Period Procurement Limits of 5 MW For Each Product Type Does Not Deprive Any Eligible QF of a Contract in Due Course.

The District Court next erroneously determines that the 5 MW bimonthly procurement limit violates the mandatory purchase (or "must-take") obligation under which utilities must buy "any energy and capacity which is made available from a qualifying facility." Winding Creek ER 13, citing 16 U.S.C. § 824a-3(a) and 18 C.F.R. § 292.303(a)(1) (applying the same determination to the 750 MW statewide cap).

Re-MAT's bimonthly 5 MW limit is a short, two-month pause in procurement, not a hard limit on procurement. The program pauses to allow for prices to adjust upward or downward to reflect market conditions, such as falling technology costs. *See* CPUC ER 140-141, 143 ¶¶ 18 & 29. The bimonthly procurement limit acts as a built-in readjustment opportunity where market signals indicate the price should be raised or lowered. *See* CPUC ER 146-47 ¶¶ 40-43. This bi-monthly limit thus paces and stabilizes procurement and allows the market to respond while "[minimizing] ratepayer exposure to a large number of non-competitively priced contracts." *See* CPUC D.12-05-035, slip op. 50-51, 2013 WL 458041 (Cal. P.U.C. Jan. 24, 2013).[3] The Re-MAT price through the adjusting pricing mechanism thus represents the utility's avoided cost of purchasing from another generator in the program.

FERC has consistently held that *states*, not FERC, determine the specific parameters of individual QF contracts, including the date at which a legally enforceable obligation is incurred *under state law*. *See W. Penn Power*, 71 FERC

[3] An additional benefit to pacing renewables procurement is to synchronize the CAISO's increasing oversupply of renewables generation during peak solar and wind generating periods with new and improving tools to manage such oversupplies. During these periods of oversupply, the CAISO may pay these generators to reduce or cease electricity generation, or "curtail" production. In April 2018, for example, the CAISO reached a new record of solar and wind curtailment of almost 95,000 MWh. *See* www.caiso.com/informed/Pages/ManagingOversupply.aspx.

¶ 61,153 at 61,495. Any suggestion that Winding Creek was entitled to a contract at the moment it requests it is therefore unsupported by law.

Winding Creek was offered a Re-MAT contract within two program periods of its expressed desire for a Re-MAT contract. The record in the case below makes clear that Winding Creek was offered a Re-MAT contract at a price of $77.23/MWh in March 2014, in the third Re-MAT program period. Winding Creek ER 11, P 32.

3. Determination of an Avoided-Cost Rate Through Re-MAT's Adjusting Pricing Is Consistent With FERC's Promotion of Competitive Pricing In Setting Avoided-Cost Rates.

a) FERC Promotes the Use of Competitive Means to Determine Avoided-Cost Rates Under PURPA.

While states *may* administratively set a numerical avoided cost rate, it is not required to do so. Consistent with the states' "broad authority" and a "great deal of flexibility" to set avoided-cost rates. *IEP*, 36 F.3d at 856. Indeed, FERC has expressly authorized the use of market-based rates or competitive solicitations to set avoided-cost rates. *See Order 671*, 114 FERC ¶ 61,102, at PP 96-99, 2006 WL 250518, at *24 (2006) (stating that "many sales made pursuant to bilateral contracts between QFs and electric utilities (including contracts at market based rates) are made pursuant to a state regulatory authority's implementation of

PURPA"); *N. Little Rock Cogeneration, Ltd. v. Entergy Servs., Inc.*, 72 FERC ¶ 61,263, at 62,173-74 (1995).

This Court is well-familiar with the dangers of setting administratively-determined avoided cost rates based on long-term forecasts. *See IEP*, 36 F.3d at 852 n.8. This Court relied heavily on FERC's *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities and Interconnection Facilities*, Federal Energy Reg. Comm'n Rep. (CCH) ¶ 32,57, 32,174 (March 16, 1998) (*Admin. Det'n*). *See IEP*, 36 F.3d at 852 n.8 and 859. In the *Admin. Det'n,* FERC acknowledged that administratively-set avoided cost rates based on forecasted fuel costs presents a "danger" that rates will not result in an "equilibrium price." *Admin. Det'n,* at 32,167, 32,174. This FERC rulemaking languished for nearly ten years and was ultimately terminated without changes to FERC's rules. However, FERC noted with some satisfaction that "[while few states allowed competitive bidding at the time of the [*Admin Det'n*], well over half the states now use competitive bidding to one degree or another in setting avoided cost rates. *Order Terminating Proceeding*, 84 FERC ¶ 61,265, *62,301, 1998 WL 770222 (Sept. 21, 1998), **2.

FERC continues to support the use of market mechanisms over administratively-set avoided cost rates in California and across the nation. *See, e.g., Energy Producers and Users Coal.*, 149 FERC ¶ 61,251, ¶ 19 n.47, 2014 WL

7205371 (Dec. 18, 2014), **5 ("As-Available PPAs are … part of the implementation of [California's] transition from a pure PURPA regime to a more-market oriented regime").

4. The District Court Cites No Authority for Concluding that the Adjusting Pricing Mechanism "Strays Too Far" from PURPA's Avoided-Cost Mandate.

Setting aside decades of federal case law and FERC innumerable orders struggling with PURPA's complex framework and requirements, the District Court interpreted the "plain meaning" of PURPA and FERC's implementing regulations to declare that whether Re-MAT complies with PURPA is "straightforward." *Id.* at 5, 13.

