

No. 17-17531, 17-17532

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

WINDING CREEK SOLAR LLC,

Plaintiff – Appellant/Cross-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 – Appellees/Cross-Appellants

On Appeal from the United States District Court
for the Northern District of California
No. 3:13-cv-04934-JD
Hon. James Donato

**MONTANA ENVIRONMENTAL INFORMATION CENTER, IDAHO
CONSERVATION LEAGUE AND VOTE SOLAR’S *AMICI CURIAE* BRIEF
SUPPORTING PLAINTIFF-APPELLANT/CROSS-APPELLEE, IN PART,
AND SUPPORTING AFFIRMANCE, IN PART**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici curiae Montana Environmental Information Center, Idaho Conservation League, and Vote Solar certifies that amici, respectively, are not publicly held corporations, that amici, respectively, do not have parent corporations, and that no publicly held corporation owns 10 percent or more of amici's respective stock.

Dated April 9, 2018

By: /s/ David C. Bender
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FED. R. APP. P. 29(A) STATEMENTS OF CONSENT TO FILE AND AUTHORSHIP

All parties consent to filing this brief pursuant to Fed. R. App. P. 29(a)(2). No party or party's counsel authored or contributed money intended to fund the preparation or submission of this brief. No person, other than Amici Curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND STATEMENT OF INTEREST OF AMICI CURIAE

This case is about the Public Utility Regulatory Policies Act ("PURPA") and implementing regulations, which open electricity markets to power produced by small-scale, non-polluting, renewable energy sources like wind and solar. Each of the amici advocates to transition our electricity generation away from large fossil-fueled power plants and to community-based renewable resources. PURPA is central to that transition.

While the particular dispute in this case involves a single, one-megawatt solar generator in California, the impacts from this case will be much broader. California is not alone in inadequately implementing PURPA. Like California, other states have capped, or otherwise precluded, renewable energy developers from obtaining long-term contracts with pre-determined prices. *See, e.g., Application of Sierra Pac. Power Co. d/b/a NV Energy for approval of its 2017-*

2036 Triennial Integrated Resource Plan and 2017-2019 Energy Supply Plan, Nevada PUC, Docket No. 16-07001 et al., Order on Phase II and Phase III, ¶ 172, 2016 WL 7475653 (Dec. 23, 2016) (imposing a cumulative cap on a long-term avoided cost methodology of 25 megawatts); *Hydrodynamics Inc. et al.*, 146 FERC ¶ 61,193 at PP 34-35 (2014) (addressing a Montana regulation capping the amount of wind generation that could be sold pursuant to contracts under PURPA); *see also Allco Renewable Energy Ltd. v. Massachusetts Elec. Co.*, 208 F. Supp. 3d 390, 398-400 (D. Mass. 2016) (Massachusetts rule that limited renewable energy developers to spot market prices rather than providing long-term contracts), reconsideration denied, 235 F. Supp. 3d 320 (D. Mass. 2017), and *aff'd*, 875 F.3d 64 (1st Cir. 2017). A decision in this case upholding the District Court's finding that California failed to fully implement PURPA will set a precedent that ensures markets for clean energy generation are open.

In fact, the Court's decision in this case will have greater impacts on total renewable electricity generation outside California than it will in the state. California's aggressive Renewables Portfolio Standard ("RPS") ensures that significant amounts of renewable energy will be developed in California regardless of PURPA projects like Plaintiff's. *See* Cal. Pub. Util. Code §§ 399.11-399.32. California's largest utilities already meet the law's 33 percent renewable requirement that applies in 2020 and are on track to meet the 2030 requirement of

50 percent ten years early. *See* California Public Utilities Commission, *California RPS: Current Renewable Procurement Status*, http://www.cpuc.ca.gov/RPS_Homepage/ (last visited April 9, 2018). In contrast, at least two states in this Circuit—Idaho and Alaska—have no minimum renewable energy requirement. Montana’s minimum requirement plateaued three years ago. Especially in those states, and others with weak¹ or no minimum renewable energy requirement, PURPA “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 J.* 125, 140 (2010); Chris Warren, *Once an Obscure Law, PURPA Now Drives Utility-Scale Solar. Regulatory Conflict Quickly Followed*, GREENTECH MEDIA (Feb. 23, 2017), <https://www.greentechmedia.com/articles/read/purpa-is-causing-conflict-in-montana#gs.uh6tWVM> (“PURPA has become a significant driver in the development of utility-scale solar projects, particularly in states like

¹ Unlike California’s requirement to transition to 50 percent renewable generation by 2030, many other states require significantly less. *See, e.g.*, Ariz. Admin. Code § R14-2-1804 (10 percent by 2020, 15 percent in 2025 and after); Mont. Code § 69-3-2004(4)(a) (15 percent since 2015 with no additional increase); Nev. Rev. Stat. §§ 704.7804, 704.7821(1)(g)-(h) (22 percent in 2020 and 25 percent in 2025 and after, but counts energy efficiency measures toward compliance); Wash. Admin. Code §§ 480-109-200(1)(c), 480-109-200(4) (15 percent by 2020 with double credit for certain resources); *see also* Or. Rev. Stat. §§ 469A.050, .052, .055 (25 percent by 2025 and 50 percent by 2040 for some utilities, but 5 to 10 percent for other utilities).

