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 FOURTH BRIEF ON CROSS-APPEAL

AROCLES AGUILAR, SBN 94753
CHRISTINE J. HAMMOND, SBN 206768
POUNEH GHAFFARIAN, SBN 242779
EDWARD MOLDAVSKY, SBN 239267
Attorneys for Appellees

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
Telephone: (415) 703-2682
Email: cjh@cpuc.ca.gov

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INTRODUCTION

After the fourth round of briefing in this cross-appeal, all but one of the salient arguments that Winding Creek Solar LLC's ("Winding Creek") Third Brief on Cross-Appeal [Dkt. 41] raised therein are answered clearly by the federal courts, orders of the Federal Energy Regulatory Commission ("FERC"), the agency charged with overseeing the implementation of the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"), and even based on Winding Creek's own expert witness testimony:

- Does the California Public Utilities Commission ("CPUC") have the sole authority to establish the time that a legally-enforceable obligation under PURPA is established, as in the case of the CPUC's Renewable Market Adjusting Tariff ("Re-MAT") program's bimonthly program periods? Yes, according to Winding Creek's own cited authority, *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 35 (2011) and *West Penn Power Co.*, 71 FERC ¶ 61,153, at ¶ 61,495 (1995); and according to *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 396-398 (5th Cir. 2014).
- Does the CPUC have a "wide degree of latitude," "broad authority," and a "great deal of flexibility" in designing its PURPA implementation programs and methods of determining avoided-cost rates, such as Re-MAT's adjusting pricing mechanism, and is its implementation of PURPA reviewed with

deference? Yes, according to *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Indep. Energy Producers Ass'n v. Cal. P.U.C.*, 36 F.3d 848, 856 (9th Cir. 1994)("*IEP*"); and *Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059 at P 24 (2010) ("*CPUC*")

- Can the Re-MAT program establish avoided-cost rates using competitive bidding and market-based rates? Yes, according to FERC's Order 671, 114 FERC ¶ 61,102, at P 99 (2006); and *Order Terminating Proceeding*, 84 FERC ¶ 61,265, *62,301 (1998). *See* CPUC's Second Br. on Cross-Appeal [Appeals Dkt. 34], pp. 37-39, 61.
- Does Re-MAT's adjusting pricing mechanism reflect the utility's avoided cost, or the "incremental cost of alternative electric energy," when the comparable alternative electricity resource is a Qualifying Facility ("QF") that indicates its commitment to sell electricity based on its marginal cost of production? Yes, according to the definition under PURPA, Section 210(d), 16 U.S.C. § 824a-3(d); *CPUC*, 133 FERC ¶ 61,059, at PP 26-29; and the *Winding Creek Solar* orders; and the testimony of Dr. Lesser, *see* CPUC Second Br., p. 59-60.
- Do the Eleventh Amendment and PURPA permit redress for a state's improper implementation of PURPA in the form of a federal court ratemaking order that references a past price for power in a market that no

longer exists? No, such redress is not prospective equitable relief that is permitted in PURPA enforcement cases, according to *Ex parte Young*, 209 U.S. 123 (1908); and *Edelman v. Jordan*, 415 U.S. 651, 662-74 (1974); *see also Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 74 (1st Cir. 2017)(*reh'g and reh'g en banc denied*).

The remining issue that will decide whether the CPUC's Re-MAT program is permissible under PURPA is whether the CPUC satisfies the requirements of FERC's PURPA-implementation regulations, 18 C.F.R., Part 292. The District Court determined that the CPUC's "Standard Contract for QFs 20MW or Less" ("Standard Contract"), procurement under which is uncapped, does not fulfill 18 C.F.R. § 292.304(d)(2)'s prescription to offer any QF the option to choose to have the price for electricity calculated at the time the energy is delivered (the "(d)(2)(i)" pricing option) or at the time the legally-enforceable obligation is incurred (the "(d)(2)(ii)" pricing option). The CPUC appeals that the District Court erred and asks this Court to apply appropriate deference to the FERC's orders on Winding Creek's petitions that raised the very same claims in the underlying federal action. In those orders, the FERC declared that the Standard Contract is the CPUC's "primary PURPA program." *Winding Creek Solar LLC*, 153 FERC ¶ 61,027, at P 7 (2015). Rejecting Winding Creek's argument that the Standard Contract's rates and terms differ from those required by 18 C.F.R. §

292.304(d)(2), FERC determined that the Standard Contract is indeed compliant with PURPA, citing to 18 C.F.R. § 292.301. This provision establishes the scope of 18 C.F.R., Part 292 and permits rates and terms that would otherwise be required by other parts of 18 C.F.R., Part 292 (such as 18 C.F.R. § 292.304(d)(2)) where agreed to by QFs and utilities. *See* Second Br., pp. 8-9, citing *Winding Creek Solar LLC*, 153 FERC ¶ 61,027, at P 7 n.10 (FERC's discussion that the Standard Contract was adopted as a CPUC rule as part of a comprehensive settlement between the majority of QFs in California, the utilities, and others).