Ratemaking, however, is a legislative function, not a judicial one, and even at the best of times is "a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation." *United States v. Morgan*, 313 U.S. 409, 417 (1941); *see also*, *e.g.*, William M. Wherry, Jr., *Public Utilities and the Law* 30 (1925) ("Rate making is a form of predicting the future."). There is nothing "straightforward" about it.

In the context of PURPA, setting avoided-cost rates is even more challenging: PURPA embodies a tension between Congress' simultaneous goals of promoting clean generation, obliging otherwise recalcitrant utilities to purchase clean power from non-utility sources, and protecting consumers from rates higher

than they would otherwise pay. *See FERC v. Mississippi*, 456 U.S. at 759. Because PURPA is so complex, rate-making under the Act happens in a framework of "cooperative federalism," *see id.* at 767, in which the states receive an unusual degree of deference: they have "broad authority" to implement PURPA, and "a great deal of flexibility" to set avoided-cost rates. *IEP*, 36 F.3d at 856. Indeed, FERC has stated:

> The [FERC's] regulations allow the States … a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation *to accommodate local conditions and concerns*, *so long as the final plan is consistent with* ***statutory*** *requirements*.

Policy Statement Regarding the Commission's Enforcement Role under Section 210 of the Public Utility Regulatory Policies Act of 1978, 23 FERC ¶ 61,304, at 61,646 (1983) (emphases added).

In rejecting Re-MAT's market adjusting pricing mechanism, Winding Creek ER 14, the District Court did not cite to PURPA itself, or to case law, or to FERC decisions or regulations, or to any other authorities that support this legal conclusion. In fact, FERC has long promoted market-based avoided-cost rates over administratively-set immutable rates. *See*, *e.g.*, *Energy Producers and Users Coal.*, 149 FERC ¶ 61,251, P 19, n.47, 2014 WL 7205371, **5 (2014) (discussing FERC's transition "to a more market-oriented regime").

In other words, FERC and the CPUC based the current market-oriented Re-MAT regime—the regime that the district court now upsets—on "judgments about the way the real world works", which "are precisely the kind that agencies are better equipped to make than are courts." *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651 (1990). Rather than defer to FERC's agency expertise, the district court asserted its own view of how PURPA should be implemented. That is not the court's function.

5. The District Court Clearly Erroneously Found that the Adjusting Pricing Mechanism Adjusts Prices Arbitrarily.

The Court goes on to find, "There was no reasoned basis for CPUC's choice of increments in multiples of $4 for [bimonthly] price adjustments as opposed to any other number; the size of these price adjustments was arbitrary." Order at ¶ 10, citing Trial Transcript at 179:13-180:7. The CPUC's witness does not, however, acknowledge that the $4 adjustment is arbitrary, only that it was proposed in the underlying CPUC proceeding and that she did not know on the stand the basis for the $4 adjustment. Trial Transcript at 177-178; Winding Creek ER 75-76. When pressed by the Court for the third time, the witness acknowledges that it "could be a reasonable assumption" that the $4 adjustment was arbitrary. *Id.* A review of the record, however, demonstrates that the $4 adjustment was based on a proposal by SCE in the underlying CPUC proceeding

that prices should adjust in $2, $4, and $6 increments depending on the market responsiveness, *see* D.12-05-035, slip op. 28-29, and the CPUC instead adopted a variation of SCE's proposal, *see id.*, slip op. 36-37, 44-45. The CPUC reasoned that the adjustment mechanism was consistent with the policy guidelines of setting prices "based on quantifiable utility avoided costs that stimulate market demand," containing costs and ensuring maximum value to ratepayers and utilities, and ensuring administrative ease and lower transaction costs for the buyer, seller, and regulator, *id*., slip op. 37, and "[enables] the FiT price to quickly respond to market conditions" and "prevent gaming by only increasing or decreasing provided that a defined level of market interest exists for a product type," *id*., slip op. 44-45.

Although the CPUC decision adopting the Re-MAT program does not discuss in exacting detail why the CPUC chose the $4 increment over others within a $2 deviation therefrom, the $4 adjustment increment itself is not static but can increase depending on market conditions. *Id.*, slip op. 46-47. Indeed, the CPUC capped the monthly price adjustments to $12 "to avoid excess bi-monthly price adjustments," based on party comments in the record. D.13-05-034, slip op. 12. The utilities' implementation of Re-MAT thus works as the program was intended: to adjust upward or downward to stimulate the market when prices are too low to attract new sellers, and to adjust downward to reflect market conditions. Moreover, the bimonthly program period was not "randomly selected," as the

Court erroneously finds. Order at 14. Instead, the CPUC considered a monthly adjustment period, but found that bimonthly program periods, coupled with decreasing the procurement limit per program period to 5 MW for PG&E, struck the right balance to ensure steady progress toward reaching procurement targets while enabling the price to reach equilibrium (readily enabling the price to decrease or increase). *See* D. 13-05-034, slip op. 10-12.

6. The District Court Erred In Second-Guessing the CPUC's Determination, Affirmed by FERC, As to What "Makes Sense" to Determine Avoided-Cost Rates.