Utah, Idaho and Montana, which have not traditionally been among the leaders in solar and wind deployment”).

Amici are not-for-profit membership organizations who advocate on behalf of their members for affordable, clean, and renewable electricity generation to lower their members’ energy prices, remove the variability in such costs due to volatile fossil fuel costs, stimulate local economic development and job creation, and eliminate the externalized costs of pollution imposed on their members when electricity is generated from dirty fossil fuels. Amici participate in regulatory proceedings to promote markets for clean, renewable energy, including in proceedings to implement PURPA, in Arizona, California, Idaho, Montana, and Nevada, as well as other states across the United States.

Montana Environmental Information Center is a Montana-based, non-profit environmental advocacy organization committed to protecting and restoring Montana’s natural environment for its members and all Montanans. The Center advocates on behalf of its members for clean energy projects and policies to transition Montana’s electricity generation to the abundant, clean, renewable resources in Montana such as wind, solar, energy efficiency, small hydropower, and low-emission biomass.

Idaho Conservation League is an Idaho-based, non-profit corporation that protects the air, water, and wild places that are the foundation of Idaho's exceptional quality of life. On behalf of its over-10,000 members, the League engages with Idaho's electric utilities and the Idaho Public Utilities Commission to advocate for energy conservation and to transition Idaho's electricity generation from dirty, expensive, fossil fuels to local, clean, affordable, renewable resources.

Vote Solar was founded in 2002 and works to make solar affordable and accessible to all Americans. Vote Solar works on behalf of its members at the state level across the United States to support policies and programs to repower the electric grid with clean, renewable energy. That work includes significant focus in the states in this Circuit.

SUMMARY OF ARGUMENT

The California Public Utilities Commission (“CPUC”) fails to fully implement PURPA because the two programs it offers to small generators—the Renewable Market Adjusting Tariff (“Re-MAT”) and “Standard Contract”—do not provide all renewable developers an option to receive long-term contracts with pre-determined prices. Dkt. No. 161 at 13.² The District Court correctly held that the CPUC fails to fully implement PURPA for this reason. However, to the extent that the District Court went further and enjoined the Re-MAT program based on an interpretation of PURPA requiring a Re-MAT program price based on market prices set by resources that would not comply with the Re-MAT program, that interpretation is in error. Setting a higher price for Re-MAT compliant generation than the general market price is consistent with PURPA.

ARGUMENT

I. BACKGROUND TO PURPA

Congress enacted PURPA in 1978 to encourage “the development of renewable and inexhaustible energy sources” and reduce our dependence on traditional fossil fuels. H.R. Rep. No. 95-496(IV) at 14 (1978); *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982); *Indep. Energy Producers Ass’n, Inc. v.*

² All referenced document numbers refer to the docket record of N.D. Cal. Case No. 13-cv-04934-JD.

Cal. Pub. Util. Comm'n, 36 F.3d 848, 850 (9th Cir. 1994).³ Specifically, Congress sought to overcome monopoly utilities' reluctance to buy generation from small renewable energy generators by requiring retail electric utilities to purchase electricity generated by those facilities pursuant to regulations established by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 824a-3(a); 18 C.F.R. § 292.303; *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 405 (1983) (citing *FERC v. Miss.*, 456 U.S. at 750); *Indep. Energy Producers*, 36 F.3d at 850. This is commonly referred to as PURPA's "must-take obligation." See e.g., Dkt. No. 161 at 2 (describing utilities' "must-take obligation"). Except for narrow statutory exceptions, nothing supersedes a renewable developer's right under PURPA to make sales to utilities and receive a prescribed price for those sales. *Southwest Power Pool, Inc.*, 125 FERC ¶ 61,314 at P 39 (2008).