Should the Court demand greater clarity from the CPUC's compliance with 18 C.F.R., Part 292 and require exacting compliance with the (d)(2)(i) and (d)(2)(ii) pricing options, the CPUC requests that the Court take notice of a newly-initiated rulemaking at the CPUC to add new standard form PURPA contracts with pricing options that adhere closely to the pricing requirements of 18 C.F.R. § 292.304(d). With unlimited procurement under these new standard contracts, any state statutory cap on energy procurement under the Re-MAT program should not render Re-MAT PURPA-non-compliant. FERC expressly allows states to implement a suite of PURPA programs and "multi-tiered avoided-cost pricing" to promote renewables and highly-efficient cogeneration, *see CPUC*, *supra* – which variety and incentive pricing all amici also support. *See* Amicus Br. of Mont. Envtl. Info. Ctr., et al. [Dkt. 17], at 22, 24, 25; and Amicus Br. of Cmty.

Renewable Energy Ass'n, et al. [Dkt. 18], at 15, 17-18. (both amici supporting the reference to other QFs to establish an avoided-cost rate).

In short, the CPUC desires to continue its long tradition of aggressively implementating PURPA and promotion of renewable generation by re-starting the Re-MAT program, a program that numerous, otherwise desirous QFs are prevented by the District Court's order from pursuing. *See* CPUC ER 252-274 (presenting at least six QFs desirous of promptly accepting Re-MAT's market-based avoided-cost rates). The CPUC respectfully requests that the Court overturn the District Court order and deny Winding Creek's – a single QF's – improper request for retrospective relief in the form of an above-avoided-cost-priced contract through a federal court ratemaking order.

ARGUMENT

A. States – Not QFs and Not FERC – Are Solely Empowered Under PURPA to Determine When Legally-Enforceable Obligations Are Established.

Winding Creek's Third Brief on Cross-Appeal devotes considerable effort to overthrow the CPUC's argument that Re-MAT's bimonthly procurement limit of 5 MW is a temporary pause in procurement permissible under PURPA. Third Br., pp. 11, 13, 16. Winding Creek relies heavily on *Windham Solar LLC*, 157 FERC ¶ 61,134 (2016), to argue that a legally-enforceable obligation between a utility and QF exists the moment a QF indicates interest. Third Br., p. 11. According to

Winding Creek, the Connecticut Authority in *Windham Solar* 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," which is a position that FERC rejected. Third Br., p. 11. Winding Creek tells this Court that "FERC further held that … under PURPA the state commission must recognize the legally enforceable obligation as of February 2016," when the QF first indicated an interested in a long-term contract under 18 C.F.R. § 292.304(d)(2)(ii). *See* Third Br., p. 16.

The CPUC is unable to find where in *Windham Solar* FERC made such determinations.[1] Instead, the very cases Winding Creek cites and quotes in its Third Brief make plain, "…*West Penn* stands for the notion that the [FERC] gives deference to the states to determine the date on which a legally enforceable obligation is incurred … subject to the terms of the [FERC's] regulations." Third Br., pp. 14-15, quoting *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006 at P35 (distinguishing *West Penn Power Co.*, 71 FERC ¶ 61,153, at ¶ 61,495).[2] In *West*

[1] Winding Creek's additional characterization about *Windham Solar* do not appear in the order. *Windham Solar* does not reference the Connecticut Authority's sole avoided-cost rate as a "short-run formula avoided cost rate," Third Br., p. 10; instead, FERC describes it as an avoided cost rate that "amounts to the real-time energy price …" 146 FERC ¶ 61,193, at P 5.

[2] Discounting the CPUC's reliance on FERC declaratory orders on Winding Creek's claims giving rise to this action, Winding Creek itself relies heavily on FERC declaratory orders.

Penn, FERC clarified, "It is up to the States, not this Commission [FERC], to determine the specific parameters of individual QF power purchase agreements, including the date at which a legally enforceable obligation is incurred *under State law*." *West Penn*, 71 FERC ¶ 61,153, at ¶ 61,495 (emphasis added). In contrast, the language the Winding Creek quotes from these declaratory orders is inapposite. *See West Penn*, 71 FERC ¶ 61,153, at ¶ 61,494-61,495 (rejecting the utility's requests that FERC modify the effective date of a fully-executed contract and allow a recalculation of the contracted-for avoided cost rate); and *Cedar Creek Wind*, 137 FERC ¶ 61,006, at P 35 (rejecting the Idaho PUC's making a fully-executed contract a condition precedent to the creation of a legally-enforceable obligation under PURPA).

The Fifth Circuit too has spoken directly to this issue and held that, irrespective of a QF's indication of committing itself to deliver power or capacity, it is the state that determines when a legally-enforceable obligation is created.

> [The QF, Power Resource Group,] has failed to show that PURPA and the FERC regulations mandate that all [Qualifying Facilities], including unbuilt ones, must be able to create a [legally enforceable obligation] at any time … FERC regulations grant the states discretion in setting specific parameters for [legally enforceable obligations].
>
> […]
>
> If FERC had determined it necessary to set more specific guidelines concerning [Legally Enforceable Obligations],

> it could have done so…. The plain text of the FERC regulation, however, fails to mandate that requirement. Rather, *defining the parameters for creating a [legally enforceable obligation]* is left to the states and their regulatory agencies.

