Nos. 17-17531 & 17-17532

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WINDING CREEK SOLAR LLC,
Plaintiff-Appellant-Appellee,

v.

CARLA PETERMAN; MARTHA GUZMAN ACEVES; LIANERANDOLPH; CLIFFORD RECHTSCHAFFEN; MICHAEL PICKER, in their official capacities as Commissioners of the California Public Utilities Commission,
Defendants-Appellees- Appellants.

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

BRIEF OF AMICI CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION AND NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION IN SUPPORT OF PLAINTIFF FOR AFFIRMANCE IN PART AND REVERSAL IN PART

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Community Renewable Energy Association is an Oregon-based intergovernmental association, formed under Oregon Revised Statutes Sections 190.003 to 190.120, that has no parent corporation and issues no stock.

Amicus Curiae Northwest and Intermountain Power Producers Coalition is organized as a nonprofit Washington corporation, formed under the Washington Nonprofit Miscellaneous and Mutual Corporations Act, Revised Code of Washington Chapter 24.06. NIPPC is a not-for-profit trade association that has no parent corporation and issues no stock.

Dated: April 9, 2018.

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STATEMENT OF INTEREST[1]

This appeal turns on the meaning of the Federal Energy Regulatory Commission's ("FERC") regulations implementing Section 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"). PURPA remains critically important to independent (i.e., non-utility) power producers who develop and operate cogeneration and renewable energy facilities in the Northwest states, where each of Amicus Curiae advocates for lawful PURPA implementation.

Amicus Curiae Community Renewable Energy Association ("CREA") is an Oregon-based intergovernmental association of local governments working with member organizations, which include irrigation districts, businesses, individuals and non-profit organizations. CREA advocates for policies encouraging development of community-scale renewable energy facilities.

Amicus Curiae Northwest and Intermountain Power Producers Coalition ("NIPPC") is a not-for-profit trade association that advocates for competition in the power sector. NIPPC's members include independent power producers who develop and operate power plants, power marketers, and independent transmission

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[1] All parties consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), Amici state that this brief was not authored in whole or in part by counsel for any party, and no party, counsel for any party, or person other than Amici, their members, or counsel made a financial contribution to the preparation or submission of this brief.

companies. NIPPC members have collectively invested billions of dollars in existing generation resources in the United States and have substantial operating assets in the Northwest along with renewable and thermal projects in advanced development.

Amici Curiae collectively advocate for PURPA rights in the Northwest states within this Court's jurisdiction, including Oregon, Washington, and Idaho. PURPA requires those states to implement FERC's regulations, as interpreted by this Court. Accordingly, although this appeal arises in California, this Court's interpretation of PURPA and FERC's regulations affects Amici Curiae's interests in the Northwest states.

CREA and NIPPC also submitted an Amici Brief to this Court on February 16, 2018, in *Californians for Renewable Energy, Inc., et al. v. California Public Utilities Commission, et al.*, No. 17-55297. That appeal raises closely related issues concerning the California Public Utilities Commission's ("CPUC") implementation of PURPA. Amici Curiae make similar arguments through this brief, without repeating points already made by other parties in this cross appeal.

INTRODUCTION AND BACKGROUND

PURPA requires traditional electric utilities to purchase the electrical output of certain qualifying facilities (or "QF") at a price set at the purchasing utility's avoided cost, i.e. the cost the utility would otherwise incur to obtain that electrical output. Congress enacted PURPA to address the energy crises of the 1970s. Pub. L. No. 95-617, 92 Stat. 3117 (1978). Section 210 of PURPA sought to increase the development of QFs. *FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982). These QFs include: (1) small power production facilities (up to 80 megawatts or "MW") that use renewable hydro, wind, solar, biomass, waste, or geothermal resources; and (2) cogeneration facilities of any size that sequentially produce electricity and another form of useful thermal energy (such as heat or steam), which is more efficient than the separate production of both forms of energy. *Id.* at 750 & n.11.