The District Court's second-guessing the CPUC's Re-MAT program contradicts well-established precedent giving states broad discretion to implement PURPA. *See FERC v. Mississippi*, 456 U.S. at 749-51; *IEP*, 36 F.3d at 856. Even FERC does not second-guess state commissions. *See CPUC*, 133 FERC ¶ 61,059, at P 24, *reh'g denied*, 134 FERC ¶ 61,044 (2011). FERC does not make an independent determination of avoided cost. *Id.*; *Signal Shasta Energy Co.*, 41 FERC ¶ 61,120, at 62,295 (1987).

B. The District Court's Rejection of the Standard Contract as the CPUC's Primary PURPA Program Does Not Give Proper Auer Deference to FERC's Determinations.

In 2013, Winding Creek asked FERC whether Re-MAT complies with PURPA and the FERC's implementing regulations. *See Winding Creek Solar LLC*, 144 FERC ¶ 61,122, 2013 WL 4053221 (2013); *see also Winding Creek*

Solar LLC, 151 FERC ¶ 61,103, 2015 WL 2151303 (2015) ("Declaratory Order"); *Winding Creek Solar LLC*, 153 FERC ¶ 61,027, 2015 WL 6083932 (2015) ("Reconsideration Order"). Winding Creek had, among other things, argued that neither the Standard Contract nor Re-MAT offered QFs the required contracting options: an adjusting price determined at the time the energy is delivered and a fixed price determined at the time of contract signing, in violation of 18 C.F.R. §§ 292.304(d)(2)(i) & (ii). *See* Winding Creek Request for Rehearing of Declaratory Order at 1-2, 10. FERC responded by upholding California's Standard Contract– calling it California's "primary" PURPA program–as a valid implementation of PURPA and FERC's regulations. Reconsideration Order, 153 FERC ¶ 61,027 at P 7 n.10, citing to 18 C.F.R. § 292.301.[4] FERC reasoned that "as long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates"—which the CPUC does with its Standard Contract—"a state may also have alternative programs that . . . limit how many QFs, or the total capacity of QFs, that may participate in the program." Declaratory Order, at PP 6, 7, 151 FERC ¶ 61,103, at **2. Re-MAT is such an

[4] FERC explained that the settlement and Standard Contract were the result of a "comprehensive settlement" between California's electric utilities and the "vast majority of QFs in California." 153 FERC ¶ 61,027, at P 7 n.10. FERC determined that the Standard Contract's price, terms and conditions, which were reached through that settlement, comply with FERC's regulations. *See id.* The settlement was achieved in a CPUC rulemaking and adopted by the CPUC as a rule. CPUC Decision 10-12-035, 2010 WL 5650671, slip op. 1, 58-59, 69.

alternative program. FERC accordingly upheld both the Standard Contract and Re-MAT as fully PURPA-compliant.

On summary judgment, district court agreed that this "makes some analytical sense, and for summary judgment purposes [accepted] it as true." Order at 15. However, the district court did not did not accept FERC's rationale. The District Court concludes that the CPUC's Standard Contract for QFs 20MW or Less is not a contract under 18 C.F.R. § 292.304(d)(2)(ii) and that the CPUC fails to provide such a contract to Winding Creek, in violation of PURPA and FERC's regulations. Order at 15-17. The District Court rejects the CPUC's argument that, based on the FERC's Declaratory Order and Reconsideration Order, the Standard Contract for QFs 20 MW or Less, is the CPUC's primary PURPA program, reasonably satisfies the rates, terms, and conditions otherwise required in Subpart C of FERC's regulations (including 18 C.F.R. § 292.304(d)(2)(i) and (ii)). In so rejecting the CPUC's argument, the District Court explained, "Neither order even mentions, let alone meaningfully discusses, the two pricing options that are required under 18 C.F.R. § 292.304(d)(2)(i) and (ii)." Order at 17.

The CPUC acknowledges, as the district court found, that FERC's order is not the most "straightforward" reading of FERC's regulations. *See* Reconsideration Order, 153 FERC ¶ 61,027 at P 7 n.10, citing to 18 C.F.R. § 292.301 as a response to Winding Creek's allegation that the CPUC does not

satisfy 18 C.F.R. §§ 292.304(d)(2)(i) & (ii). Nor are FERC's regulations unambiguous, given PURPA's complexity. *See*, *e.g.*, *IEP*, 36 F.3d at 852, 858-59. ***Critically, however, this is FERC's interpretation, not the CPUC's.*** Thus, contrary to the district court's conclusion, the Standard Contract does not ignore FERC's regulations: FERC itself has found the Standard Contract consistent with both PURPA and its implementing regulations. *See* Declaratory Order, 151 FERC ¶ 61,103, at P 7.[5]

FERC's conclusion here should be given force. FERC's interpretation of PURPA is entitled to a high degree of deference, *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 845, 863 (1984), and the deference afforded to FERC's interpretation of its own rules higher still. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). When reviewing whether a state has properly implemented PURPA, the standard is whether the state's implementation "is reasonably designed to give effect to FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751. The Standard Contract and the Re-MAT program fit that bill: FERC has said so. By not giving effect to FERC's expertise, the district court erred.

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[5] Nor were FERC's *Winding Creek* orders anomalous: FERC has often upheld formula rates of the type established in the Standard Contract. *See, e.g., Signal Shasta Energy Co.*, *supra*, 41 FERC ¶ 61,120, P 61,295, 1987 WL 118362, *2; *Energy Producers and Users Coal.*, *supra*, 149 FERC ¶ 61,251, at PP 2, 16-19, n.47, 2014 WL 7205371, ** 1, 4, 5; *So. Cal. Edison Co.*, 143 FERC ¶ 61,222, PP 6-8, 17-18, 2013 WL 2477179, **1, 2, 4 (2013).

