No. 17-55297

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIANS FOR RENEWABLE ENERGY, a California Non-Profit Corporation; et al.,
Plaintiffs-Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent State Agency; et al.,
Defendants-Appellees,

On Appeal from the United States District Court
for the Central District of California
No. CV 11-04975 SJO (JCGx)
Hon. S. James Otero

BRIEF OF AMICI CURIAE COMMUNITY RENEWABLE ENERGY ASSOCIATION AND NORTHWEST AND INTERMOUNTAIN POWER PRODUCERS COALITION IN SUPPORT OF PLAINTIFFS-APPELLANTS FOR REVERSAL

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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.

Date: February 16, 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

[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.

INTRODUCTION AND SUMMARY OF ARGUMENT

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. FERC has established regulations governing this mandatory purchase obligation, which PURPA requires the state utility commissions to implement.

Since enactment in 1978, PURPA has been credited with a "tremendous – and unanticipated – spur to technological innovation on numerous non-traditional

technologies for producing electricity."[2] The law remains an important means by which efficient cogeneration and renewable generation facilities sell their output.

This case is one of two parallel challenges to the California Public Utilities Commission's ("CPUC") implementation of PURPA, both of which are now on appeal to this Court. In the instant appeal, the District Court for the Central District of California found no PURPA violations at summary judgment. Appellants' ER 27-46. However, the District Court for the Northern District of California found fatal flaws in the CPUC's implementation of PURPA after holding a trial. *Winding Creek Solar LLC v. Peevey*, Case No. 3:13-cv-04934-JD, slip op. (N.D. Cal. Dec. 6, 2017) (provided in Addendum) (Appeal Nos. 17-17531 & 17-17532).

The *Winding Creek* court noted that a PURPA dispute "takes place in a complex regulatory context" and the parties tend "to resort to industry jargon and inside-baseball arguments in ways that sometimes obscured the basic issues." *Id.* at 5. However, after the benefit of a trial, "the dispositive facts turned out to be relatively straightforward," *id.*, and "[i]t does not require significant legal analysis to conclude that" the CPUC has failed to properly implement PURPA. *Id.* at 13.

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[2] Smithsonian Institution, *Powering the Past: A Look Back*, http://americanhistory.si.edu/powering/past/history4.htm (last visited Feb. 8, 2018).

This Court should conclude that the *Winding Creek* court correctly interpreted FERC's regulations and reverse contrary interpretations at issue in this appeal.

Specifically, because FERC's regulations require the utility to buy "any energy and capacity which is made available from a qualifying facility," 18 C.F.R. § 292.303(a), a state's PURPA program cannot impose caps that limit the utility's purchase obligation. Thus, the CPUC's Renewable Market-Adjusting Tariff (or "Re-MAT") cannot satisfy PURPA's requirements due to its caps, at least absent another PURPA-compliant program.

Additionally, FERC's regulations require utilities to offer three different pricing options to QFs. 18 C.F.R. § 292.304(d). These options include, most importantly here, the QF's option to choose a long-term fixed-price rate based on the utility's forecasted avoided costs, as calculated at the time the QF incurs the contractual obligation to sell its electrical output. 18 C.F.R. § 292.304(d)(2)(ii). Accordingly, the CPUC cannot rely on its standard offer contract as its PURPA-compliant program because it does not provide a long-term fixed-price rate calculated at the time of the QF's obligation.

The district court's decision on appeal here overlooked these basic PURPA rights – which bar caps on the utility's purchase obligation and require utilities to offer QFs long-term fixed-price rates. Therefore, this Court should reverse the decision on appeal here.

BACKGROUND

I. PURPA'S REQUIREMENTS

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). FERC's regulations mandate that utilities pay QFs a price (or a rate, e.g. $/MWh) set at the utility's "full avoided cost," that is, the marginal cost the utility would otherwise pay to acquire additional energy and capacity. *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 406, 413-17 (1983); *see also* 18 C.F.R. §§ 292.101(b)(6), 292.304(b).

