IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINDING CREEK SOLAR LLC, *Plaintiff-Appellant,* v. CARLA PETERMAN; MARTHA GUZMAN ACEVES; LIANE RANDOLPH; CLIFFORD RECHTSCHAFFEN; MICHAEL PICKER, in their official capacities as Commissioners of the California Public Utilities Commission, *Defendants-Appellees.*	Case No. 17-17531 On Appeal from the United States District Court for the Northern District of California No. 3:13-cv-04934-JD Hon. James Donato
WINDING CREEK SOLAR LLC, *Plaintiff-Appellee,* v. CARLA PETERMAN; MARTHA GUZMAN ACEVES; LIANE RANDOLPH; CLIFFORD RECHTSCHAFFEN; MICHAEL PICKER, in their official capacities as Commissioners of the California Public Utilities Commission, *Defendants-Appellants.*	Case No. 17-17532 On Appeal from the United States District Court for the Northern District of California No. 3:13-cv-04934-JD Hon. James Donato

APPELLANT'S THIRD BRIEF ON CROSS-APPEAL

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CPUC	California Public Utilities Commission
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
kW	Kilowatts, a measure of generation capacity equal to one one-thousandth of a megawatt.
kWh	Kilowatt-hours, a measure of generator electric energy output. One kilowatt-hour is equal to one one-thousandth of a megawatt-hour.
MW	Megawatts, a measure of generation capacity equal to 1,000 kilowatts.
MWh	Megawatt-hours, a measure of the energy output of a generator. A generator operating at one MW of capacity for one hour produces one megawatt-hour of electricity.
PG&E	Pacific Gas & Electric Company, the investor-owned utility that serves northern California, including the area around Lodi.
PURPA	Public Utility Regulatory Policies Act, 16 U.S.C. §824a-3.
QFs	Qualifying Facilities, cogeneration and small power production that are eligible to receive benefits under PURPA. *See* 18 C.F.R. §292.203.
Re-MAT	Renewable Market Adjusting Tariff

INTRODUCTION

The Defendant Commissioners of the California Public Utilities Commission (collectively, the "CPUC") offer this Court a Trojan Horse. On the outside, the CPUC touts its renewable energy programs including the Renewable Market Adjusting Tariff (the "Re-MAT") as a much-needed effort to avert climate disaster. But on the inside, CPUC's policies eviscerate the only federal law mandating that utilities purchase renewable energy. The Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), *see* 16 U.S.C. §824a-3, "was and remains a primary incentive for renewable power development." Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 Duke Envtl. L. & Pol'y F. 125, 140 (2010).

The CPUC touts the fact that some solar developers are prepared to enter into a Re-MAT contract at the unlawful ratcheted-down price as being evidence of the Re-MAT's "success." But neither the public nor the climate has the time to wait for the CPUC's carnival barker approach. The fact that someone is ready to "step right up and play the game," does not mean success. It only means that some QFs are prepared to take the only offer available to them. In reality the Re-MAT program is an epic failure caused by its unlawful features. Excluding projects at the initial $89.23 per megawatt-hour ("MWh") rate, only 3 solar projects have reached commercial operation under the Pacific Gas and Electric Company ("PG&E") Re-

MAT program, representing a paltry 3.498 megawatts ("MWs"), an infinitesimal amount for PG&E.[1] To put the effect of the unlawful Re-MAT features in context, at the Re-MAT's current rate of "*success*," it would take more than 1,000 years to add enough solar energy to replace just PG&E's fossil-fuel Gateway Generating Station in Antioch, CA. The CPUC's touted alternative—the Standard Contract—fares even worse. Since its inception almost a decade ago, not one new solar facility has been built in PG&E territory under that program. *See*, Winding Creek First Brief at 49; ER109 Colvin Direct ¶38.[2]

The CPUC tries to tar QF contracts as overly expensive. But avoided cost rates are, by their nature, neutral to ratepayers. Order No. 69, 45 Fed. Reg. 12,214,

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[1] *See,* PG&E's most recent RE-MAT status report (November 2017), available at: https://pge.accionpower.com/ReMAT/documents.asp?strFolder=c.%20PPAs%20Awarded/&filedown=&HideFiles=True. *See also*, May 2018 RPS report. http://www.cpuc.ca.gov/RPS_Reports_Data/. (last visited July 31, 2018).

[2] The CPUC alleges that the California IOUs "have collectively procured 255.7 MW of renewable power under Re-MAT." CPUC Br. at 30. That statement is a fabrication. The May 2018 RPS report publicly available on the CPUC's web site confirms that under the Re-MAT since 2013, the IOUs have collectively contracted for only 91.2 MWs, with only 62.9 MWs currently in service. Of that, only 40.517 MWs are new facilities in operation, *i.e.,* many facilities using the RE-MAT are old hydro facilities. http://www.cpuc.ca.gov/RPS_Reports_Data/. (last visited July 31, 2018). The new facilities in operation break down as follows: PG&E (7.846MWs), SCE (25.091MWs), and SDGE (7.58MWs). By contrast, California's total electric generation capacity is nearly 80,000 MW. *See* http://www.energy.ca.gov/almanac/electricity_data/electric_generation_capacity.html (last visited July 31, 2018).

12,224.[3] AD26. Further, the CPUC's claim leaves societal benefits out of the equation. But the CPUC staff recently reported that the dollar value and other benefits from distributed energy resources, such as Winding Creek, in abating the harmful effects of climate change and the adverse health effects of fossil-fuel use are very, very large. *See*, CPUC Docket R14-10-003, Order of March 14, 2018, *An Energy Division Staff Proposal Addendum #2*.[4] Such a conclusion should come as no surprise to Californians who are on the front lines of experiencing the effects of climate change—massive wildfires, mudslides, drought and other extreme weather events. Even a cursory review of the CPUC Energy Division's value assessment leads to the conclusion that the payment to Winding Creek at the rates Winding Creek would have received but for the unlawful caps, results in a large net positive for California ratepayers under any scenario.

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[3] *See Order 69,* Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214 (Feb. 25, 1980) ("Order 69" or "PURPA Rulemaking"). *See* AD16-AD39.

[4] http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M212/K023/212023660.PDF. In fact, using the social cost of carbon rates shown in the CPUC staff proposal at page 16 of the pdf, the levelized benefit to Californians from Winding Creek's facility would be roughly $85.75 per MWh over the 20-year term of the contract using a PG&E's 7.61% discount rate. With the remedy proposed by Winding Creek of a contract at the initial $89.23 per MWh rate (adjusted for time-of-use factors), Californians would be obtaining capacity and energy almost for nothing.