Congress found traditional electric utilities, as lone buyers of electric energy in a market with many potential producers, "were reluctant to purchase power from . . . nontraditional facilities." *Id*. at 750. Thus, PURPA directed FERC to promulgate regulations "to *encourage* cogeneration and small power production" including regulations that "require electric utilities to offer to . . . purchase electric energy from such facilities." 16 U.S.C. § 824a-3(a) (emph. added). FERC's regulations governing such purchases have remained unchanged in relevant part here since 1980, and are at the heart of the instant dispute. *See* 18 C.F.R. §§

292.301 to 292.308 (Subpart C of FERC's regulations); *Small Power Prod. and Cogeneration Facilities; Regulations Implementing Sec. 210 of the Pub. Util. Reg. Pol. Act of 1978*, Order No. 69, 45 Fed. Reg. 12,214, 12,217-30 (Feb. 25, 1980).

PURPA requires each state regulatory authority to implement these FERC regulations for each electric utility for which it has ratemaking authority. 16 U.S.C. § 824a-3(f). In contrast, utilities that are not subject to rate regulation by a state authority, such as consumer-owned cooperatives, must implement FERC's regulations on their own. *Id.* Consequently, if a state chooses to regulate certain electric utilities, it must implement FERC's regulations for such utilities. *Mississippi*, 456 U.S. at 751, 759-61.

Although initially enacted in 1978, PURPA remains highly relevant. In the Energy Policy Act of 2005, Congress considered repeal of PURPA but determined to only remove the mandatory purchase obligation for utilities that operate in organized wholesale markets that provide non-discriminatory access to QFs. Pub. L. No. 109-58, § 1253, 119 Stat. 594, 567-70 (2005); 16 U.S.C. § 824a-3(m). In the Northwest states, where Amici Curiae's members are active, no such organized

market exists, and PURPA's purchase obligation remains in effect for all QFs, just as it did in 1978.[2]

Even in such organized markets, PURPA's mandatory purchase obligation to enter into new contracts ordinarily remains in place for QFs up to 20 MW in capacity, due to the difficulties such small facilities face in participating in markets. 18 C.F.R. § 292.309(a), (d); *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688-A, 119 FERC ¶ 61,305, at PP 84-104 (June 22, 2007).

FERC relieved the major California utilities of their PURPA obligation for QFs over 20 MW (discussed below), but most of the other states within this Court's jurisdiction do not have organized markets. FERC, *supra* note 2. As a result, the PURPA requirements on the CPUC for QFs up to 20 MW at issue here are the same PURPA requirements that apply for all QFs in most other states within this Court's jurisdiction, including the Northwest states.

This case is one of two recent challenges to the CPUC's implementation of PURPA, both of which are now on appeal to this Court. In the instant appeal, the

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[2] For a discussion of the location of organized markets, *see* FERC, *Electric Power Markets: National Overview*, https://www.ferc.gov/market-oversight/mkt-electric/overview.asp (last visited April 7, 2018).

District Court for the Northern District of California correctly found fatal flaws in the CPUC's implementation of PURPA after holding a trial in response to the enforcement action brought by Winding Creek Solar LLC ("Winding Creek"). ER 1-20.[3] In the other challenge, the District Court for the Central District of California ruled the plaintiffs had not met their burden to survive summary judgment with the arguments made on the record in that case. *Solutions for Utilities, Inc v. Cal. Pub. Util. Comm'n*, No. CV 11-04975 SJO (JCGx), 2016 WL 7613906 (C.D. Cal. Dec. 28, 2016), *appeal pending*, No. 17-55297.

In this case, where the issues were clearly framed, the district court addressed the CPUC's two primary PURPA programs for renewable QFs of 20 MW or less. ER at 13-18. First, the district court addressed the CPUC's Renewable Market-Adjusting Tariff (or "Re-MAT"), which is subject to caps on participation and was the focus of Winding Creek's complaint. Next, the district court addressed the standard offer contract, which the CPUC relied upon as its PURPA-compliant program because it is available to any QF up to 20 MW. The district court found neither program fully complies with PURPA and issued declaratory and injunctive relief to that effect. ER at 19-20. However, the district

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[3] Citations to "ER" in this brief are citations to the excerpts of the record filed by Winding Creek on April 2, 2018.

court declined to issue additional relief finding that Winding Creek is entitled to a contract under the Re-MAT program at the initial offering price of $89.23 per megawatt-hour ("MWh"), which was the rate available to it but for the unlawful caps on availability of Re-MAT contracts. *Id*.

SUMMARY OF ARGUMENT

The district court's decision on appeal correctly interpreted and applied two fundamental PURPA rights. First, the Re-MAT program fails to be fully PURPA compliant due to its participation caps on the utility's purchase obligation. Second, the CPUC's standard offer contract does not excuse Re-MAT's non-compliance because it does not require utilities to offer QFs long-term fixed-price rates. Therefore, this Court should affirm those aspects of the decision on appeal here.