FERC's regulations mandate that utilities must purchase "*any* energy and capacity which is made available from a qualifying facility." 18 C.F.R. § 292.303(a) (emph. added). In this context, "energy" costs are "the costs associated with incremental production of electric energy, including the cost of fuel and certain operating and maintenance costs." *Indep. Energy Producers Ass'n v. California Pub. Utils. Comm'n*, 36 F.3d 848, 851 n.5 (9th Cir. 1994). In contrast, "[c]apacity costs are the costs associated with providing capabilities to meet the demand for electric energy," such as the fixed costs of building a new generating facility. *Id.*

The regulations also include three pricing options. First, Section 292.304(d)(1) allows the QF to sell energy and capacity on an "as available" basis, without any contractual obligation to deliver power, "in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery." 18 C.F.R. § 292.304(d)(1). For example, a cogeneration

facility that primarily serves the electrical needs of its industrial facility may choose to occasionally sell surplus energy to the utility without a contractual obligation. *See Puerto Rico Elec. Power Auth. v. FERC*, 848 F.2d 243, 247-48 (D.C. Cir. 1988).

In contrast, Section 292.304(d)(2) provides two *contractual* pricing options. It provides:

> *Each* qualifying facility *shall have the option* . . . (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the *rates for such purchases shall*, *at the option of the qualifying facility* . . .*be based on* . . . (i) The avoided costs calculated at the time of delivery; or (ii) The *avoided costs calculated at the time the obligation is incurred*.

18 C.F.R. § 292.304(d)(2) (emph. added). FERC explained that subpart (d)(2)(i) allows the QF to opt to contract "to receive the avoided costs determined at the time of delivery." 45 Fed. Reg. at 12,224. But subpart (d)(2)(ii) "enables a qualifying facility to establish a *fixed contract price* for its energy and capacity at the outset of its obligation." *Id.* (emph. added). Such fixed-price rates will be lawful even if the fixed-price rate turns out, due to changed circumstances, to be different from the utility's actual avoided costs at the time of delivery. 18 C.F.R. § 292.304(b)(5).

Section 292.304(d)(2)(ii) is critically important to QFs and to the issues implicated in this appeal. FERC recognized that its regulations must provide

prospective developers and owners of QFs with the option to enter into long-term contracts with predictable prices. 45 Fed. Reg. at 12,224. This option was intended to provide the "certainty" necessary to invest in a generation facility in the market controlled by reluctant utility purchasers. *Id.*

The regulation reflects Congressional intent. Congress recognized that "'cogenerators and small power producers are different from electric utilities, not being guaranteed a rate of return on their activities generally or on the activities vis a vis the sale of power to the utility.'" *Am. Paper Inst.*, 461 U.S. at 414 (quoting H. R. Conf. Rep. No. 95-1750, pp. 97-98 (1978)). Unlike traditional utilities that are legally entitled to charge end-use customers all prudently incurred costs of electric service, the QF's "'risk in proceeding forward in the cogeneration or small power production enterprise is not guaranteed to be recoverable.'" *Id.* Accordingly, FERC's regulation is intended "to reconcile the requirement that the rates for purchases equal the utilities' avoided cost with the need for [QFs] to be able to enter into contractual commitments based, by necessity, on estimates of future avoided costs." 45 Fed. Reg. at 12,224.

Since 1980, "FERC has 'consistently affirmed the right of QFs to long-term avoided cost contracts or other legally enforceable obligations with rates determined at the time the obligation is incurred, even if the avoided costs at the time of delivery ultimately differ from those calculated at the time the obligation is

originally incurred.'" *Allco Renewable Energy, Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390, 398-400 (D. Mass. 2016) (quoting *JD Wind 1, LLC*, 130 FERC ¶ 61,127, 61,631 (Feb. 19, 2010), and holding that rate based on unknown, future market prices does not comply with 18 C.F.R. § 292.304(d)(2)(ii)).

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 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).

These requirements are enforceable in federal court. PURPA provides a private right of action to enforce the implementation requirement in district court if FERC elects not to do so. 16 U.S.C. § 824a-3(h)(2). Additionally, under the Supremacy Clause, the state's implementation may not conflict with FERC's

regulations. *See Independent Energy Producers*, 36 F.3d at 853, 857-59 (holding conflict preemption barred CPUC's retroactive adjustment to QFs' fixed-price rates).

II. PURPA'S CONTINUED IMPORTANCE

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.[3]

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*

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[3] 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 Feb. 8, 2018).

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 3. 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.