The issues before this Court are straight-forward. Does the law allow the CPUC to suspend, or in the CPUC's language, "pause" a generator's rights under PURPA to accommodate its bi-monthly quantity cap and do the Re-MAT's automatic price adjustments bear any relation to PG&E's avoided costs. The District Court properly answered "no." The remaining question is whether Winding Creek is entitled to *prospective* relief in the form of the contract it would have received but for the illegally. That relief is fully within the District Court's power under the plain language of the statute and, because it does not impose retroactive relief or a burden on the California treasury, it is not barred by the Eleventh Amendment.

The CPUC must re-start the Re-MAT without the two features the District Court declared unlawful, and put generators that are in the queue in the position they would have been in but for the unlawful features. The fix for the Re-MAT is easy and straight-forward—eliminate the unlawful caps and the unlawful pricing adjustments that even the CPUC's expert witness agreed have nothing to do with a utility's avoided costs. It has now been almost eight months since the District Court's order, and the CPUC has yet to bring the Re-MAT into compliance with the District Court's order.

ARGUMENT

I. Winding Creek Is Entitled to The Relief It Seeks.

Although the District Court properly concluded that the Re-MAT's caps and price adjustment mechanism violate PURPA, it failed to offer an effective remedy despite clear statutory language authorizing the District Court to "require [the CPUC] to comply with [PURPA's] requirements, and [to] issue such injunctive or other relief as may be appropriate." 16 U.S.C. §824a-3(h)(2)(B). The CPUC defends the District Court's failure to provide appropriate, effective relief on two grounds, neither of which has merit.

A. The Eleventh Amendment Does Not Bar The Relief Sought By Winding Creek.

The CPUC (Br. 56-57) claims the Eleventh Amendment bars the relief requested by Winding Creek. The argument is misplaced. *First*, it rests on the erroneous premise that such relief would allow the award of retrospective monetary relief against California. *Second*, the relief Winding Creek seeks is not retrospective, but only prospective.

"In determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md. Inc. v. Maryland Pub. Serv. Comm'n*, 535 U.S. 635, 645 (2002) (internal quotation marks omitted;

alteration in original). The relief Winding Creek seeks satisfies both elements of that test.

To be sure, Winding Creek's prospective request depends on a determination that the CPUC acted illegally in the past. But sovereign immunity does not bar relief in which the plaintiff challenges the legality of past events. The Supreme Court has made clear that a prayer for relief seeking "a declaration of the past, as well as the future, ineffectiveness" of state action triggers no sovereign immunity concerns when it does not impose upon a state any monetary loss. *Verizon*, 535 U.S. at 646; *accord Porter v. Jones*, 319 F.3d 483, 491 (9th Cir. 2003) ("Although Plaintiffs' allegations are rooted in events that occurred in the past, the injunctive and declaratory relief that they seek would prevent future and ongoing illegality. The Eleventh Amendment poses no bar to Plaintiffs' claims for prospective relief." (footnote omitted)).

Winding Creek's requested relief falls squarely within that authorized by *Ex parte Young*, 209 U.S. 123 (1908). Winding Creek seeks purely prospective injunctive relief to correct an ongoing violation of federal law. As the Supreme Court has explained, so long as "no past liability of the State, or of any of its [officials], is at issue," and the court's order "does not impose upon the State 'a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials,'" a court may permissibly declare "the past, as well as the future," illegality of official action, "so that the past financial liability of private parties may be affected." *Verizon,* 535 U.S. at 646 (quoting *Edelman v. Jordan*, 415 U.S. 651, 668 (1974)). In other words, at least some consideration of past actions was appropriate in order to provide effective relief from ongoing violations and to set future regulation on a proper course. Such relief is appropriately characterized as prospective, and it is consistent with the Eleventh Amendment. *See Milliken* v. *Bradley*, 433 U.S. 267, 290 (1977).

And it is indisputable that the relief Winding Creek seeks would not require the state to spend a single penny, removing it from the purview of the Eleventh Amendment. *Sato v. Orange Cnty. Dep't of Educ*., 861 F.3d 923, 929 (9th Cir. 2017) ("whether a money judgment against the government entity would be satisfied out of state funds—is the most important" Eleventh Amendment concern). *See also, Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 48 (1994) ("the impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury."); *see id*. at 49 ("In sum . . . the vast majority of Circuits . . . have concluded that the state treasury factor is the most important factor to be considered . . . and, in practice, have generally accorded this factor dispositive weight.") (internal quotations and citations omitted).

Here, a private entity, PG&E, and not the state, would make payments under the power purchase agreement Winding Creek seeks. As *Vaqueria Tres Monjitas,* *Inc. v. Irizarry*, 587 F.3d 464 (1st Cir. 2009) demonstrates, where a lawsuit challenges *rates established under a regulatory program governing transactions between private parties,* the Eleventh Amendment is not implicated. There the district court held in 2007 that the plaintiffs had suffered due process and equal protection violations between 2003 and 2007, and imposed an injunction allowing the plaintiffs to recover a fair rate of return from the year 2003 onward. *Id*. at 472 & n.11. The First Circuit held, because "the money in question would come directly from consumers of milk in Puerto Rico," and because "no state funds are implicated by the district court's order, … the Eleventh Amendment's prohibition against retrospective relief does not apply." *Id*. at 479.

Further, to the extent that the rate that would be payable to Winding Creek would be higher than what would be available today is also of no consequence under the Eleventh Amendment. That is exactly what happened in *Vaqueria.* At bottom, there is no meaningful difference between the relief requested by Winding Creek in this case and that at issue in *Ex parte Young*. Like this case, *Ex parte Young* involved state officials who had regulated an industry by setting rates so low as to be unconstitutionally confiscatory. *Id.* at 148-149. The Court concluded that the Eleventh Amendment did not bar a federal court from enjoining the State officials' attempts to enforce the unconstitutionally low rate. *See id.* at 149. Although the ruling resulted in an increase in the flow of money from customers to members of the regulated industry, that did not convert the relief obtained from equitable relief to monetary relief against the commonwealth officials, nor did it mean that the relief violated the Eleventh Amendment. The CPUC identifies no basis on which to depart from the result in *Ex parte Young*.