Amici Curiae Community Renewable Energy Association and Northwest and Intermountain Power Producers Coalition's ("CREA/NIPPC") citation to *Portland GE v. FERC*, 854 F.3d 692, 697-702 (D.C. Cir. 2017) for the proposition that FERC orders should not be accorded deference is misplaced. CREA/NIPPC Brief at 11. In *Portland GE*, after reviewing FERC, PURPA, and Federal Power Act statutory interplay, the Court of Appeals for the District of Columbia merely determined that it lacked jurisdiction to directly review the FERC order at issue because it was advisory and arose from PURPA § 210, and not the Federal Power Act. *Id*. The same is true of CREA/NIPPC's quotation from *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1489 (D.C. Cir. 1997), which affirmed that "the Congress did not confer jurisdiction upon the courts of appeals to review a declaratory order in which the FERC interprets the PURPA." *Id*. at 1488. Neither of these citations advances the conclusion that a FERC order interpreting its own regulations is not entitled to deference by the district courts, and CREA/NIPPC's statement that "[n]o deference applies to the FERC orders in *Winding Creek*" is simply mistaken.[6] CREA/NIPPC Brief at 11.

[6] While *Chevron* deference applies to an agency's interpretation of statutes, importantly *Auer* deference is greater than *Chevron* deference. FERC nevertheless issued its orders on the Re-MAT program. Despite not taking enforcement action, FERC addressed the substance of Winding Creek's arguments raised in the District Court action.

To the contrary, "Agencies are entitled to deference to their interpretation of their own regulations." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). In fact, "where an agency interprets its own regulation, even if through an informal process, its interpretation of an ambiguous regulation is controlling under *Auer* unless 'plainly erroneous or inconsistent with the regulation.'" *Bassiri v. Xerox Corp.*, 463 F.3d 927, 930 (9th Cir. 2006), citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

As noted in *Go v. Holder*, 744 F.3d 604, 610-13 (9th Cir. 2014) (Wallace, J., concurring), the Ninth Circuit has applied *Auer* deference to agency interpretation of its regulations in a wide variety of informal and non-binding contexts. *See Zurich Am. Ins. Co. v. Whittier Props., Inc.*, 356 F.3d 1132, 1137 (9th Cir. 2004) (Department of Labor opinion letters, as interpretations of its own regulations, are given "great judicial deference"); *Bassiri*, 463 F.3d at 933 (deferring to Department of Labor opinion letter interpretation of ERISA regulations); *Public Lands for the People, Inc. v. U.S. Dept. of Agric.*, 697 F.3d 1192, 1199 (9th Cir. 2012) (giving "wide deference" to interpretation of a regulation in Forest Service Manual); *Barboza v. Cal. Ass'n of Prof'l Firefighters*, 651 F.3d 1073, 1076, 1079 (9th Cir. 2011) (deferring to Department of Labor interpretation of a regulation in an amicus brief); *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 548, 554-57 (9th Cir. 2009) (deferring to an interpretation of a "mining-related

directive" set forth in a Forest Service "Memorandum to Regional Foresters"); *Silvas v. E*Trade Mortg. Corp.*, 514 F.3d 1001, 1005 n.1 (9th Cir. 2008) (deferring to a legal opinion interpreting a regulation by Office of Thrift Supervision); *L.A. Closeout, Inc. v. Dep't of Homeland Sec.*, 513 F.3d 940, 941-42 (9th Cir. 2008) (deferring to an internal DHS memorandum interpreting a regulation). "As these cases make clear, an agency's interpretation of an ambiguous regulation—no matter how informal the pronouncement in which the agency advances its interpretation—is controlling, unless that interpretation is plainly erroneous or inconsistent with the regulation itself." *Go*, 744 F.3d at 611.

The District Court thus errs in concluding that the "FERC decisions are consequently not germane." Winding Creek ER 17. It is not necessary for FERC to "meaningfully [discuss] the two pricing options that are required under 18 C.F.R. §§ 292.304(d)(2)(i) and (d)(2)(ii)…" when 18 C.F.R. § 292.301(b) expressly provides that *nothing* in the Subpart C (of which 292.304(d)(2) is a part) limits the authority of utilities and QFs to agree to a rate or terms or conditions that differ from the rates, terms, and conditions required by Subpart C. The Standard Contract was the product of negotiations between the utilities and most QF groups in California and adopted as a rule in California. Although Winding Creek did not participate in these negotiations, it could petition the CPUC for a modification to the rule.

C. Prior to the District Court's Order, the District Court for the Central District of California Adopted FERC's Interpretation of One of the Winding Creek Orders.

In *SFUI*, 2016 WL 7613906 , the District Court for the Central District of California issued an order interpreting the first *Winding Creek* order in an action to enforce PURPA. There, the Central District Court adopted FERC's interpretation of FERC's PURPA regulations (including 18 C.F.R. § 292.304(d)(2)(i) and (ii)) to conclude that, given the existence of the Standard Contract for QFs 20 MW or Less, Re-MAT is not inconsistent with either PURPA or FERC's regulations, including 18 C.F.R. § 292.304(d)(2)(i) and (ii) whose requirements the Court expressly referenced. *See id.* at *4, *12, citing *Winding Creek Solar LLC*, 151 FERC § 61,103, at PP 6, 7, 2015 WL 2151303 (May 8, 2015). The Central District also concluded that FERC's Declaratory Order finding that the Standard Contract for QFs 20 MW or Less is entitled to deference. *Id.* at *10, citing *Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric.*, 692 F.3d 960, 966-67 (9th Cir. 2012).