Additionally, PURPA is still the only federal law mandating that utilities purchase renewable energy. Many states now have laws mandating that utilities purchase renewable energy (known as "renewable portfolio standards"). Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 DUKE ENVTL. L. & POL'Y F. 125, 144-158 (2010). But other states have no such laws or have only a minimal requirement. *See id.* at 145. For example, unlike California, the State of Idaho's

legislature has affirmatively declined to adopt any renewable portfolio standard in its most recent Idaho Energy Plan.[4]

In effect, PURPA remains the nation's bare minimum renewable energy mandate. PURPA "was and remains a primary incentive for renewable power development." Ferrey et al., 20 DUKE ENVTL. L. & POL'Y F. at 140. Therefore, although the CPUC has attempted to minimize its PURPA violations by touting California's other renewable programs, a "win" for the CPUC here would undermine overall national efforts to advance renewable energy development.

ARGUMENT

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

In contrast to the decision on appeal here, the District Court for the Northern District of California found that the CPUC failed to lawfully implement PURPA. *See Winding Creek*, slip op., at 13-18. Because interpretation of FERC's regulations is reviewed de novo, the *Winding Creek* court's persuasive interpretation deserves equal consideration to the decision on appeal here.

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[4] H.C.R. No. 34, 2012 Leg., 61st Sess. (Idaho 2012), *adopting* Idaho Legislature's Interim Committee on Energy, Environment and Technology, *2012 Idaho Energy Plan*, at pp. 9-10, 101 (Jan. 10, 2012), https://oemr.idaho.gov/wp-content/uploads/2016/06/2012_idaho_energy_plan_final_2.pdf (last visited Feb. 8, 2018).

Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Frym, 814 F.3d 1053, 1057 (9th Cir. 2016). This Court should adopt the *Winding Creek* court's carefully reasoned interpretation of FERC's regulations.

The *Winding Creek* court addressed the two primary PURPA programs for renewable QFs of 20 MW or less: (1) the Re-MAT program, which was the focus of Winding Creek's complaint, and (2) the standard offer program available to any QF up to 20 MW, which the CPUC relied upon as its PURPA-compliant program. *Winding Creek*, slip op. at 4-5.

Due to the factual complexities, the *Winding Creek* court held a bench trial on the question of whether the CPUC's standard offer contract complies with 18 C.F.R. § 292.304(d)(2). With benefit of the trial and detailed findings of fact, *see id.* at 5-11, the court easily concluded the CPUC does not have a program that is fully compliant with PURPA. In contrast to the de novo review applied to the grant of summary judgment on review here, the *Winding Creek* court's factual findings and application of them to FERC's regulations will be subject to the highly deferential clear-error standard by this Court. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

First, as the court found, the CPUC's Re-Mat program contains caps that preclude it from requiring California utilities to buy "any energy and capacity which is made available" from QFs, as required by 18 C.F.R. § 292.303(a).

Winding Creek, slip op. at 13-14. The Re-MAT program has an overall statewide cap of 750 MW, which is further limited for individual utilities and in bimonthly increments. *See id.* at 13. While the program may be useful for the few QFs who obtain contracts, it does not meet PURPA's requirements on its own.

Next, the court correctly rejected the CPUC's reliance on its standard offer contract as its PURPA-compliant program. *See id.* at 14-18. That program does not offer "avoided costs calculated at the time the obligation is incurred" under 18 C.F.R. § 292.304(d)(2)(ii). *Id.* at 15. The court explained that the "text of 18 C.F.R. § 292.304(d)(2) clearly states that, 'at the option of the qualifying facility exercised prior to the beginning of the term,' the QF may sell energy or capacity at a rate determined by either '(i) [t]he avoided costs calculated at the time of delivery; or (ii) [t]he avoided costs calculated at the time the obligation is incurred.'" *Id.*

The court had found that, while the standard ofercontract allows for a term of up to 12 years, it contains a pricing component that is fixed only as to capacity, and the energy component of the price is a "formula rate" called the short-run avoided cost (referred by the CPUC as "SRAC"). *Id.* at 10. Under this formula, "at least three of the inputs are not known at the time the contract is signed." *Id.* Those three market-based variables are a natural gas index (establishing a burner tip gas price), a market heat rate, and a location adjustment factor. *Id*. Each of

those inputs varies each month as conditions change over the term of the contract, and the overall price can "exhibit significant volatility over time." *Id.* at 11. It is therefore impossible to know the price for future months at the time the QF executes the standard offer contract because the formula will change the price paid from month to month.