Exelon Wind 1, 766 F.3d at 396 (emphasis in original), quoting *Power Res. Grp. v. Pub. Util. Comm'n*, 422 F.3d 231, 238-39 (5th Cir. 2005) ("*Power Resource III*"). The Fifth Circuit reaffirmed its holding in *Power Resource III* that "the 'plain text' of FERC's Regulation [18 C.F.R. § 292.304(d)] allowed the PUC to limit the situations in which Qualifying Facilities can form Legally Enforceable Obligations." *Id*. at 398.

> *Power Resource III* held that state regulatory agencies – rather than FERC – were empowered to define the parameters of the circumstances in which Qualifying Facilities could form Legally Enforceable Obligations. It is this essential holding which binds us here: under the cooperative federalism scheme created by PURPA, it is the PUC, rather than FERC, that defines the parameters for when a Qualifying Facility may form a Legally Enforceable Obligation.

Id. at 396.[3]

Exelon Wind 1 concerned the Texas PUC's order that foreclosed a QF from obtaining a capacity contract because, as a single wind generator with intermittent

[3] Winding Creek disputes the CPUC's description of Title II of PURPA as a program of cooperative federalism. Third Br., p. 15. The CPUC's description is correct and is based on the declarations of federal courts and FERC. *See, e.g., FERC v. Mississippi*, 456 U.S. at 767; and *Exelon Wind 1*, 766 F.3d at 396.

capacity, it does not provide firm capacity and thus was not entitled to a capacity contract.[4] Although the Texas PUC had full authority to determine when any single QF could form a legally-enforceable obligation ("… the mere fact that [the Texas PUC rule] prevents some Qualifying Facilities from entering into Legally Enforceable Obligations at certain times does not mean the PUC failed to implement FERC's Regulation"), it could not prevent *all* wind farms from ever forming legally-enforceable obligations. *Exelon Wind 1*, 766 F.3d at 396-97.

Consistent with the Fifth Circuit's and FERC's statements on state discretion to determine when a QF has secured a legally-enforceable obligation, the CPUC's Re-MAT program allows any eligible renewable QF to line up in the Re-MAT queue and await its turn to accept an offer price, at which time a legally-enforceable obligation is established, even if a contract is not yet signed. Where a QF otherwise complies with the terms of the CPUC's Re-MAT program, the utility

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[4] The Massachusetts District Court disagreed with the Fifth Circuit's *Exelon Wind 1* order that individual QFs that provide intermittent capacity are never entitled to capacity contract simply because they don't provide firm capacity. In *Windham Solar*, FERC also disagreed with the Fifth Circuit on this point, citing to the Massachusetts District's order. *Windham Solar*, 157 FERC ¶ 61,134, at P 4 n.7. The Massachusetts District held that any QF was entitled to a capacity contract under 18 C.F.R. § 292.304 (d)(2)(ii) (although intermittent capacity could be valued differently from firm capacity and thus paid a different avoided-cost rate). The CPUC agrees with the Massachusetts District and FERC on this specific point. The Massachusetts District's disagreement with the Fifth Circuit on this specific point, which is not at issue in this case, and does not change the essential and judicially undisputed point before this Court: that states, not QFs, shall determine when a legally-enforceable obligation is created.

may not avoid giving the QF a contract. Ensuring that utilities cannot avoid purchasing from a QF under a state's implementation of PURPA was the very reason that FERC references a "legally enforceable obligation" under 18 C.F.R. § 292.304(d)(2): once a QF commits itself to selling power or capacity to a utility – according to the terms of the state's PURPA implementation – then the utility is required to purchase such energy or capacity.

Because Re-MAT's bimonthly pauses in procurement are permissible under PURPA, Winding Creek has not suffered an injury-in-fact. Winding Creek participated in the Re-MAT program with full knowledge of the programmatic details – such as the queue placement, the bimonthly program period pauses, and the adjusting pricing mechanism. Within only four months of the November 2013 commencement of the Re-MAT program, Winding Creek was offered a long-term Re-MAT contract with a price calculated over the term of years. Second Br., p. 29. In March 2014, Winding Creek first declined that offer of a long-term contract, and it continued to decline every subsequent offer made to it every two months thereafter until the District Court's order. Winding Creek ER 11. Any perceived injury to Winding Creek is thus self-inflicted.

FERC in *Windham Solar* and *Hydrodynamics Inc.*, 146 FERC ¶ 61,193 (2014) – another FERC Declaratory Order – did state that competitive solicitation processes cannot be the only means by which a QF can secure a legally-

enforceable obligation under PURPA. Third Br., pp. 17-18. In *Hydrodynamics*, this statement was premised on the fact that a competitive solicitation was the sole means by which Montana wind QFs could secure a contract, and FERC especially was troubled by the fact that Montana's competitive solicitations "are not regularly held." 146 FERC ¶ 61,193, at PP 8, 32 (it appears the utility held only one all-source [both QF and non-QF resource] competitive solicitation between 2002 to 2013, and in any event no rule required that solicitations had to be held prescribes that such solicitations must occur).