Because the Central District adopted FERC's interpretation of 18 C.F.R. § 292.304(d)(2)(i) and (ii) in *SFUI* prior to the District Court's order, the District Court below should have accorded proper *Auer* deference to FERC. "An order that does no more than announce the Commission's interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment *unless and until a district court adopts that interpretation when called upon to enforce the PURPA*."

Xcel Energy Servs. Inc. v. FERC, 407 F.3d 1242, 1244 (D.C. Cir. 2005) (quoting *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1488 (D.C. Cir. 1997))(emphasis added). The District Court thus acted in error.

D. The Totality of FERC's PURPA Regulations Permits the Standard Contract As the CPUC's Primary PURPA Program.

The District Court concluded that the Standard Contract "does not – and cannot – offer both the pricing options that PURPA gives to QFs," those required under 18 C.F.R. §§ 292.304(d)(2)(i) and (d)(2)(ii). Winding Creek ER 15.

The District Court relied on the testimony of the CPUC's witness Michael Colvin that the Standard Contract complies with both 18 C.F.R. §§ 292.304(d)(2)(i) and (d)(2)(ii). Winding Creek ER 15. Yet, the District Court went on to rely on the "statements of lawyers" that "'a single pricing formula or pricing mechanism does not comply with both 18 C.F.R. §§ 292.304(d)(2)(i) and (d)(2)(ii) under PURPA." Winding Creek ER 16. The District Court thus contradicts itself, and this subject bears de novo review.

The CPUC has conceded that it does not offer a contract in compliance with 18 C.F.R. §§ 292.304(d)(2)(i), and that deficiency is addressed below. In order to determine whether the CPUC offers QFs a contract under 18 C.F.R. §§ 292.304(d)(2)(ii) at any time, irrespective of Re-MAT's statewide cap and program period limits, the Court must look to the mechanics of the Standard Contract.

The Standard Contract offers a price that consists of two components: the capacity payment and the energy payment. The purpose of offering a "price calculated at the time the obligation is incurred" is to offer developers some price certainty to attract investment. The capacity payment is fixed and can only go up, never down. This is sufficient to provide the certainty to attract investment. This satisfies the bare minimum requirement envisioned by 18 C.F.R. §§ 292.304(d)(2)(ii).

On top of the capacity payment, the QF receives a payment for energy based on a formula rate. The formula contains known components and, while the ultimate dollar amount paid is not known at the time the obligation is incurred, any amount paid is on top of a known minimum.

A formula rate with all inputs identified at the time of contract execution, even if those inputs contain market variables, complies with 18 C.F.R. § 292.304(d)(2)(ii). *See Cal. P.U.C. v. FERC*, 254 F.3d at 254. FERC's "acceptance of formula rates is premised on the rate design's 'fixed, predictable nature,' which both allows a utility to recover costs that may fluctuate over time and prevents a utility from utilizing excessive discretion in determining the ultimate amounts charged to customers." *Id.* (internal citations omitted). The formula rate for energy portion of the Standard Contract for QFs 20 MW or Less allows for *no*

utility discretion to determine the ultimate amount charged to QFs under that contract.

FERC itself holds that formula rates are rates. What is required is a prospective investor's "reasonable certainty" of the rate: "… in order to be able to evaluate the financial feasibility of a [QF], an investor needs to be able to estimate, *with reasonable certainty*, the expected return on a potential investment before construction of a facility." Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,868 (emphasis added); *see also JD Wind 1, LLC*, 130 FERC ¶ 61,129 at P 23. While the Standard Contract for QFs 20 MW or Less, the specifically identified inputs for the energy portion of the contract price provide precisely that "reasonable certainty," and the fixed payments for the capacity portion of the contract price provide absolute certainty. In contrast, Winding Creek's own expert witness testified at trial that long-term forecasts do not provide the "reasonable certainty" required in Order No. 69:

> **The Court:** It's your opinion that the data is not sufficient to project or forecast over a 10-year contract time with respect [sic] reasonable certainty what the pricing would be?
> **The Witness:** Not at all. I – I wouldn't try to do it.

Trial Transcript 41:6-10; ER 46.

The CPUC submits that the Standard Contract meets the bare minimum requirement of 18 C.F.R. §§ 292.304(d)(2)(ii). Even in the most unfavorable light,

the Standard Contract offers a hybrid of the prices required by 18 C.F.R. §§ 292.304(d)(2)(i) and (d)(2)(ii).

E. The District Court's Order, Which Favors Fixed Prices, Is In Tension With This Court's Precedent Supporting "More Flexible Pricing Mechanisms" for QF Contracts.

FERC regulation 18 C.F.R. § 292.304(d)(2)(ii) states that QF contracts may be based on the "avoided costs calculated at the time the obligation is incurred." This provision was at issue in *IEP*. In that case, utilities—and, therefore, ratepayers—were locked into fixed contract rates; in time, those rates proved to exceed the utilities' avoided costs. 36 F.3d at 858-59. The CPUC sought to remedy this problem by reevaluating FERC's prior determination that any given QF met FERC's efficiency standard. *See id.* at 852. This Court held that the CPUC may not use efficiency determinations as a pretext for modifying fixed contract prices. *Id.* at 854-55. The Court was nonetheless sympathetic to the state's dilemma: immutable contract prices had inherent flaws that could compel ratepayers to pay more than the utilities' avoided costs, to the ratepayers' long-term detriment. *Id.* And "the proper remedy for such a situation is to ensure that future standard offer contracts contain more flexible pricing mechanisms" rather than locking the utilities into fixed prices. *Id.* at 859.