The CPUC attempted to explain away the standard offer contract's shortcomings at trial, but the court appropriately rejected the CPUC's contradictory testimony and arguments. *Id.* at 15-16. Ultimately, the court concluded that the standard offer contract provided only one rate method and thus could not possibly satisfy both distinct pricing options in 18 C.F.R. § 292.304(d)(2). *Id.* This Court should affirmatively hold that the standard offer contract's formula-based pricing does not offer "avoided costs calculated at the time the obligation is incurred." 18 C.F.R. § 292.304(d)(2)(ii). Instead, its formula calculates a new avoided cost each month that can "exhibit high volatility over time." *Winding Creek*, slip op. at 11. The standard offer contract denies the QF's right to "establish a *fixed contract price for its energy and capacity* at the outset of its obligation." 45 Fed. Reg. at 12,224 (emph. added). As discussed above, this right to fixed prices is critically important to provide non-utility generators the certainty needed to invest in the facility.

The *Winding Creek* court also noted one additional flaw with the Re-MAT program, which is worthy of discussion. In addition to Re-MAT's caps, the court ruled the program's pricing mechanism strayed too far from PURPA's requirement to calculate the *utility's* avoided costs. *Winding Creek*, slip op. at 14; (citing 18 C.F.R. § 292.101(b)(6)). Instead, 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 program appears to focus solely on the renewable *QFs*' projected costs, as bid into the auction. *Id.* This ruling is on solid footing, but it should not be expanded to jeopardize the lawfulness of renewable-based avoided costs that are focused on the *utility's* avoided 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. The *Winding Creek* court's limited holding on this point is not to the contrary.

In sum, this Court should ensure the outcome here is consistent with the correct interpretation of FERC's regulations in the *Winding Creek* court's decision, which is also now on appeal.

II. THE DISTRICT COURT'S DECISION HERE CONTAINS ERRORS OF LAW IN ITS INTERPRETATION OF FERC'S REGULATIONS

Plaintiffs were correct in their "core allegation" that none of the CPUC's programs, individually or collectively, comply with PURPA. Appellants ER at 36. As in *Winding Creek*, the CPUC can only prevail if the standard offer program complies with PURPA, given the limited availability of the other programs. *See* Appellants' ER at 41 (district court order relying on standard offer contract); *id.* at 34-36 (discussing other programs, none of which, aside from standard offer contract, are available to all QFs up to 20 MW in capacity). But the district court erred to summarily conclude the standard offer program complies with FERC's regulations. Instead of addressing all issues raised by Plaintiffs, *Amici Curiae* focus hereafter on critical misinterpretations of FERC's regulations in the district court's decision that this Court should correct.

A. FERC's Regulations Require Long-Term Fixed-Price Rates

The district court's first legal error was to conclude that PURPA does not require long-term fixed-price rates. Plaintiffs argued that the "price formula under the QF Settlement," i.e. the standard offer program, offers only "variable unpredictable rates" – a point also disputed in the *Winding Creek* case.

Appellants' ER at 36.[5] Yet the district court here ruled: "To the extent CARE Plaintiffs appear to argue that avoided cost rates must be based on long-run avoided cost formulae, (*see* Opp'n 15), the Court agrees with Defendants that neither PURPA nor its implementing regulations impose such a requirement." Appellants' ER at 44. Instead, the district court believed that "FERC has expressly upheld the use of both market-based rates and short-run avoided cost rates." *Id.* (emph. and internal quotation omitted). It further adopted the CPUC's claim that it is "under no PURPA obligation to require long-term standard offers." *Id.* at 40 (internal quotation omitted). These conclusions contradict 18 C.F.R. § 292.304(d)(2)(ii).

As explained above, Section 292.304(d) provides that "[e]ach qualifying facility *shall have the option*" to have the "*avoided costs calculated at the time the obligation is incurred*." 18 C.F.R. § 292.304(d)(2) (emph. added). The plain language of subpart (d)(2)(ii) requires "avoided costs calculated at the time the obligation is incurred," which means the prices in such contract are fixed for the term of the agreement. *Id.*

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[5] Plaintiffs make similar assertions on appeal. *See* Appellants' Opening Br. at 3 (including as issue four the CPUC's failure to enforce the "various components of the full avoided cost requirement"); *id.* at 21 (noting the SRAC formula is "'pegged' to gas prices"); *id.* at 20 (similar argument regarding net metering rates).