In contrast, the Re-MAT program is not the sole means for a QF to obtain a PURPA-compliant contract: QFs may also avail themselves of the Standard Contract, which is immediately available to QFs and with no limit on procurement. As discussed further below, the CPUC has commenced a rulemaking to develop even more PURPA-compliance standard contracts with various pricing options, which would be available to any QF up to 20 MW at any time with no caps on procurement. Re-MAT is a feed-in tariff whereby the offered price can quickly ratchet up or down in response to market supply signals. CPUC ER 146, 148. Indeed, prices have fluctuated both down (signaling that the price is above-market) and up (signaling that the price is below-market). *See* CPUC ER 150, 160. It therefore reflects market interest and signals from various QFs participating in the program. CPUC ER 146-150.

The CPUC mandates that the Re-MAT program holds bimonthly program periods in which QFs can secure contracts. Not every eligible QF in the queue will secure a contract in any program period, but every eligible QF in the queue will secure a contract in time – according to the parameters established by the CPUC – until the limits for the content category in which the QF is competing are reached. To date, the limit for the peaking, as-available content category in which Winding Creek qualifies has not been reached, and Winding Creek had been continually declining offers of a Re-MAT contract since March 2014 until December 2017, when the District Court enjoined further operation of Re-MAT until modified. Even as the District Court's injunction that Winding Creek sought is in place, Winding Creek retains its top position in PG&E's peaking, as-available category.

B. The Re-MAT Program's Adjusting Pricing Mechanism Is PURPA-Compliant.

Winding Creek agrees with the District Court that Re-MAT's adjusting pricing mechanism is a "complex auction procedure burdened with arbitrary rules" that does not lead to avoided-cost rates. *See* ER 14. Winding Creek repeats arguments made in its first brief supporting the District Court's conclusion that the $4 increments are arbitrary. Third Br., p. 19. Notably, Winding Creek Third Brief makes no response to the CPUC's Second Brief's demonstration that the District Court erred in concluding that the CPUC acted arbitrarily in adopting Re-MAT's rules. *See* CPUC Second Br., pp. 41-43.

Winding Creek persists in arguing that QF prices otherwise available to a utility – which is based on a QF's costs – cannot be avoided cost because, in referencing the price that a utility could pay to other QFs, it "bears no relation to avoided costs." Third Br., pp. 17-18.[5] Neither Congress nor FERC has stated this. Instead, PURPA defines "incremental cost of alternative electric energy" to mean, "with respect to electric energy purchased from a qualifying cogenerator or qualifying small power producer, the cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." PURPA Section 210(d), 16 U.S.C. 824a-3(d). While Winding Creek parses the language of the FERC Regulation, the Court should look first to the statutory language of PURPA, which looks to the costs the utility avoids if it purchased from "another source" other than "such [QF]" for which avoided cost is being determined.[6] Definitionally, avoided cost can be determined with reference to other QFs.

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[5] Winding Creek continues to invoke the term, "full avoided cost," to suggest that the incremental cost to the utility of electricity from another QF under Re-MAT is less than avoided cost. It is not. "… [F]ull avoided cost" (the term used in FERC's rules) or "incremental cost" (the term used in PURPA)" are the same. *Greensboro Lumber Co. v. Ga. Power Co.*, 643 F. Supp. 1345, 1369 n.30 (N.D. Ga. 1986).

[6] Winding Creek forwards language in FERC's Order 69 implementing its initial PURPA regulations that avoided cost is "the highest marginal cost that the QF displaces…" Third Br., p. 20, citing Order 69, 45 Fed. Reg. 12,214, at 12,216 (1980). Nothing in Order 69 states this or comes close to Winding Creek's conclusion.

Winding Creek also repeats its arguments avoided cost that rates should not be based on an individual QF's costs. Third Br., p. 12, 19-. However, Winding Creek's Third Brief never once addresses the CPUC's Second Brief quoting Winding Creek's own witness who testified that the marginal cost of procurement equals the generator's cost of production. *See* Second Br., pp. 59-60. Even FERC sanctions the use of market-based prices utility's avoided cost. *See* Second Br. at pp. 37-38, 61, 62, citing *Order 671*, 114 FERC ¶ 61,102, at PP 96-99 (2006); and *Order Terminating Proceeding*, 84 FERC ¶ 61,265, *62,301 (1998). And Winding Creek's Third Brief never once addresses the very specific context in which FERC did not want to look at a QF's costs: because it did not want states to engage in the traditional cost-of-service ratemaking used for rate-regulated public utilities such as PG&E. *See FERC v. Mississippi*, 456 U.S. at 750-51 & n.11.

C. Winding Creek Would Have This Court Erroneously Believe That PURPA's Goals of Protecting Consumers and Promoting Renewables and QF Development Are Mutually Exclusive.