The additional Re-MAT pricing issue presents a more nuanced question. FERC's regulations allow the CPUC to implement a multi-tiered avoided cost scheme whereby Re-MAT eligible QFs may elect to sell at a higher avoided cost rate stream that reflects the purchasing utility's additional avoided costs of compliance with a state renewable procurement law. Therefore, this Court should not expand the reasoning of the district court's decision in a way that might undermine the use of multi-tiered avoided cost programs that compensate certain QFs for additional costs of compliance with state renewable procurement laws. However, in this particular case, the district court found as a matter of fact that the

Re-MAT price *adjustment* mechanism is arbitrary and thus not reasonably reflective of the utility's avoided costs. Therefore, if necessary to reach the issue, this Court could affirm the injunction against the Re-MAT's price adjustment mechanism for that narrow reason.

Finally, the district court erred in deciding not to issue further relief requested by Winding Creek. The district court's decision not to do so was premised on an erroneous conclusion that Section 210(h)(2)(B) of PURPA does not allow such relief. To the contrary, federal district courts have jurisdiction to issue relief necessary to remedy the harm caused to a QF by a state's violation of FERC's PURPA regulations.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED FERC'S REGULATIONS, AND CONCLUDED NONE OF THE CPUC'S PROGRAMS COMPLY WITH PURPA

The Court should adopt the district court's carefully reasoned interpretation of FERC's regulations. With benefit of the trial and detailed findings of fact, ER at 1-20, the district court easily concluded the CPUC does not have a program that is fully compliant with PURPA. Notably, although the district court's interpretation of FERC's regulations is reviewed de novo, the district court's factual findings and application of them to FERC's regulations are subject to the highly deferential clear-error standard. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir.

2002).

A. FERC's Regulations Bar Caps on the Mandatory Purchase Obligation and Require Long-Term Fixed-Price Rates

This Court should conclude that the district court correctly interpreted FERC's regulations on two of the primary legal arguments made by Winding Creek. First, the Re-MAT program cannot satisfy PURPA's requirements due to its participation caps in the absence of another PURPA-compliant program without such caps because FERC's regulations require utilities to purchase "any energy and capacity which is made available" from QFs. 18 C.F.R. § 292.303(a). Second, the CPUC cannot rely on its standard offer contract as its PURPA-compliant program because that contract relies on a pricing formula that does not provide a long-term fixed-price rate calculated at the time of the QF's obligation, as required by 18 C.F.R. § 292.304(d)(2)(ii). The bases in the regulatory text and related FERC orders for these conclusions are fully briefed by Winding Creek and other amici, and thus need not be repeated here. *See, e.g., Winding Creek First Br.* at 26-29, 39-50.

Additional points regarding agency deference, however, are worthy of discussion. The CPUC argued below (and presumably will so argue on appeal)

that *Chevron*[4] deference applied to certain ill-advised statements in *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 (May 8, 2015), *reh'g den*, 153 FERC ¶ 61,027 (Oct. 15, 2015). ER at 17; D.Ct. ECF Doc. 132 at 6-7. The CPUC claims those FERC orders found the CPUC's PURPA implementation fully PURPA compliant. In those orders, Winding Creek had petitioned FERC, as required by 16 U.S.C. § 824a-3(h)(2)(B), prior to initiating its own enforcement action against the CPUC. FERC acknowledged the problematic caps in the Re-MAT program, but it excused the caps due to the CPUC's assertion that its standard offer contract, developed as part of a QF settlement agreement (the "QF Settlement"), provided all QFs up to 20 MW access to a long-term PURPA contract. 151 FERC ¶ 61,103 at PP 6-7; 153 FERC ¶ 61,027 at P 7 & n. 10. Neither order explains how the standard offer contract's formula provides a fixed price as required by 18 C.F.R. § 292.304(d)(2)(ii).

The referenced QF Settlement had previously prompted FERC to find that California QFs *over* 20 MW have non-discriminatory access to organized markets, as required by Section 210(m) of PURPA, 16 U.S.C. § 824a-3(m). *Pac. Gas. and Elec. Co.*, 135 FERC ¶ 61,234, PP 24-29 & ordering paragraphs (June 16, 2011).