In orders issued from 1980 through 2016, FERC has consistently characterized this right as a right to long-term fixed-price rates based on a forecast of future avoided costs – a right that is necessary to encourage investment in renewable technologies by non-utility generators. *See* 45 Fed. Reg. at 12,224; *accord Windham Solar LLC*, 156 FERC ¶ 61,042, at P 5 (July 21, 2016); *Va. Elec. and Power Co*., 151 FERC ¶ 61,038, at PP 24-25 (Apr. 16, 2015); *Hydrodynamics Inc.*, 146 FERC ¶ 61,193, at PP 31-33 (Mar. 20, 2014); *Cedar Creek Wind, LLC*, 137 FERC ¶ 61,006, at P 32 (Oct. 4, 2011); *JD Wind 1, LLC*, 130 FERC ¶ 61,127, 61,631; *N.Y. State Elec. & Gas Corp.*, 71 FERC ¶ 61,027, 61,115-16 (Apr. 12, 1995).

Nonetheless, the CPUC argues that this Court allows rates that are not fixed and are updated over the term of the contract, like CPUC's short-run avoided cost formula. In *Independent Energy Producers*, this Court acknowledged that the problem at hand was that the CPUC's erroneous forecasts of fuel costs set in the 1980s had resulted in contracts that contained fixed prices higher than the actual avoided costs years later. 36 F.3d at 858-59. The CPUC's summary judgment memorandum in the instant case relied on this Court's suggestion that "the proper remedy for such a situation is to ensure that future standard offer contracts contain more flexible pricing mechanisms." Appellants' ER at 221 (citing *Independent Energy Producers*, 36 F.3d at 859). But the CPUC's argument here improperly

relies on a snippet of this Court's decision out of context; closer scrutiny demonstrates the CPUC is wrong.

This Court held that "current law" entitles QFs to contracts that "lock the Utilities into paying rates that were calculated on incorrect assumptions about the future cost of fossil fuels," and thus PURPA and FERC's regulations preempted the CPUC's retroactive recalculation of rates in long-term contracts. 36 F.3d at 858. In so holding, this Court repeatedly recognized the intent of Section 292.304(d)(2)(ii), as promulgated in 1980, was to provide long-term fixed-price rates. *See id.* at 851 (describing the three pricing options in 18 C.F.R. § 292.304(d)); *id.* at 852 (discussing CPUC's initial standard offer contracts, which complied with the regulations by providing a fixed-price option); *id.* at 858 (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 the snippet the CPUC cites, the *Independent Energy Producers* decision noted that FERC had proposed to begin allowing more flexible pricing rules and cited FERC's notice of proposed rulemaking order. 36 F.3d at 859 (citing *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying*

Facilities, and Interconnection Facilities, IV Fed. Energy Reg. Comm'n Rep. (CCH) ¶ 32,457 at 32,172-32,174 (1988)), Appellants' ER at 490-492.[6] In the specific pages of the proposed rulemaking cited by this Court, FERC discussed the requirement in 18 C.F.R. 292.304(d)(2)(ii) that rates be "calculated at the time the obligation is incurred," and discussed possible revisions to "allow for greater pricing flexibility." *Id.* at 32,173, Appellants' ER at 491. The proposed regulation may have included the possibility of using a "fixed payment for capacity" and a "variable energy component," *id.* at 32,174, Appellants' ER at 492, – similar to the CPUC's standard offer contract at issue here.

But FERC withdrew the proposed rule in 1998, after issuance of *Independent Energy Producers*. *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 FERC ¶ 61,265, 62,301 (Sept. 21, 1998). Thus, FERC had *proposed* significant changes to 18 C.F.R. § 292.304(d)(2) that may have given the CPUC the flexibility it now claims to have in support of its standard offer contract, but those changes were never made. Section 292.304(d) remains the same as promulgated in 1980. The "current law" today is the same is it was in *Independent Energy Producers*,

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[6] This 1988 FERC order is not generally available in online databases, but it is included in the record as a summary judgment exhibit. Appellants' ER at 473-512.

and therefore the CPUC must offer rates that "lock" in prices for the QFs. 36 F.3d at 858.

Ignoring existing law, the district court relied on a FERC order that is off point. *See* Appellants' ER at 44 (quoting *Revised Regulations Governing Small Power Production & Cogeneration Facilities*, Order No. 671, 114 FERC ¶ 61,102, at P 99 (Feb. 2, 2006), where it states, "many sales made pursuant to bilateral contracts between QFs and electric utilities (including contracts at market-based rates) are made pursuant to a state regulatory authority's implementation of PURPA"). The quoted FERC order merely states that QFs still enjoy exemptions from rate regulation even if the terms and rates in their contracts were bilaterally negotiated instead of being established by a state commission. 114 FERC ¶ 61,102, at P 99. However, the possibility of obtaining mutually agreeable rates does not undermine each QF's backstop right to compel utilities to enter into contracts with rates reflecting the utility's avoided costs. 18 C.F.R. § 292.301(b); 45 Fed. Reg. at 12,217.