B. The Statute Expressly Authorizes The Relief Sought By Winding Creek.

Once the District Court enjoined the Re-MAT caps and pricing adjustment mechanism, the District Court had the jurisdiction to, and should have, ordered the CPUC to process Winding Creek's Re-MAT application stripped of the illegal caps and pricing adjustment mechanism. The District Court was plainly empowered to grant this relief under PURPA, which authorizes District Courts to "require . . . State regulatory authorit[ies]" like CPUC "to comply" with the FERC's PURPA rules, and, in doing to, to "issue such injunctive or other relief as may be appropriate." PURPA section 210(h)(2)(B), 16 U.S.C. §824a-3(h)(2)(B). In light of this language, the District Court's conclusion that Winding Creek's request for relief "does not belong in this forum" is clear legal error. And, without the relief it seeks, Winding Creek suffers irreparable harm from the CPUC's illegal actions properly identified by the District Court.

The CPUC's attempt to rescue the District Court's action ignores this clear statutory language authorizing the relief Winding Creek seeks. Instead, the CPUC argues that the Court must accord deference to the CPUC's determinations of avoided cost rates. But the relief requested by Winding Creek fully complies with this requirement. Winding Creek would be awarded a contract at a rate already set by the CPUC, which it would have received absent the illegal price cap and downward pricing ratchet. Granting this relief would in no way require the District Court to "second guess" or "make independent determinations" of the avoided cost calculations made by CPUC. The CPUC's argument therefore fails.

C. The FERC's Recent Decision in *Windham Solar LLC* Confirms That Winding Creek Is Entitled To The Contract It Seeks.

The CPUC argues that the FERC's brief notices of intent not to act addressed to Winding Creek should carry the day, even though those rulings were based upon incomplete information, did not have the benefit of the fact-finding trial held in this case, and are premised upon factual conclusions that even the CPUC's expert witnesses say do not exist. But when it comes to the relief that Winding Creek seeks, the CPUC ignores a more recent FERC ruling directly on point.

In *Windham Solar LLC*, 157 FERC ¶61,134 (2016), the solar generator presented a detailed contract (as here) to the utility in February 2016 for the sale of the energy to the utility for a 30-year term. The contract contained fixed pricing based upon a third-party's calculation of the utility's long-term avoided costs. As here, the state commission and the utility objected claiming that Windham was only entitled to a short-run formula avoided cost rate because that was the only rate approved by the state commission. As here, the state commission argued that it had broad authority to determine avoided cost rates. Also as here, the state commission took the position that if its current implementation of PURPA did not comply with the FERC's rules, then it was entitled to essentially pause PURPA until such time as it created new rules.

The FERC rejected the state commission's arguments (including rejecting the use of a formula rate like the CPUC's Standard Contract and the notion of a "pause") and held that a legally enforceable obligation between the utility and Windham existed as of February 2016, *i.e.*, when Windham presented the contract to the utility in which it committed itself to sell its facility's output. The FERC further held that Windham was entitled to be paid at a long-term forecasted rate fixed for the entire contract term, that under PURPA the state commission must recognize the legally enforceable obligation as of February 2016, and the state commission must calculate the long-term forecasted avoided costs. The only difference here is that the long-term forecasted rate was already calculated at the $89.23/MWh rate (adjusted by the then time-of-use factors).

By instructing the state commission that it must issue the contract to Windham that Windham was entitled to receive in 2016, the FERC firmly rejected the notion that a pause of an individual QF's rights are permitted. This case fits squarely under *Windham Solar*. Winding Creek accepted the price and terms offered by PG&E under the Re-MAT in the first round in 2013, and the only reason why PG&E did not execute the contract was the unlawful cap imposed by the CPUC. Thus, under *Windham Solar*, Winding Creek is entitled to the contract it sought in 2013.

II. The CPUC Provides No Basis To Overturn The District Court's Holding Regarding The Unlawful Re-MAT Provisions.

PURPA requires a utility to purchase *all* energy offered by a QF. The Re-MAT violates this requirement because it imposes a cap on PURPA purchases, and Winding Creek was denied a PURPA contract solely because of the cap. As the District Court correctly held, "[t]he plain meaning of [PURPA's must-purchase obligation] is that utilities must buy all of the energy and capacity offered by QFs. It does not require significant legal analysis to conclude that CPUC's imposition of caps in the Re-MAT program violates the must-take obligation." *See*, ER13.

The District Court was likewise correct when it concluded that Re-MAT's price adjustment mechanism, which automatically adjusts Re-MAT prices based on arbitrary factors that are unrelated to a utility's avoided costs, violates PURPA's requirement that avoided cost rates must be set based on the utility's avoided costs, not a QF's cost of production.

A. The State Law Cap Is Irrelevant.

The CPUC (Br. 34-35) suggests that it cannot follow the District Court's order until an appellate court renders its decision. That assertion is absurd. *First*, while the CPUC might not be bound by a lower *state* court, it is clearly bound by the orders of the U.S. District Court, regardless of contrary state law. *Second*, neither Re-

MAT's unlawful bi-monthly cap nor its unlawful price adjusting mechanism are created by California statute. They are the creation of the CPUC. If anything, the CPUC's imposition of the bi-monthly cap is contrary to the California statute, which requires a first-come first-served approach, *i.e.*, with no pause or waiting. *Second*, with respect to the absolute cap, which does appear in the statute, the CPUC previously instituted a work-around in 2007 in Order D.07-07-027 (which is mentioned at page 26 of the CPUC brief). Initially the feed-in tariff under Cal. Pub. Util. Code sec. 399.20 applied only to water and wastewater entities. Under the initial version of section 399.20 the cap was *zero* for entities such as Winding Creek. The CPUC solved that problem by creating a parallel feed-in tariff outside of section 399.20. So the ability of the CPUC to effectively eliminate the statutory cap in section 399.20 without changing the statute is beyond dispute.

B. The FERC's Regulations Do Not Permit A Suspension of QF Rights.

The only "pause" in PURPA's implementation was at the beginning. 18 C.F.R. §292.401 (1980), AD33, gave each state commission and nonregulated utility one year to implement the FERC's rules. No other pause or suspension is authorized, and the CPUC cites no legal support for such a suspension. In fact, here the "pause" resulted in a permanent ban of the ability of Winding Creek to build its project. By the time Winding Creek was offered a contract by PG&E the price had adjusted to $77.23/MWh, a price too low for Winding Creek to build its facility.