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[4] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

FERC ordered those large QFs may no longer compel purchases by the three major California utilities under PURPA. *Id.* But FERC orders on that topic have no impact here, as the district court correctly concluded.

First, FERC orders discussing the CPUC's ongoing implementation of PURPA for QFs 20 MW and under, such as *Winding Creek*, 151 FERC ¶ 61,103, are not necessarily binding in the district court under PURPA's enforcement provisions. *Portland Gen. Elec. Co. v. FERC*, 854 F.3d 692, 697-702 (D.C. Cir. 2017). "[A]t most, [FERC's PURPA orders] could have commanded some deference from a district court in a future enforcement action." *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485, 1489 (D.C. Cir. 1997).

No deference applies to the FERC orders in *Winding Creek*. Contrary to the CPUC's arguments, *Chevron* properly applies to an agency's interpretation of a statute. *Go v. Holder*, 744 F.3d 604, 610-13 (9th Cir. 2014) (Wallace, J., concurring). The issue here is the application of facts (the standard offer contract's rate formula) to the meaning of a regulation (18 C.F.R. § 292.304(d)(2)(ii)), not the meaning of the PURPA statute. *Chevron* would apply only to determine if FERC's regulation itself violated PURPA, but the CPUC made no such argument.

FERC's orders interpreting an *ambiguity* in its *regulations* could sometimes receive *Auer*[5] deference. *See Swecker v. Midland Power Coop.*, 807 F.3d 883, 888 (8th Cir. 2015). Under *Auer*, an agency's interpretation of an ambiguous regulation controls unless it is "plainly erroneous or inconsistent with the regulation, or there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Cal. Pub. Util. Comm'n v. FERC*, 879 F.3d 966, 974-96 (9th Cir. 2018) (internal quotation omitted) (declining to defer to a FERC order that was "merely a convenient litigating position and a *post hoc* rationalization").

In this case, to the extent there is any ambiguity in the regulations, the Court should defer to FERC's consistent policy, beginning in FERC's promulgating order in 1980, that 18 C.F.R. § 292.304(d)(2)(ii) entitles each QF to a "fixed contract price for its energy and capacity at the outset of its obligation." 45 Fed. Reg. at 12,224. Such deference is especially appropriate where the interpretation "is consistent with [the agency's] approach" and "stated purpose for promulgating the regulation." *Barboza v. California Ass'n of Prof'l. Firefighters*, 651 F.3d 1073, 1079 (9th Cir. 2011).

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5 *Auer v. Robbins*, 519 U.S. 452 (1997).

But *Auer* deference could not apply to any contrary determination in *Winding Creek*, 151 FERC ¶ 61,103, because such application of that order would be inconsistent with "other indications of the [agency's] intent at the time of the regulation's promulgation." *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (internal quotation omitted). As the district court correctly held, FERC's *Winding Creek* orders merely accepted the CPUC's factual assertions regarding its standard offer contract without explaining how it complies with the regulation or providing any meaningful analysis to which a court could defer. ER at 17. It reflects no considered judgement and cannot reverse FERC's longstanding precedent, particularly where this Court has previously applied FERC's interpretation. *See Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n*, 36 F.3d 848, 858 (9th Cir. 1994) (stating, "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. 18 C.F.R. § 292.304(d)(2)").

In any case, there is no ambiguity in the regulation because it requires "avoided costs *calculated* at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii) (emph. added). The rate formula in the standard offer contract consists of variables whose values cannot be known until delivery, years *after* the obligation is incurred, *see* ER at 10-11, and it obviously cannot satisfy the plain terms of that regulation. No FERC order provides any explanation of how it could.

The CPUC also argued below (and presumably will so argue on appeal) that California appellate decisions affirmed use of the rate formula underlying the standard offer contract several years ago. D. Ct. ECF Doc. 155 at 10 (citing *S. Cal. Edison Co. v. Pub. Utils. Comm'n of State of Cal.*, 26 Cal. Rptr. 3d 700 (Cal. Ct. App. 2005); *S. Cal. Edison Co. v. Pub. Utils. Comm'n of State of Cal.*, 125 Cal. Rptr. 2d 211 (Cal. Ct. App. 2002)). This argument is misplaced.