This Court has urged "more flexible pricing mechanisms" in lieu of fixing rates for long-term contracts based on long-term forecasts, in the context of

considering 18 C.F.R. § 292.304(d)(2)(ii) contract. *See IEP,* 36 F.3d at 852 & n.7. *IEP* concerned whether the CPUC may reevaluate FERC's prior determination that a QF meets FERC's efficiency standards, as a means for adjusting prices that exceed avoided-cost rates. The facts giving rise to the claim were that utilities, and consequently ratepayers, were "[locked]" into fixed contract rates where such rates proved in time to exceed utilities' avoided costs. *Id.*, pp. 858-59. The Ninth Circuit held that only FERC had authority to make such efficiency determinations. *Id.* Holding that the CPUC may not to use efficiency determinations as a pretext for reducing fixed contract prices, the Ninth Circuit was nonetheless sympathetic to the state's dilemma that immutable contract prices compelled ratepayers to pay more than the utilities' avoided costs. *Id.* The Ninth Circuit urged the CPUC to instead pursue "more flexible pricing mechanisms" over standard contracts that "lock the Utilities" into fixed rates, in order to address the frustration that fixed-price contracts can exceed a utility's avoided costs, to the long-term detriment of consumers. *Id.*, slip op. 858-59.

The CPUC's Standard Contract for QFs 20 MW or Less employs such a "more flexible pricing mechanism." The CPUC's formula rate, however, appears caught between the Ninth Circuit's encouragement of "more flexible pricing mechanisms" and the type of fixed, immutable rate that the Court exacts from a plain language reading of 18 C.F.R. § 292.304(d)(2)(ii). The Court's order is thus

in tension with both the Ninth Circuit in this regard and with FERC's support for the Standard Contract for QFs 20 MW or Less specifically and FERC's support of formula rates generally.

II. Federal Courts Do Not Engage in Ratemaking and Are Limited to the Relief They Can Provide to Prospective Equitable Relief.

The District Court correctly refrained from concluding that Winding Creek's requested price is the proper avoided cost price to which it is entitled, and thus correctly refrained from ordering the CPUC a Re-MAT contract at the initial offering price of $89.23/MWh. Winding Creek ER 19-20. Winding Creek never requested a specific contract at a specific price in its Second Amended Complaint, and as the District Court correctly noted, Winding Creek made this request only in its first Post-Trial Brief. Winding Creek ER 19, citing Dkt. No. 154 at 16.

Section 210(h) of PURPA, under which Winding Creek filed the underlying federal court action, provides for a QF to seek an enforcement action against a state commission for failure to implement PURPA or FERC's regulations. Section 210(h) allows the district court to "require such State regulatory authority … to comply with such requirements" and to award "injunctive and such other relief as may be appropriate." Any such relief is restricted by the Eleventh Amendment.

The CPUC is an arm of the state protected by the Eleventh Amendment. *See Sable Commc'ns of Cal., Inc. v. Pac. Tel. and Tel. Co.*, 890 F.2d 184, 191 (9th Cir. 1989). The Eleventh Amendment bars *any* relief against the CPUC, and any claim

for damages or retroactive equitable relief against the CPUC Commissioners in their official capacities. *See Edelman v. Jordan*, 415 U.S. 651, 662-74 (1974); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989); *Townsend v. Univ. of Alaska*, 543 F.3d 478, 484-85 & n.5 (9th Cir. 2008). The narrow exception of the *Ex parte Young* doctrine allows prospective equitable relief against state officials acting in their official capacities. *See Edelman*, 415 U.S. at 663-71.

Accordingly, the Eleventh Amendment bars retroactive equitable relief, such as ordering the CPUC Commissioners in their official capacities to compel a utility to sign the Re-MAT contract with Winding Creek that Winding Creek sought in October 2013, at the $89.23/MWh price for peaking as-available energy. Instead, if this Court determines that the CPUC's Re-MAT program violates PURPA or that the CPUC is otherwise not properly implementing PURPA, then the proper remedy would be to uphold the District Court's order that the CPUC issue such new orders implementing PURPA consistent with federal law.

Federal courts have a limited scope of review under Section 210(h) of PURPA. Federal court review under Section 210(h)(2)(B) of PURPA is limited to whether the requirements imposed by CPUC decisions, on their face, violate PURPA or FERC's regulations. *See Power Res. Group v. Pub. Utils. Comm'n of Tex.*, 422 F.3d 231, 234-39 (5th Cir. 2005); *Exelon Wind 1, LLC v. Smitherman*, 2012 WL 4465607, at *7-*8 (W.D. Tex. 2012). As discussed in this brief, a state

commission's implementation of PURPA is reviewed with "deference," *Power Res. Group*, 422 F.3d at 236, 238-39; *IEP*, 35 F.3d at 856, and the CPUC has broad discretion to implement PURPA. *See FERC v. Mississippi*, 456 U.S. at 751. This includes the discretion to determine avoided-cost rates and the terms of QF contracts. *Id.*; *Power Res. Group*, 455 F.3d at 239; *CPUC*, 133 FERC ¶ 61,059, at P 24, 2010 WL 4144227. The federal district court does not make independent factual determinations of avoided cost. *See Morgan*, 313 U.S. at 417; *Prudential Ins. Co. of Am. v. L.A. Mart*, 68 F.3d 370, 375-76 (9th Cir. 1995). Even FERC does not second-guess state avoided-cost determinations or make independent determinations of avoided cost. *CPUC*, 133 FERC ¶ 61,059, at P 24, 2010 WL 4144227. Finally, under PURPA, the federal district court does not adjudicate challenges to the reasonableness of state rules or their application to a particular utility, or review the State commission administrative record. *See* 16 U.S.C. §§ 824a-3(g); 2633(c); *Policy Statement Regarding the Commission's Enforcement Role Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304, at P 61,644 (1983).