The CPUC's discussion of "latitude" citing *West Penn Power* for state commissions is also misplaced. When the FERC has referenced a State's latitude regarding QF wholesale sales, it has been in the specific context of rebuffing a utility seeking to overturn what was State action *encouraging* QF generation. *See, e.g*., *W. Penn Power,* 71 FERC P61,153 (1995) at P61,495 ("*Penn Power*"); *Metropolitan Edison Co.*, 72 FERC P61,015 (1995) (siding with the QF denying petition by utilities to act against State commission order in favor of QF); *Jersey Central Power & Light Co.,* 73 FERC P61,092 (1995) (same); *California Pub. Utils. Comm'n*, 133 FERC ¶61,059 (2010) (same). FERC action in those factual situations was consistent with *promoting* QF generation and shielding a QF from unreasonable actions of a utility.

When States have attempted to act under the guise of a State's purported "latitude," which action, as here, discouraged or interfered with QF wholesale sales or a QF's right to a legally enforceable obligation, the FERC has declared such State action inconsistent with PURPA and disagreed with assertions (as the CPUC makes here) that the *West Penn* decision provides latitude to state commissions that restrains QF contracts. *See, e.g., Cedar Creek Wind, LLC,* 137 FERC P61,006 at P35 (2011) *("Cedar Creek")*:

> Idaho PUC and other protesters interpret *West Penn's* discussion to give broad discretion to the states as to what constitutes a legally enforceable obligation and when such obligation is incurred. *We disagree*. While *West Penn* stands for the notion that the Commission gives

> deference to the states to determine the date on which a legally enforceable obligation is incurred, such deference is subject to the terms of the Commission's regulations. *West Penn* does not, as Idaho PUC argues, give states the unlimited discretion to limit the ways a legally enforceable obligation is incurred. Indeed, Commission regulations and Order No. 69 expressly use the terms "contract" and "legally enforceable obligation" in the disjunctive to demonstrate that a legally enforceable obligation includes, but is not limited to, a contract.
>
> (Emphasis added. Internal citations omitted.)[5]

The CPUC calls PURPA a program of "cooperative federalism", *see* CPUC Br. at 10, but as this Court recognized in *Indep. Energy Prods. Ass'n v. Cal. Pub. Utils. Comm'n,* 36 F.3d 848, 857, fn. 14 (9th Cir. 1994) ("*IEP*"), that characterization is appropriate for titles I and III of PURPA, but not title II, which is at issue here. When PURPA was enacted, Congress gave States 1 year to implement PURPA after the FERC issued its regulations. FERC's regulation 18 C.F.R. §292.401 (1980), *see* AD33, provided that a State could comply with its implementing obligation by issuing regulations, resolving disputes on a case-by-case basis, or taking other action reasonably designed to give effect to FERC's rules. The

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[5] In *California Pub. Utils. Comm'n*, 133 FERC 61,059, 61,226 (2010) the FERC stated that it was reluctant to second guess the state commission's determinations of avoided cost—consistent with the "exempt from scrutiny" standard in 18 C.F.R. §292.601. But that statement recognizes *federal* authority to, in fact, second-guess State commissions. Indeed that authority is explicit in the Federal Power Act §§205, 206, and 18 CFR §292.601. Notably the *California Pub. Utils. Comm'n* case was a situation where the CPUC was fixing a high long-term rate to promote QF generation which was being challenged by the utilities, not a situation here where the State knowingly sought to restrict QF generation.

Supreme Court referenced that flexibility provided by FERC's regulations in *FERC v. Mississippi*, 456 U.S. 742 (1982). 18 C.F.R. §292.401 (1980) has since been repealed. Winding Creek does not claim the repeal means that States have no flexibility in how they implement the FERC's PURPA rules. But States do not have, and never had (after the 1-year grace period provided by Congress) the power to suspend (or in the CPUC's words "pause") PURPA while they consider, or reconsider, how to implement it, or what the calculation of avoided costs should be.

Moreover, as argued above, in *Windham Solar* the FERC rejected the state commission's notion of a "pause" and held that a legally enforceable obligation between the utility and QF existed as of February 2016, *i.e*., when the QF presented the contract to the utility in which it committed itself to sell its facility's output. The FERC further held that the QF was entitled to be paid at a long-term forecasted rate fixed for the entire contract term, that under PURPA the state commission must recognize the legally enforceable obligation as of February 2016, and the state commission must calculate the long-term forecasted avoided cost rate. By instructing the state commission that it must issue the contract to the QF that the QF was entitled to receive in 2016, the FERC firmly rejected the notion that a pause of an individual QF's rights are permitted. As argued above, this case fits squarely under *Windham Solar*. Winding Creek accepted the price and terms offered by PG&E under the Re-MAT in the first round in 2013, and the only reason why PG&E

did not execute the contract was the unlawful cap imposed by the CPUC.

In short, while the CPUC has plenty of latitude in implementing PURPA, it cannot implement PURPA in a manner that violates the statutory must-purchase obligation, as the cap plainly does. Nor can it impose rates that depart from the purchasing utility's avoided costs, as the automatic price adjustment mechanism clearly does.

C. The Re-MAT Pricing Adjustment Is Not Consistent With FERC's Regulations.

The Re-MAT price adjustment mechanism (which caused the subsequent downturn in rates) is, as the District Court concluded, arbitrary and "a method that even the CPUC witness acknowledged was without a reasoned basis." *Id.* at 14. It bears no relation to avoided costs, which means that the resulting rate also is not based on avoided costs.

As Winding Creek argued in its opening brief, the CPUC's policy goal—getting QF power at the lowest possible rate through a competitive process—may be laudable, but Congress chose a different policy goal when it enacted PURPA: to "accelerate the development of renewable … energy sources and convert the national economy to alternative fuel resources…". H.R. Rep. No. 95-496(IV), at 14 (1977), *reprinted in* 1978 U.S.C.C.A.N. 8454, 8466. FERC has *specifically* held that "requiring a QF to win a competitive solicitation as a condition to obtaining a long-term contract imposes an unreasonable obstacle to obtaining a legally enforceable obligation." *Hydrodynamics Inc.*, 146 FERC ¶61,193, P.32 (2014); *see also Windham Solar LLC*, 156 FERC ¶61,042, P5 (2016) ("The Commission likewise has determined a state regulation to be inconsistent with PURPA and the Commission's PURPA regulations to the extent that it offers the competitive solicitation process as the only means by which a QF . . . can obtain long-term avoided cost rates" (internal quotation marks omitted)).