PURPA provides clear lanes for federal and state regulators to carry out PURPA's must-take obligation. FERC consults with state authorities and then promulgates rules "necessary to encourage" small renewable power generation. 16 U.S.C. § 824a-3(a); *FERC v. Miss.*, 456 U.S. at 750-51; *Indep. Energy Producers*, 36 F.3d at 856. State regulatory commissions, in turn, implement FERC's policies

³ The relevant PURPA provisions refer to cogeneration and small power production facilities, including renewable power generation. 16 U.S.C. § 824a-3(a). While certain cogeneration facilities are also PURPA generators, only small renewable energy facilities are at issue in this case, and only those facilities are discussed here.

for state-regulated utilities. 16 U.S.C. § 824a-3(f). State regulators can choose the procedural mechanism to implement FERC’s rules: issuing regulations, adjudicating cases, or taking other actions, so long as the implementation gives effect to FERC’s rules. *FERC v. Miss.*, 456 U.S. at 751. State regulators act as the fact-finders, applying FERC-specified factors to calculate the price for electricity sold pursuant to PURPA’s “must-take obligation” and to determine when that obligation is triggered. 18 C.F.R. § 292.304(e) (providing factors for state regulators to consider when establishing the price, but not mandating how those factors are weighted); *FERC v. Miss.*, 456 U.S. at 759 (“§ 210 has the States enforce standards promulgated by FERC”), 760 (“[T]he statute and the implementing regulations simply require the [state] authorities to adjudicate disputes arising under the statute.”); *Indep. Energy Producers*, 36 F.3d at 856.

When correctly implemented, PURPA fulfills Congress’ goal to encourage new small-scale generation. “Overall, PURPA provided a tremendous—and unanticipated—spur to technological innovation on numerous non-traditional technologies for producing electricity. From gas turbines to wind turbines, from solar cells to geothermal generators, PURPA enabled small, start-up entrepreneurial firms and larger, established companies to enter the generation business.” Richard Hirsh, *Powering the Past: A Look Back, The Public Utility Regulatory Policies Act*, “PURPA’s Effect on Technological Innovation,”

SMITHSONIAN INSTITUTION (2002),

<http://americanhistory.si.edu/powering/past/history4.htm>. In fact, PURPA is the only policy supporting the transition to smaller-scale renewable electricity generation in some parts of the country. *See Warren, supra.*

A. PURPA Requires That Each Renewable Generator Be Offered Three Options for Selling Electricity to the Utility

Pursuant to its Congressional mandate to set requirements for the “must-take obligation” sufficient to encourage renewable generation development, FERC’s rules require that each generator be offered three options for selling their electricity to utilities.⁴ First, the generator can opt to simply sell electricity as it becomes available, with no obligation to continue doing so in the future. 18 C.F.R. § 292.304(d)(1).⁵ Second, the generator can opt to enter a long-term contract and

⁴ Because the right to sell to the utility is statutory, a bilateral contract is not necessary. By committing to deliver electricity pursuant to a “legally enforceable obligation” a renewable generation developer triggers a reciprocal obligation by the utility to purchase. 18 C.F.R. § 292.304(d)(2); *In re JD Wind 1, LLC*, 129 FERC ¶ 61,148 at P 25 (2009) (A developer “by committing itself to sell to an electric utility, also commits the electric utility to buy from the QF; these commitments result either in contracts or in non-contractual, but binding, legally enforceable obligations.”); *Hydrodynamics*, 146 FERC ¶ 61,193 at P 31 (FERC developed the legally enforceable obligation option to prevent utilities from refusing to enter a contract). Because the distinction between a bilateral contract and the “legally enforceable obligation” is not relevant to the issues in this case, both options are referred to collectively in this brief as a “contract” for simplicity.

⁵ This option is especially attractive to large industrial or commercial operations that typically generate electricity for their own use, but occasionally have excess

receive a price determined at the time the electricity is delivered. 18 C.F.R. § 292.304(d)(2)(i). Third, the generator can opt to enter a long-term contract with prices over the contract term determined at contract formation (i.e., pre-determined). 18 C.F.R. § 292.304(d)(2)(ii).⁶

The third option—the option at issue in this case—requires a projection (or forecast) of future prices before the contract is executed and “enables a qualifying facility to establish a fixed contract price for its energy and capacity at the outset of its obligation.” 45 Fed. Reg. 12,214, 12,224 (Feb. 25, 1980). A long-term contract with prices set in advance provides price certainty over the life of an investment in renewable generation, which is necessary to obtain financing and, therefore, critical for most projects. 45 Fed. Reg. at 12,224 (explaining the basis for the mandate to offer the option of a long-term contract with prices determined at contract formation); *Windham Solar LLC and Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 8 (2016) (recognizing that price certainty is needed for new investment); *New York State Elec. & Gas Corp.*, 71 FERC ¶ 61,027 at *14-15 (the right to prices set

electricity that they choose to sell if, and when, available to the utility without being bound by contract to do so.