The District Court correctly held that Winding Creek's "request for a specific contract at a specific price is an as-applied challenge that does not belong in this forum," concluding that such a federal court action would "[go] too far." Winding Creek ER 19-20.

F. Winding Creek's True Objection to the Re-MAT Program Is the Price Offered to It, In Contravention of the "Broad Authority" of States to Set Avoided-Cost Rates Under PURPA.

1. Avoided-Cost Rates Need Not Be Based On Non-QF Sources

Winding Creek argues that the Re-MAT price adjustment mechanism, which moves up or down depending on the participation of other QFs, is a violation of PURPA's avoided-cost definition. Winding Creek argues that the avoided-cost rates must instead be based on the next increment of procurement from a *non*-QF source. Winding Creek's principal argument opposition to Re-MAT's adjusting pricing mechanism is that Re-MAT sets the contract price based on the QF's costs, not the utility's avoided costs. This argument is circular and misplaced.

In competitive markets, generators will offer electricity based on their marginal costs, which, when accepted by a purchasing utility, becomes the utility's avoided cost. Winding Creek's witness Dr. Lesser's deposition testimony supports the principal that a QF's marginal cost in a competitive market can be a proper avoided-cost rate under PURPA:

> Q: And you go on to state [in a textbook authored by Dr. Lesser], "in a competitive market, price should equal marginal cost."
>
> A: That's correct.
>
> Q: And is that a true statement?
>
> A: In the textbook competitive market, the market clear price will reflect the marginal cost of the marginal supplier that what it means.

Q: Is it your understanding that an avoided cost rate could not be based on a competitive price?

MR. PRICE: Objection, form.

A: I don't understand your question. Could you rephrase that, please?

Q: Is it your understanding that in setting avoided cost rates, a state commission may not use competitive market pricing?

A: No, that's not my understanding.

Decl. of Elizabeth M. McQuillan In Support of D. Commissioners' Opp. to Mot. for Summ. J., ECF 93 at 11, Exh. A, Transcript of Deposition of Jonathan Lesser, Ph.D. (July 15, 2015) (Deposition Transcript at 45:7-24).

FERC has upheld the methodology of referencing only other QFs to determine the next increment of procurement, if the next increment of procurement must be from a QF. *See CPUC,* 133 FERC ¶ 61,059, P 23, 2010 WL 4144227, **7. The subject of *CPUC* is the CPUC's AB 1613 Combined Heat and Power Program. *See* Cal. Pub. Util. Code §§ 2840-2845. By statute, the AB 1613 program is exclusive to highly-efficient cogenerators, not all gas-fired QFs. Upon the CPUC's request for clarification, FERC expressly agreed with the CPUC that, where state law restricts the generation resources, then avoided-cost rates may be based on that set of resources. *CPUC*, 133 FERC ¶ 61,069, P 23, 2010 WL 4144227, **7, citing 18 C.F.R. §304(c)(3)(i). This is true even though the pool of generators eligible to participate in the AB 1613 program are QFs, and that discrete

pool of QFs will determine the avoided-cost rate. Like the AB 1613 program, Re-MAT statutorily restricts the pool of generators eligible to participate in that program.

The next increment of procurement can also be from a non-QF, but it need not be. Given the variety of procurement vehicles mandated on utilities, the next increment of procurement can be from a QF or a non-QF, from a natural gas-fired generator or from a renewable generator, and the CPUC offers

2. Avoided-Cost Rates Can Be, But Need Not Be, Administratively-Set Based On Long-Term Forecasts – Instead, They Can Be Based on Competitive Pricing Mechanisms Such as the Spot Market or Re-MAT's Adjusting Pricing Mechanism.

Nowhere in PURPA or the PURPA regulations is the use of long-term forecasts required to set avoided-cost rates.

In 2006 FERC recognizes the "significant changes that have occurred in the [electric procurement] industry since the first QF facilities were introduced." *Order 671*, 114 FERC ¶ 61,102, at P 96. Since PURPA was enacted, state procurement programs have proliferated, and some – like Re-MAT – are PURPA programs. *See id.*, at P 99. "[M]any sales made pursuant to bilateral contracts between QFs and electric utilities (*including contracts at market-based rates*) are made pursuant to a state regulatory authority's implementation of PURPA." *Id*. at P 99 (emphasis added).

3. Winding Creek Admits That Administratively-Determined Forecasted Rates Produce "Wrong" Avoided Costs.

At trial, Winding Creek's expert witness testified that forecasts produce "wrong" prices that the utilities will avoid in the future.

> [Lesser:] My experience as a forecaster is if I do a long-term forecast for you, I can guarantee one thing with perfect certainty. My forecast will be wrong. And that's why there is an old joke about the forecaster's creed, which is: Give them a number or give them a date, don't give them both.