Accordingly, this Court should again conclude that FERC's regulations provide QFs the option to enter into a long-term contract containing fixed-price rates and reject contrary statements in the district court's decision.

B. FERC's Regulations Require Payment for Avoided Capacity Costs

The district court also misread the right to capacity payments. The court stated: "Moreover, avoided cost rates are not required to have a specific capacity component—rather, capacity is one factor that 'shall, to the extent practicable, be taken into account' by public utilities commissions in setting avoided cost rates. 18 C.F.R. § 292.304(e)." Appellants' ER at 41. This statement is wrong.

The regulations unambiguously require utilities to purchase "any energy *and capacity* which is made available" from QFs, 18 C.F.R. § 292.303(a) (emph. added), and they entitle QFs to contract to sell "energy *or* capacity," 18 C.F.R. § 292.304(d) (emph. added). Indeed, FERC's "[u]se of the term 'legally enforceable obligation' is intended to prevent a utility from circumventing the requirement that provides capacity credit for an eligible qualifying facility merely by refusing to enter into a contract with the qualifying facility." 45 Fed. Reg. at 12,224; *see also id.* at 12,225-26 (providing background to support the capacity-payment requirement). This Court agrees that avoided costs include both energy *and* capacity costs. *Independent Energy Producers*, 36 F.3d at 851 n.5.

The district court relied on 18 C.F.R. § 292.304(e), but that provision merely explains how to determine the amount the utility must pay the QF for energy and capacity. *See* 45 Fed. Reg. at 12,226-27 (explaining, *inter alia,* "the rate for

purchases from a qualifying facility should be adjusted to reflect its value to the utility"). In an extreme case, a utility may have no foreseeable need for any capacity and may thus be relieved of the obligation to pay QFs for capacity costs the utility cannot avoid. *See Hydrodynamics*, 146 FERC ¶ 61,193, at P 35. But that is the only circumstance where a utility need not pay for capacity provided by a QF. *Id*. This Court should again conclude QFs are entitled to payment for avoided capacity costs.

III. THE DISTRICT COURT'S DECISION HERE INCORRECTLY APPLIED PRECLUSION AND DEFERENCE DOCTRINES

The district court also assumed that prior administrative and judicial decisions already resolved the complex factual and regulatory issues before it. In doing so, the court misapplied preclusion and deference doctrines important to proper application of FERC's regulations.

A. The District Court Improperly Relied on FERC's Orders Addressing the CPUC's QF Settlement

The district court's reliance on certain FERC orders related to the CPUC's "QF Settlement" was misplaced. Appellants' ER at 39-41; *see also id.* at 33-34. (discussing the CPUC's QF Settlement). That QF Settlement 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). 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.

First, FERC orders discussing the CPUC's ongoing implementation of PURPA for QFs 20 MW and under 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).

Second, the court erred in its application of agency deference doctrines. At the CPUC's urging, the district court applied *Chevron*[7] deference to certain ill-advised statements in *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 (May 8, 2015). Appellants' ER at 39-40. In that order, Winding Creek Solar, the QF that later became the successful plaintiff in court, had petitioned FERC, as required by 16 U.S.C. § 824a-3(h)(2), prior to initiating its own enforcement action against the CPUC. FERC acknowledged the problematic caps in the Re-MAT program, but it

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

excused the caps due to the CPUC's assertion that its standard offer program, developed as part of the QF Settlement, provided all QFs up to 20 MW access to a long-term PURPA contract. *Winding Creek*, 151 FERC ¶ 61,103 at PP 6-7. The order does not explain how the standard offer contract's formula provides a fixed price as required by 18 C.F.R. § 292.304(d)(2)(ii).

No deference applies to the FERC order in *Winding Creek*. *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 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*[8] deference, a doctrine the CPUC failed to raise below. *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

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[8] *Auer v. Robbins*, 519 U.S. 452 (1997).

matter in question." *Cal. Pub. Util. Comm'n v. FERC*, No. 16-70481, 2018 U.S. App. LEXIS 462, at **11-18 (9th Cir. Jan. 8, 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 QFs to a long-term fixed-price rate calculated at the time of the obligation. 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).