Winding Creek indicates that consumer protection is exclusive of promoting QFs under PURPA. Third Br., p. 17 ("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 …"). PURPA, however, was enacted to balance dual goals, the second goal requiring that rates paid to QFs for their power and capacity "be just and reasonable to the electric

consumers of the electric utility and in the public interest." 16 U.S.C. § 824a-3(b). PURPA's sponsors "[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.

The fact that the Re-MAT price offered to Winding Creek as soon as it became eligible to accept an offer - $65.23/MWh – was "too low to allow Winding Creek to move forward with development," Winding Creek Third Br., p. 21, is irrelevant to the utility, the CPUC, FERC, or this Court. What matters is the "incremental cost of alternative electric energy" otherwise available to the purchasing utility. Congress' goal was to create a broad pool of market participants for energy generation that was just and reasonable for electricity consumers and not to create a corporate "welfare program" supported by ratepaying consumers. *See Greensboro Lumber*, 643 F. Supp. at 1369, n.30; *see also* H.R. Conf. Rep. 95-1750, 1978 WL 8505, at *98 (PURPA was "not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers"). *Exelon Wind 1*, 766 F.3d at 384.

D. Winding Creek's Argument That California Is Hindering Renewable Development Is Simply Untrue.

Winding Creek uses colorful rhetoric to argue that the CPUC is hindering renewables development. Third Br., p. 35. This simply is untrue. California is a

national and global leader in promoting and implementing programs and policies that support the success of renewables and a diverse energy portfolio.[7] California state law mandates that electric utilities and other retail sellers and providers of electricity procure the equivalent of 50% of their annual retail sales from eligible renewable sources by 2030. Cal. Pub. Util. Code §§ 399.11-399.32. From 2003 to 2016 alone, the CPUC has approved contracts for over 23,705 MW of renewable capacity, and 15,565 MW of renewable capacity have achieved commercial operation under California's Renewables Portfolio Standard ("RPS") program. CPUC ER 164-65. In addition, "over 4,800 MW of solar resources have been installed at more than 625,000 sites through the California Solar Initiative" by February 2017. CPUC ER 153. These figures are even higher today.

California has achieved these goals by implementing a variety of programs such as RPS, Net Energy Metering, Re-MAT, Renewable Auction Mechanism ("RAM"), etc. to allow opportunities for a wide range of market participants.

> California has managed to promote the simultaneous build-out of both technologies [solar PV and onshore wind] through a suite of diverse policy instruments. […]

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[7] *See* U.S. Energy Information Administration, California State Energy Profile ("California … leads the nation in generation from solar, geothermal, and biomass energy" and "leads the nation in electricity generated from solar photovoltaics (PV), accounting for almost half of the U.S. total.") (https://www.eia.gov/state/print.php?sid=CA#9). *See also* Felix Mormann et al., *A Tale of Three Markets: Comparing the Renewable Energy Experiences of California, Texas, and Germany*, 35 Stan. Envtl. L.J. 55, 55-56 (2016).

> California has flanked its RPS with a suite of more tailored, complementary policies. Some of these are aimed at specific technologies and applications, such as the [California Solar Initiative] promoting behind-the-meter deployment of solar PV, while others offer support for small-scale ([Net Energy Metering], [Feed-in Tariff]) or medium-scale ([Renewable Auction Mechanism]) generators across a range of renewable energy technologies. The result of this policy potpourri is a diverse portfolio of renewables in California's electricity mix, including but not limited to solar PV and onshore wind.

Mormann, at 90-91 (discussing the "important of policy nuance and diversity, for a mixed renewables portfolio"). It is precisely because of the need for portfolio diversity that California offers a broad suite of investment options for new market entrants, including new QFs. The CPUC does not dictate the particular program investors will pursue. Instead, investors will decide what is most profitable for them, most in line with their business models, or other reasons. Hence, the total energy procured under the Re-MAT program may be small compared with California's aggressive renewables mandates, but this is of no consequence.[8] Under the philosophy of cooperative federalism recognized by federal courts and under PURPA, individual states are laboratories for the rest of the nation to benefit.

[8] Winding Creek correctly notes that the CPUC has procured 91.2 MW of electricity under the Re-MAT program. Third Br., p. 2 n.2. The CPUC's 255.7 MW figure represents the total amount procured under both the Re-MAT and the 2006 California Assembly Bill 1969 Feed-in Tariff program, the expansion of statutorily included the Re-MAT Feed-in Tariff program. *See* CPUC ER 139.

See Conn. Light & Power Co. v. FPC, 324 U.S. 515, 529-30 (1945). One should not review Re-MAT in isolation when assessing California's success in promoting PURPA and renewables development.

E. The District Court Correctly Refrained, and Other Federal Court Similarly Correctly Abstain, From Engaging In Ratemaking.

Winding Creek continually argues for this Court to order an avoided-cost rate for it of $89.23/MWh. Third Br., pp. 3, 19. Winding Creek simply wants the Court to order a specific dollar amount to be paid as the avoided-cost rate – a ratemaking function from which federal courts abstain. 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. 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. ER 19, citing Dkt. No. 154 at 16.