Trial Transcript 40:19-23; Winding Creek ER 45. Dr. Lesser further testified that when administratively-set avoided cost rates are set too high, "like any other subsidy, there is a welfare loss to society. Society does not benefit from having subsidies." *Id.* at 54:14-17. Precisely because of the "uncertainty" of forecasts, avoided-cost rates can be set too high or too low: "And that's my point, that there is such significant uncertainty [with forecasts] that if you want to finance QFs … you will need greater revenue certainty." *Id.* at 54:20-25. Winding Creek's expert witness prefers auction mechanisms.

4. Winding Creek Misrepresents the Meaning of "Full Avoided Cost."

Winding Creek would have this Court believe that the term, "full avoided cost," means the highest price of the next increment of procurement, in contrast to Re-MAT's design in achieving the lowest price of the next increment of

procurement. However, neither PURPA nor FERC's regulations anywhere supports Winding Creek's misreading.

A utility's "full avoided cost" is the utility's "avoided cost." They are the same thing. *See Am. Paper Inst.*, 461 U.S. 402, 404 (1983) ("*API*"). The rate a utility pays to a QF cannot be a discount from the avoided cost, i.e., a "cost less than the cost to the utility of producing the energy itself or purchasing it from an alternative source." *Id.* at 406, citing 45 Fed. Reg. 12214 (1980). The U.S. Supreme Court illustrated plainly what is not a "full avoided cost": a "fixed percentage of avoided cost." *API*, 461 U.S. at 415.

Just as the price paid cannot be less than a utility's avoided cost, it cannot be more. *See id.* at 413. Avoided cost is the "maximum rate that the [FERC] may prescribe." *Id.* In other words, avoided cost is both the floor and the ceiling. States have wide discretion to determine avoided cost, but they cannot artificially discount it.

An avoided cost rate cannot be "the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." *API*, 461 U.S. at 413-14. This is because this standard is applicable to electric utilities subject to cost-of-service rate regulation. *Id.* at 414. QFs, on the other hand, are not subject to traditional cost-of-service regulation. *Id.* In order to avoid subjecting individual small QFs to the burden of cost-of-service ratemaking,

PURPA would have states determine a utility's avoided cost. *See* H.R. Conf. Rep. 95-1750, 1978 WL 8505, at *98.

5. Avoided Cost Rates Must Be "Just and Reasonable to the Electric Consumers of the Electric Utility And In the Public Interest."

Within the range of avoided cost rates that states can establish pursuant to their broad discretion, there are those close to the ceiling and those close to the floor of that range. However, all are proper avoided cost rates as long as they adhere to PURPA's definition. Sponsors of PURPA "[intended] that that phrase "just and reasonable to the electric consumers of the utility' be interpreted in a manner which looks to protecting the interests of the electrics [*sic*] consumer in receiving electric energy at equitable rates." H.R. Conf. Rep. 95-1750, 1978 WL 8505, at *97. But certainly it is appropriate to compensate QFs at the "lower" end of the range of utility avoided costs. *Id.* at *98.

> Unless the "just and reasonable" language is to be regarded as mere surplusage, it *must be interpreted to mandate consideration of rate savings for consumers that could be produced by setting the rate at a level lower than the statutory ceiling*.

API, 461 U.S. at 416 n.9 (emphasis added).

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed.

Respectfully submitted,

AROCLES AGUILAR
CHRISTINE J. HAMMOND
POUNEH GHAFFARIAN

By: /s/ CHRISTINE J. HAMMOND

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Date: June 1, 2018

STATEMENT OF RELATED CASES

Winding Creek cites to *CAlifornians for Renewable Energy, Inc., et al. v. California Public Utilities Commission, et al.*, No. 17-55297 ("*CARE*"), as a case related to the instant one. The CPUC agrees that both this and the *CARE* appeal challenge various parts of the CPUC's PURPA implementation plan.

Date: June 1, 2018 /s/ *Christine J. Hammond*

Christine J. Hammond
Attorney for Appellees/Cross-Appellants Commissioners of the California Public Utilities Commission

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT R. 32-1

I certify that pursuant to Federal Rules of Appellate Procedure, Rule 32(a)(7)(C), Ninth Circuit Rule 32-1(e), and the Court's Memorandum Re: Briefing Schedules in Cross-Appeals (ECF 2-4), the attached **CALIFORNIA PUBLIC UTILITIES COMMISSION'S SECOND BRIEF ON CROSS-APPEAL** is proportionately spaced, has a typeface of 14 points or more, and contains 14,839 words, as counted by Microsoft Word word count function.

/s/ *Christine J. Hammond*

CHRISTINE J. HAMMOND

June 1, 2018

PROOF OF SERVICE

I hereby certify that I electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 1, 2018 the following document(s):

- **CALIFORNIA PUBLIC UTILITIES COMMISSION'S SECOND BRIEF ON CROSS-APPEAL**

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ CHRISTINE J. HAMMOND

CHRISTINE J. HAMMOND

ADDENDUM

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FEDERAL

STATE

U.S. Const. Amend. XI

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

18 C.F.R. § 292.301

§292.301 Scope.

(a) Applicability. This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.

(b) Negotiated rates or terms. Nothing in this subpart:

(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or

(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.

Cal. Cont., art. III, § 3.5

§ 3.5 An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

(b) To declare a statute unconstitutional;

(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.