Congress and FERC have instructed states to take a different route. FERC believes that "the basis for the determination of rates for purchases should be the utility's avoided costs and should not vary on the basis of the costs of the particular qualifying facility." PURPA Rulemaking, 45 Fed. Reg. at 12,222; *IEP*, 36 F.3d at 857 ("[FERC's] regulations are clear that the rate to be paid by utilities for electric energy be determined according to the avoided cost to the utility of generating that energy or purchasing it elsewhere, and not according to the QF's efficiency.").

This approach leaves ratepayers indifferent between buying from QFs and non-QFs—so they are no worse off than they otherwise would have been—while simultaneously providing strong incentives for QF generators to enter the market. Order No. 69, 45 Fed. Reg. at 12,222 ("[I]n most instances, if part of the savings from cogeneration and small power production were allocated among the utilities' ratepayers, any rate reductions will be insignificant for any individual consumer. On the other hand, if these savings are allocated to the relatively small class of qualifying cogenerators and small power producers, they may provide a significant incentive for a higher growth rate of these technologies."). Here, CPUC has wrongly elevated its goal of saving ratepayers money[6] – despite Congress's clear instruction that ratepayers should merely be kept indifferent as to the source of generation – and in the process has frustrated Congress's clear intention to provide strong financial incentives for small renewable generators.

Because the Re-MAT price adjusting mechanism is not based on the costs a utility would incur *but for* its purchase from QFs, the resulting price is not an avoided cost rate under PURPA. As CPUC's expert witness Ms. Cheryl Lee testified under questioning from the District Court, those administratively set $4 per MWh increments were "arbitrarily selected," and have absolutely nothing to do with changes in utilities' avoided costs. ER77, Trial Tr. 179:20-25. That testimony is confirmed by the text of the relevant CPUC decisions, in which CPUC explains that the rationale for the price-adjustment mechanism was to identify the lowest price at which a QF would be willing to supply the desired quantity of electricity to utilities *based on the costs faced by the QF generators*: "[Re-MAT] allows generators to set the market price through the bidding process, which theoretically will ensure the

[6] As argued above, in reality the CPUC is not saving ratepayers money by the Re-MAT caps and its ratcheted-down prices. The CPUC's "price" comparison merely accounts for the nominal price but it fails to account for the benefits ratepayers receive, which, as the CPUC staff have determined, are very, very large.

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*. ER211, CPUC May 2012 Decision at 63 (emphasis added); *see also* ER77, Trial Tr. at 179:13-19 (noting that the basis for a $4 adjustment was the knowledge of what QF generators were willing to accept as a price in the previous program period). But a rate adjustment mechanism based on a *QF's* willingness to accept a certain price based on its *own* costs says nothing about the costs a *utility* would avoid by purchasing electricity from a generator *other than* a QF. It is undisputed that the Re-MAT automatic price adjustments do not even attempt to model the costs the utility would incur *but for* its purchase from QFs. For that simple reason, pricing adjustments under Re-MAT are not based on avoided costs as required by 18 C.F.R. §§292.304(b)(2) and 292.304(d)(2).

It is no answer for CPUC to claim that the Re-MAT price reflects the costs that a utility avoids by purchasing from one QF instead of another QF. (CPUC Br. 59-61.) That is so for two reasons. *First*, FERC has defined "avoided costs" to mean the costs the utility would incur "but for the purchase from the qualifying facility or qualifying facilities." 18 C.F.R. §292.101(b)(6) (emphasis added). That "but for" price is the costs of buying from a *non-QF*. And as the FERC explained in its PURPA Rulemaking, *it is the highest marginal cost that the QF displaces*, whether existing or in the future. *See* Order No. 69, 45 Fed. Reg. at 12,216 (emphasis added):

> The Commission has added the term 'incremental' to modify the costs which an electric utility would avoid as a result of making a purchase from a qualifying facility. Under the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with the highest running cost. At any given time, an economically dispatched utility can avoid operating its highest-cost units as a result of making a purchase from a qualifying facility. *The utility's avoided incremental costs* (and not average system costs) *should be used to calculate avoided costs*.

Second, a utility is not permitted to avoid purchasing electricity from a QF. FERC's rules direct that "[e]ach electric utility shall purchase . . . *any energy and capacity* which is made available from a qualifying facility . . . [d]irectly to the electric utility." 18 C.F.R. §292.303(a)(1) (emphasis added). This regulation – the "must take" requirement – requires the utility to purchase all electricity generated by a QF. It makes no sense to define the utility's *avoided* costs in reference to the costs of purchasing electricity from another QF, when the utility is required to purchase from that QF too. *See* ER49, Trial Tr. at 55:18-21.

The CPUC cites *California Pub. Utils. Comm'n*, 133 FERC 61,059, 61,226 (2010), but that ruling is inapposite. (Br. 60-61). There the FERC stated that it was reluctant to second guess the state commission's determinations of avoided cost—consistent with the "exempt from scrutiny" standard in 18 C.F.R. §292.601. Notably the *California Pub. Utils. Comm'n* case was a situation where the CPUC was fixing an above-market long-term rate to promote QF generation which was being challenged by the utilities, not a situation here where the State knowingly sought to restrict QF generation.

The CPUC has not attempted to hide the reason it designed the Re-MAT program in the way that it did. In CPUC Decision 12-05-035, which promulgated the Re-MAT program, CPUC stated that it adopted a "market-based approach" – by which it meant an approach that required one QF to bid against another – because such an approach was "in the best interest of California electricity customers" by identifying the lowest price at which QFs were willing to sell. ER210-11, CPUC May 2012 Order at 62-63. CPUC's rationale for its adjusting price mechanism is to have the price vary on the basis of the costs of the particular QFs that participate—"In a market-based process, the seller determines the price it wishes to seek based on its understanding of the underlying project costs, and changes in those costs." ER228, CPUC January 2013 Order at 6; *see also id.* ("[B]ecause the Re-MAT is a market-based price, it should include all of the generator's costs…"). The CPUC (Br. 37-38) cites general FERC policy favoring market-based rates in electricity markets under the Federal Power Act, but these general policies do not authorize CPUC to ignore the specific requirements of PURPA. Nor do they justify departure from the specific FERC decisions noted above rejecting competitive solicitation approaches like Re-MAT as a violation of PURPA.