Federal courts have a limited scope of review under Section 210(h) of PURPA. As discussed in the CPUC's Second Br., pp. 57-58, a state commission's implementation of PURPA is reviewed with "deference," *Power Resource III*, 422 F.3d at 236, 238-39; *IEP*, 36 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 Resource III*, 422 F.3d at 239; *CPUC*, 133 FERC ¶ 61,059, at P 24. The federal district court does not make independent factual determinations of avoided cost. *See United States v. Morgan*, 313 U.S. 409, 417 (1941); *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. In reviewing PURPA enforcement actions, a 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).

Winding Creek also asks this Court to ignore the fact that Re-MAT's initial offer price of $89.23/MWh was only a starting price. It was based on the weighted average of the *highest* priced executed contracts of the three large California utilities in the CPUC's RAM program. CPUC Decision 12-05-035, slip. op. 40-41, 45, 110. Because the RAM program was designed for generators up to 20 MW (an entirely different market segment for generation), the CPUC implemented the adjusting pricing mechanism. The initial offer price was therefore *by design*

intended to "quickly respond to market conditions" by ratcheting up or down if the initial price is too high or too low for any generation type (i.e., Re-MAT "content categories"). *See* CPUC Second Br., pp. 28, 42, quoting CPUC Decision 12-05-035, slip op, pp. 44-45. In fact, by using a 2011 price as Re-MAT's starting price in late-2013, the CPUC was aware that "the state's renewable energy market has matured and prices have decreased" since the $89.23/MWh price was established in 2011. CPUC Decision 12-05-035, slip op., p. 60. Accordingly, the Re-MAT program's $89.23/MWh starting price was premised on the assumption that such a price did not reflect the then-effective market price and would quickly reduce to reflect to cost the utility would otherwise pay in the market for the next increment of power but for its purchase from that QF – the very definition of a PURPA avoided cost.

In a separate action that Winding Creek's parent (Allco Finance Limited, through a separate, wholly-owned company Allco Renewable Energy Limited ("Allco Renewable")) filed against Commissioners of the Massachusetts Department of Public Utilities ("MDPU"), Allco Renewable secured a district court order invalidating the MDPU's regulations on nearly identical grounds as that here: that Massachusetts' implementation of PURPA does not satisfy the specific requirements of 18 C.F.R. § 292.304(d)(2)(i) and (ii). *See Allco Renewable Energy Ltd. v. Massachusetts Electric Co., et al.*, 208 F.Supp.3d 390,

392, 395, 398 (D. Mass. 2016).[9] The Massachusetts District Court concluded that the MDPU's sole use of spot market energy prices to compensate QFs was a (d)(2)(i) pricing option, and not a (d)(2)(ii) pricing option, *id.* at 398, and invalidated the MDPU's PURPA implementation. *Id.* at 392, 401. The District Court, however, pointedly refused to order that Allco Renewable be awarded a specific contract because "[n]othing in the [PURPA] statutory scheme provides this Court with ratemaking authority, and it lacks the expertise to do so." *Id.* at 401. The District Court then referred the MDPU to revisit its implementation of FERC's rules consistent with its order. Allco Renewable challenged the Massachusetts District Court's abstention, and the First Circuit Court of Appeals upheld this part of the order, stating, "The District Court is correct." *Allco Renewable Energy,* 875 F.3d at 74. The First Circuit quoted its precedent, "'Judgment calls, including the lower court's choice of equitable remedies, are afforded substantial deference and will be disturbed only if the court has made a significantly mistaken judgment.'" *Id.* at 74, citing *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Municipality of San Juan*, 773 F.3d 1, 7 (1st Cir. 2014) (internal citation omitted).

[9] The MDPU did not have before it a FERC declaratory order similar to *Winding Creek Solar LLC*, 153 FERC ¶ 61,027, P7 n.10, in which FERC relied on 18 C.F.R. § 292.301 to support the CPUC's pricing options under the Standard Contract.

Allco Renewable sought rehearing or rehearing *en banc* of the First Circuit's decision, pleading that waiting for a revised MDPU PURPA implementation plan would delay the legally-enforceable obligation to which it was entitled. Both the original First Circuit panel and the majority of the First Circuit denied Allco Renewables' request. Order of the Court, *Allco Renewable Energy, Ltd. v. Mass. Elec. Co*., No. 17-1296 (1st Cir. Dec. 28, 2017) When the MDPU initiated a proceeding to revise its PURPA implementation plan six months after the Massachusetts District Court order, Allco Renewable pleaded that the wait for a new PURPA implementation would leave it in a "no-man's land" where it must "wait and hope that the MDPU takes some action that would be compliant with PURPA." *Allco Renewable*, 875 F.3d at 71. The First Circuit was unmoved and, *nearly fourteen months after the District Court order invalidating the MDPU PURPA implementation,* instructed Allco Renewable to exercise reasonable patience, allow agency regulatory processes to progress, and only then avail itself of relief through the revised MDPU PURPA implementation:

> Allco overstates the irregularity and gravity of this situation. […] Allco's eagerness for the MDPU to conclude this process so that it may enter into a contract with National Grid under the resulting PURPA-compliant regulations is understandable. Yet, *waiting for the MDPU to promulgate those regulations does not quite amount to a "no man's land." Allco's rhetorical flourish ignores the mundane and commonplace nature of waiting for an agency to conclude a rulemaking process.* Indeed, at any given moment, countless men (among others) can be

> found in this land of awaiting finalized agency rules. Allco's temporary visit there does not show that Congress meant to give it a private right under PURPA.