⁶ Forecasted avoided costs represent lawful “avoided costs” under PURPA even when circumstances change and prices fixed by contract turn out to be higher, or lower, than prevailing prices at the time that electricity is delivered. 18 C.F.R. § 292.304(b)(5); *New York State Elec. & Gas Corp.*, 71 FERC ¶ 61,027, 1995 WL 216781 at *15 (1995).

at contract formation is intended to provide developers with needed “certainty with regard to return on investment in new technologies”).

State regulators like the CPUC must make all three options available to *each* renewable energy developer under PURPA. 18 C.F.R. § 292.304(d); *Indep. Energy Producers*, 36 F.3d at 851-52, 858 (describing the three pricing options required by 18 C.F.R. § 292.304(d) and stating that the regulation entitles developers “to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed”); Dkt. No. 161 at 3; *Windham Solar and Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 4; *In re FLS Energy, Inc. et al.*, 157 FERC ¶ 61,211 at P 21 (2016). States who deprive renewable energy developers long term price security guaranteed by FERC rules violate PURPA. The CPUC’s failure to offer long term contracts with pre-determined prices to all developers is the basis for this case.

B. PURPA Requires That the Utility Pay the Renewable Developer an “Avoided Cost” Price Based on the Electricity That the Utility Would Have Purchased “But For” the PURPA Purchase, Which May Be Limited by State-Mandated Procurement Obligations

Retail utility customers are held harmless under PURPA because utilities pay only the amount it would cost to generate or purchase the electricity from another source—known as the “avoided cost” price. 16 U.S.C. § 824a-3(d); 18 C.F.R. §§ 292.101(b)(6), 292.304(d); 45 Fed. Reg. at 12,216; *Indep. Energy Producers*, 36 F.3d at 858; Dkt. No. 161 at 3. “In plain English, this means that

public utilities purchase [renewable] power at the same rate the utility would have paid in acquiring or producing the same power through other means.” *Ellis-Hall Consultants, LLC v. Pub. Serv. Comm’n of Utah*, 2014 UT 52, ¶ 23, 342 P.3d 256, 261. FERC regulations specify the factors that state commissions apply to calculate the “avoided cost” price, 18 C.F.R. § 292.304(e), but generators and purchasing utilities are free to negotiate, rather than litigate, the price. 18 C.F.R. § 292.301; *Public Service Co. of New Hampshire v. New Hampshire Elec. Coop. Inc.*, 83 FERC ¶ 61,224 at 62,001 n.19 (1998) (“A negotiated rate for the QF sale is always permitted.”).

Because avoided costs depend on the source of electricity that the utility would obtain “but for” the PURPA generator, 18 C.F.R. § 292.101(b)(6), state laws dictating the type of generator a utility can build, or buy from informs the avoided cost calculation. *Cal. Pub. Util. Comm’n*, 133 FERC ¶ 61,059 at PP 21-26 (2010) (Avoided cost calculations, therefore, “can properly take into account real limitations on ‘alternate’ sources of energy imposed by state law.”). The price of electricity from type of generation that does not comply with state laws cannot be the “but for” avoided cost price of electricity under PURPA.

C. California’s PURPA Implementation

California attempts to implement PURPA by offering small renewable generators only two options: (1) a long-term contract with pre-determined prices to

a limited number of small projects through the Re-MAT program, and (2) a “Standard Contract” that does not provide pre-determined prices but, instead, provides a formula for determining future prices based on variable inputs determined each month. Dkt. No. 161 at 4-5, 6-11.

The Re-MAT program requires California utilities to source a minimum amount of electricity from generation smaller than three megawatts. Cal. Pub. Util. Code § 399.20; *Order Instituting Rulemaking to Continue Implementation and Administration of California Renewables Portfolio Standard Program*, CPUC Decision 12-05-035 at 2-3, 123-129, 2012 WL 2049420 (May 24, 2012) (“2012 Re-MAT Order”); Dkt. No. 161 at 6, ¶ 3. Each utility is allocated a share of Re-MAT’s cumulative 750 megawatt requirement, and each utility’s share is further divided between three different categories of generation—baseload, peaking as-available (i.e., solar), and non-peaking as-available (i.e., wind and hydropower). 2012 Re-MAT Order at 2, 42-44; Dkt. No. 161 at 7-9, ¶¶ 5, 14-16; *see also* Cal. Pub. Util. Code § 399.20(d)(2)(c), (f). California’s Pacific Gas & Electric Company (“PG&E”) utility—which the Plaintiff seeks to sell to in this case—must acquire a total of 49.949 megawatts of solar generation from generators three megawatts and smaller. Dkt. No. 161 at 9, ¶ 16.