The CPUC attempts (Br. 38, 54-55) to invoke this Court's decision in *IEP* to justify its departure from PURPA and FERC's PURPA regulations. But this Court's conclusion that CPUC might offer "more flexible pricing mechanisms" in the future, 36 F.3d at 859, does not justify the Re-MAT's violation of PURPA's mandatory purchase obligation or the departure from full avoided costs created by the monthly cap and automatic price adjustment mechanism. On the contrary, IEP makes clear that, under PURPA, "QFs are entitled to receive the *full* avoided cost rates provided in the QF's standard offer contract . . .and not a rate that is 80% (or less than 80%) of the full avoided cost rate." *Id.* 854-55. Like the program at issue in *IEP,* Re-MAT "authorizes the Utilities to deny to QFs one of the benefits to which they are statutorily entitled under PURPA," full avoided cost rates, *id.* at 855, and *IEP* is therefore fully consistent with the District Court's decision. *See also id.* at 858.

IEP likewise forecloses several other CPUC arguments. *First,* CPUC claims (Br. 59-60) that it may set avoided costs by reference to the avoided costs of QFs, not utilities. But *IEP* concluded that FERC's "regulations are clear that the rate to be paid by utilities for electric energy be determined according to the avoided cost to the *utility* of generating that energy or purchasing it elsewhere, and not according to the QF's efficiency." *Id.* at 857. *Second*, CPUC claims (Br. 62) that it is allowed to offer rates below full avoided costs to "protect" consumers from PURPA contracts that might in the future than the utility's future avoided cost. But *IEP* recognizes that "the fact that the prices for fuel, and therefore the Utilities' avoided costs, are lower than estimated, does not give the state and the Utilities the right unilaterally to modify the terms of the standard offer contract. Federal regulations provide that QFs are entitled to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed." *Id.* Hence, "the avoided cost rate provided in the contract might be greater or less than the utility's current avoided costs but that certainty as to rate was important" to ensure investment in QF generation. *Id.*

The CPUC also claims (Br. 62-63) that it has authority to require utilities to pay something less than full avoided costs. As *IEP* recognized, FERC adopted regulations in 1980 requiring utilities to pay full avoided costs for PURPA contracts, and required the states to follow these regulations in implementing PURPA. *Id.* at 851. Hence, the CPUC's claim is contrary to nearly five decades of established law.

FERC recognized that the utility's avoided costs calculated at the time the obligation is incurred may turn out to be quite different than the utility's avoided costs at the time the power is actually delivered. Order No. 69, 45 Fed. Reg. at 12,224. But FERC believed that "in the long run, 'overestimations' and 'underestimations' of avoided costs will balance out," and it emphasized "the need for certainty with regard to return on investment in new technologies." *Id.* (emphasis added.); *see also JD Wind*, 130 FERC ¶61,127, at ¶23 ("[FERC] has … consistently affirmed the right of QFs to long-term avoided cost contracts … with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred.”). Thus, if a QF is able to sell at a profit because its costs are less than the utility’s avoided cost, that furthers the purpose of the statute: it creates economic incentives for further investment in renewable energy, while leaving ratepayers no worse off. *See Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 417 (1983) (affirming FERC’s decision to require utilities to pay a rate equal to their avoided costs, which provides the “maximum incentive for the development of cogeneration and small power production”); Order No. 69, 45 Fed. Reg. at 12,222.

D. The CPUC Is Asking This Court To Ignore The Merits.

The CPUC urges this Court to don blinders and look only to FERC’s barebones notices of intent not to act, which the CPUC erroneously alleges “approved” the Re-MAT. The CPUC tried this same tactic of arguing that the evidence and merits should be ignored at the District Court after the CPUC’s attorneys were displeased with the testimony at trial of its expert witness. *See*, District Court order at 16:

> Defendants’ about-face on Colvin as a witness and his testimony is not well-taken. In addition, defendants’ post-trial attacks on Colvin are all in the form of statements by lawyers and not based on evidence before the Court. A lawyer’s argument does not trump a fact witness’s testimony at trial. That is all the more true here because other facts undermine defendants’ contentions.

Substantively, as the District Court stated, neither FERC declaratory 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), or how the Standard Contract, the Re-MAT program, or some combination of the two, satisfies those requirements [and thus were] not germane." *Id*. at 17. Further, no deference is due to FERC's PURPA declaratory orders. *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 391-2 (5th Cir. 2014); *Indus. Cogenerators v. FERC*, 47 F.3d 1231, 1235 (D.C. Cir. 1995) (FERC PURPA declaratory order is "legally ineffectual apart from its ability to persuade"). *See also Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("[i]nterpretations such as those in opinion letters … which lack the force of law … do not warrant *Chevron*-style deference"). Further, no deference would be due even if the FERC orders were binding because FERC failed to "articulate the critical facts" and "fully explain" the basis for its conclusions. *Great Lakes Gas Transmission Ltd. P'ship v. FERC,* 984 F.2d 426, 432 (D.C. Cir. 1993). And "[a]gency decisions may not, of course, be inconsistent with the governing statute," *Defenders of Wildlife v. EPA*, 420 F.3d 946, 959 (9th Cir. 2005), *rev'd on other grounds sub nom. by NAHB v. Defenders of Wildlife*, 551 U.S. 644 (2007). The barebones declaratory orders deserve no deference under these standards.[7]

[7] The CPUC's claim that reliance on a FERC order by district court in *Solutions for Utilities, Inc v. Cal. Pub. Util. Comm'n*, No. CV 11-04975, 2016 U.S. Dist. LEXIS 17998, 2016 WL 7613906 (C.D. Cal. Dec. 28, 2016) (Br. 50-51) makes a difference is wrong. This Court owes no deference to any district court opinions apart from deference to findings of fact, which as here were made after a trial. PURPA does not change that result.