875 F.3d at 71-72 (emphasis added.)

Putting aside for the moment that the CPUC is appealing the District Court's refusal to defer to FERC in the *Winding Creek Solar* orders, the CPUC has commenced a new rulemaking to supplement its primary PURPA program with a New QF SOC with all pricing options under 18 C.F.R. § 292.304(d), which should remove any cloud of compliance with FERC's Regulations. *See Order Instituting Rulemaking Regarding Continued Implementation of the Public Utility Regulatory Policies Act and Related Matters*, CPUC Docket R.18-07-017 (August 1, 2018) ("Order Instituting Rulemaking"), attached as Exhibit A to the Declaration of Christine J. Hammond filed in support of the CPUC's Unopposed Motion for Judicial Notice of the Order Instituting Rulemaking, filed concurrently with this Fourth Br. The CPUC anticipates resolving the rulemaking within six months of its initiation. *Id.* at 10.

F. The Retroactive Relief Sought by Winding Creek is Barred by the Eleventh Amendment

Winding Creek seeks an order compelling the contract "that it would have received" years ago, as "prospective" relief. Third Br., p 4. It also asserts that the relief that it seeks "would not require the state to spend a single penny, removing it

from the purview of the Eleventh Amendment." Third Br., p. 7. Winding Creek errs in its Eleventh Amendment analysis.

Any relief to which Winding Creek is permitted under Section 210(h) of PURPA is restricted by the Eleventh Amendment. The CPUC is an arm of the state protected by the Eleventh Amendment. *See* CPUC Second Br., pp. 56-58. Only the narrow exception of the *Ex parte Young* doctrine allows prospective equitable relief against state officials acting in their official capacities. *See Edelman v. Jordan*, 415 U.S. at 663-71. Accordingly, the Eleventh Amendment bars retroactive equitable relief, such as that Winding Creek seeks here.

By seeking to characterize its requested relief as prospective, rather than retroactive, Winding Creek acknowledges the importance of that distinction. However, Winding Creek unconvincingly frames its desired relief within the *Ex parte Young* exception. Fundamentally, the question of whether the proposed relief is prospective or retroactive does not turn on whether or not dispersal of funds from the state treasury is implicated, as Winding Creek argues, citing to *Sato v. Orange County Dep't of Educ*., 861 F.3d 923 (9th Cir.2017). Third Br., p. 7. In *Sato* the discussion regarding the import of potential state treasury impacts was within the framework of at five-part test to "determine whether a government entity is an arm of the state." *Sato*, 861 F.3d at 928; *see Mitchell v. Los Angeles Community College District,* 861 F.2d 198, 201 (9th Cir. 1988). The only

pertinent question to answer is whether the defendant is an arm of the state. Here, Winding Creek makes no attempt to rebut that the CPUC is an arm of the state. *See Sable Commc'ns of Cal., Inc. v. Pac. Tel. and Tel. Co.*, 890 F.2d 184, 191 (9th Cir. 1989). Thus, *Sato* does not imply that this case is outside the purview of the Eleventh Amendment, as Winding Creek suggests.

Vaqueria Tres Monjitas, Inc. v. Irizarry, 587 F.3d 464 (1st Cir. 2009) does nothing to support the claim that Winding Creek's proposed relief is prospective. *See* Third Br., pp. 7-9. While impact on the state treasury was a focal point of its Eleventh Amendment analysis in *Vaqueria*, the First Circuit declined to "to rule on plaintiffs' characterization of the regulatory accrual as prospective." *Vaqueria,* 587 F.3d at 478.

In a subsequent case, the First Circuit noted: "We do not imply that the Eleventh Amendment bars claims only for money damages. That is not the case." *Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 662 n.4 (1st Cir. 2011). As the Fourth Circuit observes, "Money damages are probably the purest and most recognizable form of retrospective relief, but surely not the only form, and the fact that that remedy is not sought whereas an injunctive or declarative form is, does not automatically establish that the *Ex parte Young* exception allows the action to proceed." *Republic of Paraguay v. Allen*, 134 F.3d 622, 628 (4th Cir. 1998).

Ultimately, Winding Creek does not establish that the relief that it seeks is prospective, as required by *Ex parte Young*. It wants to force a contract with the interconnecting utility at a price energy existed years ago. That time has passed, and such terms are not currently available. Such relief, regardless of its source, is retroactive and thus barred.

G. Should the Court Determine the CPUC Is Not Correctly Implementing PURPA, Prospective Relief Would Be Comprised of the CPUC Modifying Its Implementation of PURPA and Winding Creek Availing Itself of a PURPA-Compliant Program.

The only proper remedy, if this Court affirms that a remedy is required, would be to uphold the District Court's order that the CPUC issue such new orders implementing PURPA consistent with federal law. The CPUC, however, disagrees that a remedy is warranted because Winding Creek perception of an injury is self-inflicted, as discussed above.