Collateral estoppel cannot apply here because the prior decisions did not address the "identical issue" that Winding Creek presses here. *Murray v. Ala. Airlines, Inc.*, 237 P.3d 565, 566 (Cal. 2010) (internal quotation omitted). The prior decisions addressed whether the CPUC was using the correct natural gas index and delivery point in its short-run avoided cost formula from 2001 to 2004, which appears to have been a time-of-delivery rate offered under 18 C.F.R. § 292.304(d)(2)(i). *S. Cal. Edison Co.*, 125 Cal. Rptr. 2d at 219-222. Neither decision discusses whether the formula, as it exists today in the standard offer contract, somehow complies with 18 C.F.R. § 292.304(d)(2)(ii) by providing a fixed-price rate.

Additionally, no order setting rates is preclusive years later. Ratemaking is an ongoing endeavor, where new arguments made in a new case require new findings and conclusions. *Tesoro Ala. Petroleum Co. v. FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000). These prior California decisions are therefore irrelevant.

In sum, the district court correctly held that the CPUC has failed to implement the requirements in FERC's regulations that bar caps on the mandatory purchase obligation and require long-term fixed-price rates.

B. The Court Should Not Invalidate the Use of Multi-Tiered Avoided Cost Rate Programs

The Court should not endorse the dicta in the district court's decision that could be construed to invalidate the concept of renewable-based pricing alternatives underlying the Re-MAT program. Renewable-based pricing could be lawfully offered under FERC's PURPA regulations.

Specifically, in addition to the Re-MAT program's unlawful caps and the standard offer contract's failure to provide all QFs with long-term fixed-price rates, the district court also ruled that the Re-MAT program's pricing mechanism strayed too far from PURPA's requirement to calculate the *utility's* avoided costs. ER at 14 (citing 18 C.F.R. § 292.101(b)(6)). In so ruling, the district court found that the program requires renewable QFs to bid against each other in a "complex auction procedure burdened with arbitrary rules," which "the CPUC witness acknowledged was without a reasoned basis." *Id.* As such, the district court concluded the program focuses solely on the renewable *QFs*' projected costs, as bid into the auction, instead of being a reasonable reflection of the *utility's* avoided costs. *Id*.

Given the concessions of arbitrariness by the CPUC's own witness, there is a narrow and defensible ground to require the CPUC to revise the program to correct the arbitrary pricing adjustment factors. The "state's authority to implement section 210 is admittedly broad[.]" *Indep. Energy Producers*, 36 F.3d at 856. But in a federal enforcement action to ensure the state's implementation complies with FERC's regulations, a district court can find noncompliance when the state regulatory authority's witness agrees the rate adjustment factors are arbitrary. *See Husain*, 316 F.3d at 835 (clear-error standard applies to application of law to the facts).

Notably, the CPUC could also cure the Re-MAT's cap problem by simply making its standard offer contract fully PURPA compliant and available to all QFs, including Re-MAT eligible QFs that either elect not to sell under Re-MAT or are not selected in that program. *See* ER at 14-15 (agreeing that fully compliant standard offer contract could remedy flaws in the Re-MAT program). For whatever reason, the CPUC has opted not to implement these easy fixes.

But the district court also suggested that it may make more "sense to look to a spot market price or similar indicator for electricity," as opposed to use of the auction-based renewable-pricing mechanism used in the Re-MAT program. ER at 14. This additional reasoning is problematic because avoided costs may properly

include the utility's additional avoided costs of compliance with a state renewable portfolio standard where the QF enables the utility to avoid those costs.

To illustrate, if a utility must comply with a state's renewable portfolio standard, the utility's avoided costs may be the costs of the next incremental renewable plant. In that case, the state may offer a multi-tiered avoided cost rate program that includes the option to elect a higher avoided cost rate stream to certain QFs that allow the utility to avoid the additional cost of compliance with state law. FERC has confirmed that 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." *Cal. Pub. Util. Comm'n*, 133 FERC ¶ 61,059, at PP 21-26 (Oct. 21, 2010).

Thus, FERC approved of the CPUC's proposal to calculate avoided costs based on the costs of certain highly efficient cogeneration facilities because California law mandated utilities to acquire energy from such facilities. *Id*. Likewise, the Oregon Public Utility Commission provides a renewable avoided cost rate that reflects the costs of the next renewable plant the utility must acquire under Oregon's renewable portfolio standard law, such as a wind farm. *In the Matter of Public Utility Commission of Oregon: Investigation Into Resource Sufficiency Pursuant to Order No. 06-538*, Order No. 11-505, 2011 Ore. PUC LEXIS 444 (Dec. 13, 2011).