The CPUC's out-of-context reliance on this Court's statement in *IEP* regarding "more flexible pricing mechanisms" is especially telling. *See* CPUC Br. at 54. That reference in *IEP* was in the context of FERC's *Administrative Determination of Full Avoided Costs*, FERC Stat. ¶32,457 (1988) ("*Administrative Determination*"). But the *Administrative Determination* was a proposed rule that FERC never adopted and formally withdrew in 1998. *See Admin. Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, & Interconnection Facilities*, 84 FERC ¶61,265, 62,301 (1998) (ECF 133 at 8-9) (withdrawing proposed rule and stating that "the Commission does not believe it appropriate to adopt revisions proposed a decade ago."). Thus, while the *Administrative Determination* had *proposed* significant changes to 18 C.F.R. §292.304(d)(2) that would have eliminated the current subsection (d)(2)(ii) and given the CPUC the flexibility it now claims, *see Administrative Determination* ¶32,192 (ECF No. 129 at 45), *those changes were never made* and §292.304(d)(2) was left unaltered. The CPUC's reliance on the *Administrative Determination* underscores the conflict between the Standard Contract and the federal regulations that *do* exist today. FERC retained the language of §292.304(d)(2)(ii) requiring a rate based on a utility's "avoided costs calculated at the time the obligation is incurred," 18 C.F.R. §292.304(d)(2)(ii), *even though* that pricing option allows QFs to lock in a long-term avoided cost rate based on forecasts of future fuel costs that may turn out to be incorrect. *See IEP* at 858-59 (explaining that still-"current law" entitles QFs to contracts that "lock[] the Utilities into paying rates that were calculated on incorrect assumptions about the future cost of fossil fuels."). This Court's language in *IEP* at 859, stating that "the proper remedy for such a situation is to ensure that future standard offer contracts contain more flexible pricing mechanisms," *see* CPUC Br. at 54, cited the *Administrative Determination*—which, again, FERC chose not to finalize. FERC, in other words, *rejected* the need for a more flexible pricing mechanism. FERC has continued to re-affirm its rejection of pricing mechanisms similar to those contained in the Standard Contract as being compliant with 18 C.F.R. §292.304(d)(2)(ii). *See, e.g., Windham Solar* at P4-5 (requiring a fixed forecasted rate for the entire term).

Under the pricing mechanism that *is* reflected in FERC's regulations, the CPUC must offer QFs the *option* to choose a rate based *either* on avoided costs calculated at the time of delivery, *or* on avoided costs calculated at the time the QF and utility enter their contract. 18 C.F.R. §292.304(d)(2)(i)-(ii). Neither the Standard Contract nor the Re-MAT—taken independently or taken together—satisfies this requirement, as the District Court held.

Moreover, even on its own terms, FERC's declaratory order is erroneous. The Standard Contract does *not* allow a QF to choose a rate based on "[t]he avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). The rate under the Standard Contract is based on a *formula* that is set when the obligation is incurred, but the variables included within the formula will fluctuate over time depending on the market conditions when electricity is actually delivered. *See* Winding Creek First Brief at 44-46. As a result, the rate under the Standard Contract is not a forecasted rate based on the utility's avoided costs "*calculated* at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii) (emphasis added); *See* Winding Creek First Brief at 47-50. Indeed, a QF selling under the Standard Contract will have no idea what rate it will receive for its sales until it actually delivers that electricity. The CPUC's expert agreed that "the PUC cannot say what price will be at any given time in [a] 12-year [contract] period until those variables are filled in by actual market data." *See* Winding Creek First Brief at 48. The CPUC's expert Mr. Colvin also conceded that the rate under the Standard Contract is a (d)(2)(i) rate (based on avoided costs calculated at the time of delivery):

> I think it is correct to say that the commission has determined that the short run avoided costs, the costs that the qualifying facility would be paid, should be best represented by what the individual generator unit would have been paid that a utility would have procured but for the QF *at the time that the energy is delivered*.

See Winding Creek First Brief at 46. (emphasis added); *id.* ("Qualifying facilities are paid for the gas price on the month that they have just experienced. So you are not paid for your energy until the end of the month. So you will know what the March 2017 short run avoided cost payment is at the end of March 2017. Q[uestion:]

And not before that? A[nswer:] Correct.”).

In short, as the District Court correctly held, the formula contained in the Standard Contract offers a rate based on avoided costs “calculated at the time of delivery,” 18 C.F.R. §292.304(d)(2)(i) — *not* a rate based on avoided costs “calculated at the time the obligation is incurred.” *Id.* § 92.304(d)(2)(ii).

To comply with PURPA, however, a state commission must allow a QF to elect either of these two types of rates. *Id.* §292.304(d)(2). As FERC has previously recognized, ensuring that a QF can choose a rate based on avoided costs “calculated at the time the obligation is incurred,” *id.* §292.304(d)(2)(ii), is critical to achieving Congress’s objectives in enacting PURPA. That is because, “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 69, 45 Fed. Reg. at 12,218. FERC “recognized that avoided costs could change over time, and that the avoided costs and rates determined at the time a legally enforceable obligation was incurred could differ from the avoided costs at the time of delivery.” *JD Wind 1 LLC*, 130 FERC ¶61,127 (2010), at P23. If a QF were forced to contract at a rate based on avoided costs calculated at the time of delivery, it would have no idea what rate it would receive for its sales until it actually delivers that electricity, and thus could not estimate with reasonable certainty the expected return on its investment. Thus, FERC “has …

consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations *with rates determined at the time the obligation is incurred*, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is originally incurred." *Id.* (emphasis added).

Because the Standard Contract rate cannot be "calculated at the time the obligation is incurred," 18 C.F.R. §292.304(d)(2)(ii), the CPUC cannot point to the Standard Contract in order to excuse the Re-MAT program's non-compliance with PURPA. In fact, this case is materially identical to *Hydrodynamics*. Once the quantity limit under the Re-MAT program is reached, the only option for a QF of less than 20 MW is the Standard Contract, which offers an agreement with "variable, market based rates." *Hydrodynamics*, 146 FERC ¶61,193, at P34. Thus, once the Re-MAT's quantity limit is reached – as it is every two months when PG&E procures 5 MW of solar capacity – solar QFs like Winding Creek "cannot obtain forecasted avoided cost rates, which is inconsistent with the Commission's regulations, which entitle a QF with a legally enforceable obligation to rates that, at the QF's option, are forecasted avoided cost rates." *Id.* In short, FERC erred in concluding that the Re-MAT program is simply an alternative to another program through which the CPUC fully complies with PURPA. The Standard Contract for QFs 20 MW or less does not allow QFs to make the election required under the regulations. 18 C.F.R. § 292.304(d)(2)(ii). Thus, CPUC cannot rely on it to excuse the Re-MAT program's non-compliance with PURPA.

As the District Court understood after hearing the witnesses at trial, the Re-MAT price adjustment mechanism simply does not reflect the costs that a utility avoids by purchasing electricity from a new renewable energy facility. Therefore, it violates the statute. The District Court correctly rejected the CPUC's arguments and recognized, based on the testimony of the CPUC's own witness, that "the Standard Contract does not -- and cannot -- offer both of the pricing options that PURPA gives to QFs." District Court order at 15.