The District Court erred in not giving proper *Auer* deference to FERC's determination that the Standard Contract is the CPUC's "primary PURPA program" under 18 C.F.R. § 292.301, which permits utilities and QFs to negotiate rates and terms that differ from the rates and terms otherwise required by the FERC Regulations such as 18 C.F.R. § 292.304(d). *See* CPUC Second Br., pp. 43-49, citing *Winding Creek Solar LLC*, 153 FERC ¶ 61,027. Indeed, the District Court did not even analyze the connection between 18 C.F.R. § 292.301 to 18 C.F.R., Subpart 292 raised in the CPUC's post-trial briefs below – a connection

that *FERC* highlighted in *Winding Creek Solar* orders, not the CPUC. Although the District Court and Winding Creek disparaged the CPUC's reliance on FERC's declaratory orders on the very claims Winding Creek makes in federal court, Winding Creek relies heavily on multiple FERC Declaratory Orders – *Windham Solar*, *Cedar Creek*, and *West Penn*, among others.[10]

If the Court determines that Winding Creek is entitled to any relief, it should consist of a PURPA contract at the utility's current avoided-cost rate, consistent with the Eleventh Amendment and the orders of district courts and Circuit Courts across the country.

H. The CPUC's Pending PURPA Rulemaking Would Offer Any QF 20MW or Less All Pricing Options Under 18 C.F.R. § 292.304(d).

The District Court was prepared "for summary judgment purposes" to "[accept] as true" that, should the CPUC have a Standard Contract that satisfies all foundational requirements of the PURPA Regulations, the CPUC is permitted to have a separate program that does not satisfy all basic requirements of PURPA. Winding Creek ER 14-15. As discussed in the CPUC's Second Br., pp. 43-49, the District Court erred in not giving FERC the proper *Auer* deference, in not addressing FERC's reliance on 18 C.F.R. § 292.301 in *Winding Creek*, and in

[10] The Fifth Circuit's discounting of FERC Declaratory Orders in *Exelon* goes specifically to the where the Circuit Court has already spoken to the issue and should not, therefore, discount FERC's *Winding Creek* Declaratory Orders.

concluding that the Standard Contract does not satisfy the requirements of 18 C.F.R., Part 292.

Should this Court have any question that FERC's application of 18 C.F.R. § 292.301 in *Winding Creek* is not entitled to deference, or that FERC misapplied 18 C.F.R. § 292.301 in its Declaratory Order, the CPUC asks that Court to note the following: the CPUC on July 26, 2018 formally voted out a new Order Instituting Rulemaking to comply with all elements of 18 C.F.R. § 292.304(d). *See* Order Instituting Rulemaking attached to CPUC's Unopposed RJN filed concurrently with this Fourth Brief.[11] While retaining the Standard Contract that was negotiated between California QFs and utilities to resolve over a decade of pending litigation, the CPUC intends to adopt an additional standard offer contract (the "New QF SOC") with all pricing options unambiguously compliance with 18 C.F.R. § 292.304(d)(1), (d)(2)(i), and (d)(2)(ii). The CPUC anticipates that it will establish the New QF SOC with the pricing options within six months of the rulemaking's initiation.

Once any ambiguity as to the CPUC's compliance with the basic requirements of implementing PURPA is unquestionably resolved, Winding Creek's claim of injury should be rendered moot. With an unquestionably valid

[11] As set forth in the Declaration of Christine J. Hammond, undersigned counsel on July 12, 2018 emailed counsel for Winding Creek a link to the proposed Order Instituting Investigation.

and complete implementation of PURPA and FERC's Regulations that provides for long-term legally-enforceable obligations with all required pricing options, "a state may also have alternative programs that … limit how many QFs, or the total capacity of QFs, that may participate in the [alternative] program." *Winding Creek Solar*, 151 FERC ¶ 61,103, at PP 6, 7 (2015).

CONCLUSION

For all of the foregoing reasons and reasons in the CPUC's Second Br. on Cross-Appeal, the CPUC respectfully requests that the Court reverse the District Court's order, uphold the Re-MAT program as a valid implementation of PURPA, and deny Winding Creek's request for retroactive relief.

Respectfully submitted,

AROCLES AGUILAR
CHRISTINE JUN HAMMOND
POUNEH GHAFFARIAN
EDWARD MOLDAVSKY

By: s/ CHRISTINE JUN HAMMOND

Attorneys for
Defendants-Appellees/Cross-Appellants

California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102
Telephone: 415-703-2682
Email: cjh@cpuc.ca.gov

Dated: August 22, 2018

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 FOURTH BRIEF ON CROSS-APPEAL** is proportionately spaced, has a typeface of 14 points or more, and contains 6,985 words, as counted by the Microsoft Word word-count function.

/s/ *Christine J. Hammond*

August 22, 2018 CHRISTINE J. HAMMOND

CERTIFICATE 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 August 22, 2018 the following documents:

- **CALIFORNIA PUBLIC UTILITIES COMMISSION'S FOURTH 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