Accordingly, a state utility commission may implement an additional avoided cost rate option that reflects the costs of renewable energy by focusing on the *utility's* avoided costs to comply with state law. Such programs provide certain QFs with an additional option to sell at a rate that might be more attractive than rates reflecting the cost of the utility's non-renewable plants. This additional option is important in circumstances where the avoided costs of conventional generation alone are inadequate to fully compensate renewable QFs for the costs they enable the utility to avoid. The district court's limited holding on this point can be upheld, but only on the limited basis that the Re-MAT program's pricing adjustment mechanism is arbitrarily unlawful.

In sum, this Court should ensure the outcome here does invalidate the use of multi-tiered avoided cost programs that provide additional compensation to QFs that enable the utility to avoid additional costs of compliance with a state renewable portfolio standard.

II. THE DISTRICT COURT'S REFUSAL TO ISSUE ADDITIONAL RELIEF WAS PREMISED ON AN ERRONEOUS CONCLUSION OF LAW

After finding neither of the CPUC's PURPA programs fully compliant with PURPA, the district court erred in declining to issue meaningful relief to Winding Creek. The standard of review is de novo where, as here, the district court's ruling rests solely on a premise of law. *Ting v. AT&T*, 319 F.3d 1126, 1134-35 (9th Cir.

2003). The district court necessarily abuses its discretion when it bases its decision on an erroneous legal standard. *Harris v. Board of Supervisors, L.A. County*, 366 F.3d 754, 760 (9th Cir. 2004). Here, the district court's ruling relied on an erroneous interpretation of the statute, and thus this Court should review that ruling de novo and reverse it.

Specifically, while the district court issued declaratory relief and enjoined the CPUC commissioners to issue new orders implementing PURPA in a manner consistent with federal law, the district court declined to find that Winding Creek is entitled to a contract under the Re-MAT program at the initial offering price of $89.23 per MWh. ER at 19-20. Yet the district court's findings of fact conclude that was the rate available to Winding Creek but for the unlawful caps in the Re-MAT program. *Id.* at 11, ¶ 31. In so ruling, therefore, the district court relied solely on a legal conclusion that additional relief was beyond the scope of an "implementation challenge" brought under Section 210(h)(2)(B) of PURPA. *Id.* at 20.

The relief available in federal court when a state violates FERC's PURPA regulations is not as limited as the district court concluded. As noted above, if a state chooses to regulate certain electric utilities, it must "implement" FERC's regulations for such utilities. 16 U.S.C. § 824a-3(f)(1); *Mississippi*, 456 U.S. at 751, 759-61. Although PURPA provides states with "latitude in determining the

manner in which [FERC's] regulations are to be implemented" – whether that "manner" be issuance of regulations, resolution of disputes on a case-by-case basis or some other manner – the state's chosen "manner" of implementing PURPA must be "reasonably designed to give effect to FERC's rules." *Id*. at 751 (emph. added). In other words, under Section 210(f)(1) of PURPA, the state's regulations, generally applicable orders, and resolution of case-by-case matters must not conflict with FERC's regulations. If they do conflict, the state has failed to lawfully implement PURPA.

These requirements are enforceable in federal court. PURPA provides a private right of action to enforce the implementation requirement in district court when FERC elects not to do so. 16 U.S.C. § 824a-3(h)(2)(B). If the state regulatory authority has failed to lawfully implement FERC's regulations, as occurred here, Section 210(h)(2)(B) unambiguously provides that the district court "may issue such injunctive or other relief as may be appropriate." 16 U.S.C. § 824a-3(h)(2)(B). The statute does not prohibit issuance of relief necessary to completely remedy the injuries caused to the plaintiff by the state regulatory authority's failure to lawfully implement FERC's regulations.

The fact that Section 210(g) of PURPA also provides a separate avenue for relief through the state courts does not diminish the relief available in federal court. *See* 16 U.S.C. § 824a-3(g)(1). As FERC has itself determined in interpreting these

statutory provisions, QFs "are also entitled to bring an enforcement petition pursuant to section 210(h) of PURPA to pursue remedies – through the *federal* administrative and judicial systems." *Grouse Creek Wind Park, LLC*, 142 FERC ¶ 61,187, P 42 (March 15, 2013) (emph. in original). Furthermore, "[b]ecause those are two separate and distinct, and permissible, paths," a federal "enforcement action need not be delayed or tempered by a separate state proceeding." *Id.*; *see also Murphy Flat Power, LLC*, 141 FERC ¶ 61,145, PP 26-27 (Nov. 20, 2012). There is additional relief available in state court because Section 210(g)(1) also allows relief where the state regulatory authority has violated the *state's* own rules. *Exelon Wind 1, LLC*, 140 FERC ¶ 61,152, P 46 & n. 54 (Aug. 28, 2012). But that does not nullify the federal district court's jurisdiction to issue relief for violations of FERC's regulations.