E. A Variable Formula Rate Does Not Comply With 18 C.F.R. § 292.304(d)(2)(ii).

The CPUC claims (Br. 36-38, 40, 46 n.5, 53) that the Re-MAT's failure to provide a predictable avoided cost rate at the time the QF enters into a PURPA contract is acceptable because FERC allows for market-based pricing or formula rates. But the authorities cited by the CPUC do not support this proposition.[8] On the contrary, in *JD Wind 1, LLC,* one of the authorities cited by CPUC, FERC made clear that "[t]he Commission's regulations, from the beginning, have given QFs the

[8] The authorities cited by CPUC variously construe the Federal Power Act, not PURPA, *CPUC v. FERC,* 254 F.3d 250 (D.C. Cir. 2001) (cited CPUC Br. 52), aspects of PURPA not relevant to this case, *Energy Producers & Users Coalition,* 149 FERC ¶ 61,251 (2014), *Southern Cal. Edison Co.,* 143 FERC ¶ 61,222 (2013) (cited CPUC Br. 46 n.5), or the unexceptionable proposition that states have some discretion in establishing PURPA rates. *Signal Shasta Energy Co.,* 41 FERC ¶ 61,120 (1987).

option of choosing to have rates calculated at the time the obligation is incurred. The intention of the Commission was to enable a QF *'to establish a fixed contract price for its energy and capacity at the outset of its obligation*.'" 130 FERC ¶ 61127 P 23 (2010) (emphasis added), and FERC in that case rejected Texas's attempt to deny wind generator QFs the right to obtain PURPA contracts because wind generators cannot deliver firm power.

The basic underlying rationale is, as the CPUC concedes, that the QF must be able to calculate the rates it will receive "with reasonable certainty." Order No. 69, 45 Fed. Reg. at 12,218. But the actual language of the regulation requires entitles the QF to have its rate determined *and fixed* at the inception with no variability. The FERC has most recently confirmed that in *Windham Solar. See Windham Solar LLC,* 157 FERC ¶61,134 at P4-5 (2016) (a "QF has the option to sell its output pursuant to a legally enforceable obligation *with a forecasted avoided cost rate*…. the Connecticut Authority must recognize that a legally enforceable obligation exists and calculate the appropriate forecasted avoided cost rate pursuant to section 292.304(d)(2)(ii) of the Commission's regulations.") (emphasis added)). *See also*, *Hydrodynamics, Inc.*, 146 FERC ¶61,193, P31 (2014) ("Under section 292.304(d) of the Commission's regulations, a QF also has the unconditional right to choose whether to sell its power … at a forecasted avoided cost rate.")

The District Court's decision that Re-MAT fails this test is fully justified because the rates to be received depend on market indices that are wholly unpredictable. *See* Winding Creek First Brief at 44-50. The CPUC does not seriously contend otherwise.

Instead, it argues, without the benefit of authority, that the capacity component of the rate somehow makes the entire rate predictable because that element is predictable. The plain language of the regulation makes clear that a (d)(2)(ii) must be "*calculated*" at the time the contract is entered. A formula containing variables whose values cannot be known does not comply with the plain meaning of the regulation, because the rate cannot be ascertained. Where every other element of the rate is concededly completely unpredictable, the District Court did not err in concluding that the rate as a whole fails to meet PURPA's requirement that it be calculated at the outset of the PURPA contract, and CPUC suggests no reason why the Court's conclusion should be rejected.

The CPUC's citation (Br. at 52-53) of *CPUC v. FERC*, 254 F.3d 250, 254 (D.C. Cir. 2001) for the proposition that "[a] formula rate with all inputs identified at the time of contract execution, even if those inputs contain market variable, complies with 18 C.F.R. § 292.304(d)(2)(ii)," is simply vacuous. That case has absolutely nothing to do with PURPA, but rather whether a Federal Power Act § 205 filing was required for non-jurisdictional contracts entered into by the California Independent Transmission Operator, CAISO. Formula rates, of course, are acceptable rates in the electricity markets, just as a variable formula rate is acceptable under PURPA under 18 C.F.R. § 292.304(d)(2)(i). But a formula rate does not meet the requirements of 18 C.F.R. § 292.304(d)(2)(ii), which requires a fixed forecasted rate, as the FERC has emphatically stated in its recent decision in *Windham Solar*. A formula rate is exactly the type of rate the state commission offered to Windham. While that rate qualified as a (d)(i) rate, it did not qualify as a (d)(ii) rate.

Even though the capacity price in the Standard Contract has a fixed price floor, the energy price is variable. A QF may or may not be able to deliver capacity, and under PURPA, it has no obligation to provide capacity even if it is providing energy under a long-term contract. Even if it was in a that permitted it to provide capacity, the revenue from capacity represents a small, under 20%, portion of the revenue from a solar facility. But regardless of how the Standard Contract handles capacity, a QF is entitled to a fixed forecasted rate for its energy and the Standard Contract simply does not provide that.

The absurdity of the CPUC's claim that the Standard Contract provides the "reasonable certainty" required under 18 C.F.R. § 292.304(d)(2)(ii) is amply demonstrated by the fact that since its inception almost a decade ago, *not one new solar facility has been built in PG&E territory under that program*. *See*, Winding Creek First Brief at 49; ER109 Colvin Direct ¶38.

In sum, nothing in the CPUC's brief undermines the District Court's ultimate conclusion that "Winding Creek does not, as the law mandates, have access to an uncapped program offering, at its election, either a rate under 18 C.F.R. §292.304(d)(2)(i) or (d)(2)(ii)." *Id.* at 18.

CONCLUSION

As Winding Creek argued in its opening brief, the failure to either provide a direct award or order a *nunc pro tunc* re-selection, hinders, rather than furthers, the purposes of the statute. It has already been more than 5 years since the unlawful caps were imposed, resulting in no ability for Winding Creek to obtain the long-term contract to which is entitled under federal law. A QF, such as Winding Creek, would have little incentive in the future to enforce the provisions of PURPA if at the end of the federal court process it receives a hollow victory. PURPA remains the nation's bare minimum renewable energy mandate. But if the judiciary is unwilling to provide a remedy that Congress authorized it to provide, PURPA is merely an empty shell.

For the foregoing reasons and those in Winding Creek's First Brief, this Court should order the District Court to act to limit the ongoing irreparable harm to Winding Creek by either directing a contract be provided to Winding Creek, or ordering the CPUC to process Winding Creek's Re-MAT application and the applications of others similarly situated as of the date those QFs applied, stripped of the caps and pricing adjustment mechanism. In all other respects, the District Court should be affirmed.

Respectfully submitted this 1st day of August 2018.

/s/ Thomas Melone
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32, I hereby certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(i) because this brief contains 9, 410 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) because this brief has been prepared in 14-point, Times New Roman font using Microsoft Word.

/s/ Thomas Melone
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