California utilities’ Re-MAT quotas are filled through bi-monthly contract offerings of no more than five cumulative megawatts of generation, with prices

adjusted in \$4 increments between the bi-monthly offers in an attempt to balance prices with the supply of bidders. Dkt. No. 161 at 7-9, 11, ¶¶ 6-11, 17. The program's caps mean that only solar projects smaller than three megawatts and that are in the queue when PG&E hits its bi-monthly five megawatts and cumulative 49.949 megawatts caps will receive contracts. Renewable generation developers that do not meet Re-MAT's three megawatt size restriction, or that are not high enough in the queue, have no opportunity for a long-term contract with a price established at the time of contract formation. The only option for those renewable generators is the "Standard Contract."

Unlike the Re-MAT program, the "Standard Contract" does not limit the number of projects that can theoretically participate. Dkt. No. 161 at 9-11, ¶¶ 19, 21, 29. However, the actual price to be paid for electricity is not known at the time the contract is executed. Instead, the price fluctuates over time depending on three inputs that "can exhibit significant volatility over time"—natural gas price, market heat rate, and location adjustment factor. *Id.* ¶¶ 23-27. Those data points "are not known at the time the contract is signed" so the price cannot be known when the contract is signed. *Id.* ¶ 23. A renewable developer opting for the Standard Contract, therefore, must accept enormous investment risk because she will not (and cannot) know the price she will receive for her generation before she commits to the investment.

II. THE DISTRICT COURT CORRECTLY FOUND THAT THE CPUC FAILED TO ENSURE THAT ALL RENEWABLE GENERATORS HAVE AN OPTION TO SELL PURSUANT TO A LONG-TERM CONTRACT WITH PRE-DETERMINED AVOIDED COST PRICES

The CPUC’s attempt to force small renewable generators to pick between a capped program and a program that lacks a pre-determined price for electricity fails to fully implement federal law. Every PURPA-qualifying renewable energy developer is entitled to the option to sell pursuant to a “fixed contract price” calculated at the time the contract is formed. 18 C.F.R. § 292.304(d)(2)(ii); 45 Fed. Reg. at 12,224. The Re-MAT program provides this option to only some—not all—developers and the Standard Contract does not provide a pre-determined price at all.

By definition, the capped Re-MAT program does not allow *all* qualifying renewable generation projects to obtain a long-term contract with prices calculated when the contract is signed. Dkt. No. 161 at 13. Only those three megawatts and smaller, and in the queue below the bi-monthly and cumulative program caps, will receive a contract. These restrictions necessarily mean that some projects will not receive contracts with pre-determined prices, in direct conflict with 18 C.F.R. § 292.304(d)(2)’s mandate that “[e]ach qualifying facility shall have the option” to sell power on a short-term basis or pursuant to a long-term contract that—“at the option of the qualifying facility”—includes prices determined at the time the contract is executed. *Allco Renewable Energy*, 208 F. Supp. 3d at 398-400 (FERC

regulations require all qualifying facilities to have an option to sell pursuant to long-term contract); *Windham Solar and Allco Fin. Ltd.*, 157 FERC ¶ 61,134 at P 5 (finding that Connecticut’s attempt to limit renewable energy developers to real-time prices determined at delivery, rather than providing an option for a long-term avoided cost determined at contract formation, conflicts with FERC regulations);⁷ *Hydrodynamics*, 146 FERC ¶ 61,193 at PP 32-34 (finding a requirement to win a solicitation as a condition of obtaining a long-term contract and a 50 megawatt cap on wind generation purchases to conflict with PURPA’s right for all developers to obtain long-term contracts). In fact, the Re-MAT program caps are effectively the same as those that FERC found “inconsistent with [FERC]’s regulations” in *Hydrodynamics*, 146 FERC ¶ 61,193 at P 34.

The Standard Contract does not fill the void for projects that do not receive contracts through Re-MAT because the Standard Contract relies on variable, future inputs to calculate prices rather than containing prices “calculated at the time the obligation is incurred.” 18 C.F.R. § 292.304(d)(2)(ii); *Allco Renewable Energy*,

⁷ Following FERC’s decision, the Connecticut Public Utilities Regulatory Authority reversed its prior decision that real-time rates are sufficient to implement PURPA and is revising its regulations to make a forecasted avoided cost rate available to all renewable developers pursuant to 18 C.F.R. § 292.304(d)(2)(ii). *Petition of Windham Solar LLC for Approval of A Power Purchase Agreement Between Windham Solar LLC and the Connecticut Light And Power Co. d/b/a Eversource Energy Voluntary Remand*, Docket No. 16-03-08RE01, 2018 WL 659792, *3-*5 (Jan 10, 2018).