The district court erred to place a limitation on the relief available in an "implementation claim." ER at 20. In so ruling, the district court cited *Solutions for Utilities, Inc*, 2016 WL 7613906, at *15, which in turn cited *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380 (5th Cir. 2014). In *Exelon Wind 1*, the Fifth Circuit held, "An implementation claim involves a contention that the state agency . . . has failed to implement a lawful implementation plan under § 824a-3(f) of PURPA, whereas an 'as-applied' claim involves a contention that the state agency's . . . implementation plan is unlawful, as it applies to or affects an individual

petitioner." *Exelon Wind 1*, 766 F.3d at 388 (internal quotation omitted). In essence, the Fifth Circuit held that an "implementation claim" challenges rules or orders of general applicability, whereas an "as applied claim" challenges an order directed narrowly at a specific QF. *Id.* at 388-94. But the Fifth Circuit's strict dichotomy between "implementation claims" and "as applied claims" has never been adopted by this Court. The statute itself does not provide that state courts have exclusive jurisdiction over the state's violation of FERC's regulations just because the relief requested might benefit a particular QF.

In any event, as the district court ruled, Winding Creek alleged and proved that the CPUC's orders of general applicability constitute an unlawful implementation of FERC's regulations. ER at 20, 262-64. Indeed, the CPUC identified no fully compliant PURPA program. Even under Fifth Circuit's holding in *Exelon Wind 1*, this is an implementation case. Once the claim was properly before the district court, the relief allowed by the statute is broad. *See* 16 U.S.C. § 824a-3(h)(2)(B).

Additionally, and separately, the Supremacy Clause of the United States Constitution provides an independent avenue for federal jurisdiction and relief free of any limitations that might exist in the private right of action in Section 210(h)(2)(B) of PURPA. The CPUC's orders implementing PURPA may not conflict with FERC's regulations. *See Indep. Energy Producers*, 36 F.3d at 853,

857-59 (applying conflict preemption). Winding Creek's operative complaint against the CPUC commissioners, in their official capacities, also invoked the Supremacy Clause. ER at 266-69, 278-83.

In an analogous circumstance, the Supreme Court found an independent basis for federal question jurisdiction under the Supremacy Clause. *Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642-44 (2002). The *Verizon Maryland* court explained that the private right of action in the Telecommunications Act, 47 U.S.C. § 252, "does not *divest* the district courts of their authority under 28 U.S.C. § 1331." (emph. in original). Accordingly, this Court has found federal question jurisdiction over a preemption challenge to the CPUC's "interpretation and enforcement of existing interconnection agreements" under the analogous Telecommunications Act. *Pac. Bell v. Pac-West Telecomm, Inc.*, 325 F.3d 1114, 1124-25 (9th Cir. 2003). This reasoning applies equally to Section 210 of PURPA, which likewise does not divest the district court of jurisdiction to redress violations of federal law. *See* 16 U.S.C. § 824a-3(h).

Thus, relief is available to require the CPUC commissioners here to ensure Winding Creek receives a long-term contract as an appropriate remedy to the CPUC commissioner's ongoing failure to lawfully implement PURPA. The district court erred to conclude otherwise.

CONCLUSION

For the reasons explained above, the Court should affirm district court's judgment on the merits but reverse the district court's refusal to issue further relief requested by Winding Creek.

Dated: April 9, 2018.

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STATEMENT OF RELATED CASES

As discussed in this Amici brief, the decision by the District Court for the Central District of California on appeal in *Californians for Renewable Energy, Inc., et al. v. California Public Utilities Commission, et al.*, No. 17-55297, also addressed issues closely related to the issues in this appeal and is also now pending before this Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1, I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), Fed. R. App. P. 28.1(e)(2)(A), and Circuit Rule 28.1-1 because it contains 5064 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 97-2003, Times New Roman, 14-point font.

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

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