208 F. Supp. 3d at 398-400; *Hydrodynamics*, 146 FERC ¶ 61,193 at P 34 n.73 (finding a state program that provided only variable future prices insufficient to provide a long-term contract with prices calculated at the time the obligation is incurred); *FLS Energy*, 157 FERC ¶ 61,211 at P 21 (describing the developer’s right to choose to sell based on pre-determined avoided cost rates determined at the beginning of the contractual obligation as “unconditional”). That is, the Standard Contract prices are not pre-determined and therefore do not satisfy 18 C.F.R. § 292.304(d)(2)(ii).

Because the CPUC only offers the capped Re-MAT program and the variable-price Standard Contract, the CPUC fails to implement PURPA fully. Re-MAT provides some, but not all, projects with long-term contracts with pre-determined prices, whereas the Standard Contract does not contain avoided cost prices calculated at the time of contract formation. The CPUC’s PURPA implementation is incomplete.

The CPUC argued to the District Court (issue costs. Instead, FERC’s May 8, 2015, “Notice of Intent Not to Act and Declaratory Order” simply notes that the Standard Contract provides a “long-term PURPA contract” that allows developers to sell at “*an* avoided cost rate, containing both an energy and capacity component.” *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 at P 6 (2015) (emphasis added); *see also* Dkt. No. 161 at 15 (noting that the Plaintiff agrees that

the Standard Contract “provides a rate based on an ‘avoided cost.’”). That does not address the relevant issue in this case: *when* the avoided cost rate is calculated. Specifically, the Standard Contract does not include a price calculated “at the time the obligation is incurred,” so it cannot satisfy 18 C.F.R. § 292.304(2)(d)(ii).

Likewise, FERC’s assertion on October 15, 2015, that the “Standard Contract” is “consistent with PURPA” is irrelevant to the issues in this case. *Winding Creek Solar, LLC*, 153 FERC ¶ 61,027 at P 7 (2015). There is no dispute that the Standard Contract is “consistent with” PURPA because it implements one of the options available to a developer—to receive avoided costs determined in the future “at the time of delivery.” 18 C.F.R. § 292.304(d)(2)(i). The Standard Contract is also “consistent with” PURPA because it constitutes a limited settlement between some renewable generation developers and some utilities, which FERC’s regulations specifically allow. 18 C.F.R. § 292.301; *Winding Creek Solar, LLC*, 153 FERC ¶ 61,027 at P 7 n.10. However, individual programs can be “consistent with” PURPA and yet not be sufficient, by themselves, to satisfy PURPA’s requirement to offer each generator all three options provided in 18 C.F.R. 292.304(d)(2) for selling electricity. FERC never found the Standard Contract to satisfy PURPA’s required long-term contract with avoided costs determined at contract formation option.

Moreover, even if FERC had found the Standard Contract to satisfy the long-term contract with pre-determined prices option, this Court would be compelled to reject that conclusion. The plain language of FERC's regulation provides that "each," meaning every single renewable energy facility, has a right to choose a long-term contract that includes avoided cost prices "calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii); *Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008) ("'Each' means '[e]very one of a group considered individually.'" (citation omitted)). Because Re-MAT does not provide all generators with such a contract and the Standard Contract does not provide prices calculated at the time the contract is signed, any contrary interpretation by FERC would contradict the plain language of FERC's regulations and, therefore, would not be controlling. *Turtle Restoration Network v. U.S. Dep't. of Commerce*, 878 F.3d 725, 734 (9th Cir. 2017) (an agency's interpretation does not receive deference when "the plain language of [the] regulation is not reasonably susceptible" to the interpretation); *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 701 (D.C. Cir. 2017) (FERC declaratory rulings interpreting PURPA in response to petitions for enforcement are not binding). Regardless, as set forth above, FERC has consistently recognized the right of all PURPA generators to long-term, fixed-price contracts at rates determined at the time the contract obligation is incurred. Nothing in the FERC decisions the CPUC cites to says differently.

The CPUC’s arguments that this Court’s decision in *Independent Energy Producers* invited the Standard Contract’s variable pricing—to the exclusion of an option for pre-determined prices—also lacks merit. This Court’s *Independent Energy Producers* decision noted the potential to erroneously forecast long-term avoided costs in long-term contracts and suggested that “the proper remedy for such a situation is to ensure that future standard offer contracts contain more flexible pricing mechanisms.” *Indep. Energy Producers*, 36 F.3d at 859. That suggestion explicitly referred to FERC’s then-pending proposal to revise its regulations to offer different pricing mechanisms. *Id.* (citing Administrative Determination, IV Federal Energy Reg. Comm’n Rep. (CCH) ¶ 32,457 at 32,172-74 (1988), in turn discussing possible revisions to FERC’s requirement to offer prices calculated at contract formation). But, FERC later withdrew its proposal. *Admin. Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, & Interconnection Facilities*, 84 FERC ¶ 61,265 at 62,301 (1998). Therefore, the regulations today are the same as in 1994 when this Court recognized that those rules “entitled [the developer] to deliver energy to utilities at an avoided cost rate calculated at the time the contract is signed.” *Indep. Energy Producers*, 36 F.3d at 858. This Court’s reference to potential FERC rule changes was not an invitation to the CPUC to ignore the plain language of 18 C.F.R. § 292.304(d)(2)(ii) and deny renewable generation developers long-term contracts

with prices calculated at the time the contract is formed. Arguments by the CPUC to the contrary misread *Independent Energy Producers*.

The Re-MAT and Standard Contract programs are an incomplete set of options to fully implement PURPA because they do not provide “each” renewable generation project an option for a long-term contract with prices “calculated at the time the obligation is incurred” as required by 18 C.F.R. § 292.304(d)(2)(ii).

California must offer such contracts to all PURPA-qualifying generators. But that omission from the current set of options does not make the Re-MAT and Standard Contract incompatible with PURPA. As long as the state offers each generator a contract with pre-determine prices, it can also continue to offer the Re-MAT and Standard Contract programs as additional options.

III. THE DISTRICT COURT ERRED TO THE EXTENT IT DETERMINED THAT THE RE-MAT PROGRAM MUST SET AN AVOIDED COST PRICE LIMITED BY THE SPOT MARKET PRICE

The District Court’s decision correctly finds that Re-MAT does not meet all of PURPA’s requirements. However, the District Court went further and found fault with Re-MAT’s pricing program because it “strays too far from basing prices on a utility’s but-for cost.” Dkt. No. 161 at 14. While this appears to be a finding of fact, based on the District Court’s discussion of the CPUC’s own witness, the District Court also stated that the CPUC should base prices on “a spot market price or similar indicator for electricity.” *Id.* To the extent the District Court rejected

Re-MAT's pricing based on an interpretation of PURPA requiring the use of a spot market price, or another indicator of electricity prices from all generators in the entire California energy market, the District Court erred.

PURPA requires utilities to pay the incremental cost of electricity that the utility would have otherwise generated or purchased. 18 C.F.R. §§ 292.101(b)(6), 292.304(b)(2), 292.304(d). The electricity that the utility would have otherwise generated or purchased can be limited by state procurement requirements. *Cal. Pub. Util. Comm'n*, 133 FERC ¶ 61,059 at P 26. That is, “where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility’s avoided cost for that procurement requirement.” *Id.* at P 29. Thus, as FERC explains, the “‘full avoided cost’ need not be the lowest possible avoided cost and can properly take into account real limitations on ‘alternate’ sources of energy imposed by state law.” *Id.* at PP 21-26. Re-MAT provides such a limitation and California can set higher, Re-MAT specific, prices.

California’s Re-MAT program restricts the types and size of generators that California utilities can use to obtain a specific tranche of electricity. *Cal. Pub. Util. Code* § 399.20; 2012 Re-MAT Order at 2-3, 123. Specifically, PG&E must obtain 49.949 megawatts from solar generators three megawatts and smaller. Dkt. No.

161 at 9, ¶ 16. Other states in this Circuit similarly require that utilities purchase a minimum amount of electricity from small renewable generation resources. *See, e.g.,* Ariz. Admin. Code § R14-2-1805 (requiring a minimum portion of generation from Distributed Renewable Energy Resources), R14-2-1802(B) (explaining that Distributed Renewable Energy Resources are specified types of small energy sources); Mont. Code §§ 69-3-2004(4)(b)(i) (requiring at least 75 megawatts from “community renewable energy projects”), 69-3-2003(4) (defining a community renewable energy project as having local owners or is owned by a public utility and is less than or equal to 25 megawatts); *see also* Nev. Rev. Stat. § 704.7821(2)(a) (requiring a minimum amount of solar energy).

These mandatory procurement requirements are legitimate exercises of states’ authority over resource planning and serve important state goals to develop diverse, community-based, generation sources. *New York v. FERC*, 535 U.S. 1, 24 (2002) (states may control such matters as “integrated resource planning,” “utility buy-side and demand-side decisions,” and “utility generation and resource portfolios” (quoting FERC Order No. 888, 75 FERC ¶ 61,080 at 31,782 n.544 (1996))); *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) (states are authorized “to direct the planning and resource decisions of utilities under [its] jurisdiction,” such as by “order[ing] utilities to purchase renewable generation” (quoting *S. Cal. Edison Co.*, 71 FERC ¶ 61,269 at 62,080

(1995))) ; *S. Cal. Edison Co.*, 70 FERC ¶ 61,215 at 61,676 (1995) (“[R]esource decisions are the prerogative of state commissions” and states may “require a utility ... to purchase power from the supplier of a particular type of resource.”).

By limiting the type of electricity generation utilities can procure to meet the Re-MAT program requirements, California also limits the “avoided cost” calculation to those electricity generation options that would comply with that state law. 18 C.F.R. § 292.101(b)(6); *Cal. Pub. Util. Comm’n*, 133 FERC ¶ 61,059 at P 27. PG&E cannot source its 49.949 megawatt Re-MAT solar tranche from anything other than solar generators three megawatts and smaller. Spot market⁸ purchases do not satisfy the obligation. Cal. Pub. Util. Code § 399.20(b) (defining resources that can be used to meet the requirement); *id.* § 399.20(f) (requiring utilities to provide a tariff rate to its proportionate share of the statewide cap of 750 megawatts). Therefore, “spot market” electricity is not the electricity PG&E would buy “but for” the Re-MAT-eligible PURPA projects and the “spot market” price is not the ceiling for Re-MAT “avoided cost” prices. 18 C.F.R. § 292.101(b)(6); *Cal. Pub. Util. Comm’n*, 133 FERC ¶ 61,059 at PP 20, 26-27 (“[W]here a state requires a utility to procure a certain percentage of energy from

⁸ The “spot market” represents the price for energy from all generation in the California Independent System Operator market. *See California Independent System Operator, Market processes and products*, <http://www.caiso.com/market/Pages/MarketProcesses.aspx> (last visited Mar. 14, 2018).

generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement.”).

The District Court erred as a matter of law to the extent that it interprets PURPA to require Re-MAT prices be set based on “a spot market price or similar indicator for electricity” that includes non-Re-MAT-eligible generators. Dkt. No. 161 at 14. The CPUC may lawfully look to the price for Re-MAT-eligible solar generators to set the avoided cost rate for solar projects that elect to participate in that program. Dkt. No. 161 at 7, ¶¶ 6-8 (the CPUC holds an auction that adjusts prices up and down to meet the supply of projects satisfying the Re-MAT program's requirements). Doing so is consistent with PURPA's definition of “avoided costs.” 18 C.F.R. § 292.101(b)(6); *Cal. Pub. Util. Comm'n*, 133 FERC ¶ 61,059 at P 27.

Although the “spot market” does not set a ceiling for Re-MAT avoided costs, it does set the floor. PURPA generators are not required to participate in the Re-MAT program and California utilities obtain most of their electricity outside that program. Therefore, a generator can opt out of the program if the price of electricity in the broader market is higher than the Re-MAT price. To the extent Re-MAT-eligible generation is more expensive than conventional alternatives, Re-MAT avoided cost prices should be based on the higher cost of generation meeting

the Re-MAT program’s requirements. But, if Re-MAT-eligible projects cost less than conventional market power, projections of the general market price sets the avoided costs price floor. 18 C.F.R. § 292.101(b)(6); *Pub. Serv. Co. of New Hampshire*, 83 FERC ¶ 61,224 at 62,001 (explaining that price must be based on “all potential sources of capacity in determining avoided costs”); *S. Cal. Edison Co.*, 70 FERC ¶ 61,215 at 61,677 (avoided cost must be based on all potential sources of generation that the utility could purchase). While renewable generation has been more expensive historically, declining costs means that it is now (or will soon be) less expensive than conventional generation. When that occurs, renewable generation cannot be forced to compete only with other renewable generation because it displaces higher-cost conventional generation that would be used “but for” new renewable generation.

To the extent the Court reaches the District Court’s finding regarding Re-MAT program pricing, the Court should hold that Re-MAT avoided costs are not limited by the “spot market price or similar indicator for electricity,” Dkt. No. 161 at 14, because those sources of electricity do not satisfy the utility’s procurement obligations under California law.

CONCLUSION

The Court should affirm the District Court’s finding that the capped Re-MAT program and Standard Contract do not provide all renewable energy projects

with long-term contracts with prices calculated at the time of contract formation, as required by law. The Court should reverse the District Court's decision to the extent that it relies on an interpretation of PURPA requiring Re-MAT pricing be limited by the spot market or similar pricing.

Respectfully submitted this 9th day of April, 2018.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g) counsel for amici curiae certifies that this brief contains 6,068 words, based on the “Word Count” feature of Microsoft Word 2016, compiling with the length requirement of Federal Rule of Appellate Procedure 29(a)(5). Pursuant to Federal Rule of Appellate Procedure 32(f) this word count does not include the words contained in the Corporate Disclosure Statement, Table of Contents, Table of Authorities, and Certificates of Counsel, signature block or Certificate of Service. Counsel also certifies that this document was prepared in proportionally spaced type using 14-point Times New Roman in Microsoft Word 2016, compiling with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6).

Dated: April 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

Dated: April 9, 2018

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