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). FERC's *Winding Creek* order merely accepts 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. *Accord Winding Creek*, slip op. at 17. It

reflects no considered judgement and cannot reverse FERC's longstanding precedent that this Court has previously adopted.

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). A rate formula consisting of variables whose values cannot be known until delivery, years *after* the obligation is incurred, obviously cannot satisfy the plain terms of that regulation. No FERC order provides any explanation of how it could.

B. The District Court Erred to Rely on California Appellate Decisions

The district court also erroneously assumed, apparently applying collateral estoppel, that California appellate decisions have already upheld the legality of the rate formula underlying the standard offer contract. Appellants' ER at 41 (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)).

Collateral estoppel cannot apply here because the prior decisions did not address the "identical issue" that Plaintiffs press 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.

CONCLUSION

The Court should reverse the district court and reconfirm the meaning of FERC's regulations as described herein.

Date: February 16, 2018

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STATEMENT OF RELATED CASES

As discussed in this Amici brief, the decision by the District Court for the Northern District of California, *Winding Creek Solar LLC v. Peevey*, Case No. 3:13-cv-04934-JD, slip op. (N.D. Cal. Dec. 6, 2017) (included in Addendum hereto), also addressed issues closely related to the issues in this appeal, and is also now pending before this Court in Appeal Nos. 17-17531 & 17-17532.

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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. 32(a)(7)(B), and Circuit Rule 32-1 because it contains 6,496 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 February 16, 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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ADDENDUM

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Winding Creek Solar LLC v. Peevey,
Case No. 3:13-cv-04934-JD, slip op. (N.D. Cal. Dec. 6, 2017) A1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

WINDING CREEK SOLAR LLC,
Plaintiff,
v.
MICHAEL PEEVEY, et al.,
Defendants.

Case No. 13-cv-04934-JD

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER ON SUMMARY JUDGMENT

Plaintiff Winding Creek Solar LLC has sued the Commissioners of the California Public Utilities Commission ("CPUC") for a declaration that three CPUC orders conflict with federal law and consequently violate the Supremacy Clause of the United States Constitution. The CPUC orders set up a procurement program called "Re-MAT" (short for "Renewable Market-Adjusting Tariff"), and regulate the terms on which utility companies like the Pacific Gas and Electric Company ("PG&E") must purchase power from alternative energy power production facilities like small wind farms and solar projects. Winding Creek intends to build such a solar project in Lodi, California, and it seeks a long-term contract to sell the energy from the proposed facility to PG&E. It sued because it believes the CPUC orders in dispute prevented it from getting a contract entitlement under the Public Utility Regulatory Policies Act ("PURPA").

This order brings to a close a case that has been fought hard over a number of years. After three rounds of motions to dismiss, the parties filed cross-requests for summary judgment which were heavily briefed and included submission of an amicus brief from PG&E and other third-party utility companies. Disputes over material facts compelled the Court to hold a one-day bench trial. Both sides presented witnesses and expert testimony, and filed substantial post-trial briefs. The Court makes these findings of fact and conclusions of law, and grants summary judgment in favor of Winding Creek.

United States District Court
Northern District of California

BACKGROUND

To frame the rather technical dispute between the parties, the Court summarizes the statutory context set out in a prior order. Dkt. No. 60. Under the Federal Power Act ("FPA"), 16 U.S.C. § 791a et seq., the interstate commerce of electric energy at wholesale is subject to regulation by the Federal Energy Regulatory Commission ("FERC"). In 1978, Congress enacted the Public Utility Regulatory Policies Act ("PURPA"), which amended the FPA. PURPA was enacted to encourage the development of renewable sources of energy, and "thus to reduce American dependence on fossil fuels by promoting increased energy efficiency." *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 850 (9th Cir. 1994). To that end, PURPA directs FERC to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules that require electric utilities to offer to "purchase electric energy from [qualifying cogeneration and small power production facilities]." 16 U.S.C. § 824a-3(a). The Court found in a prior order that plaintiff Winding Creek's proposed Lodi facility is a "qualifying small power production facility" under PURPA. Dkt. No. 75 at 9. PURPA requires State regulatory authorities such as CPUC to implement the rules prescribed by FERC. 16 U.S.C. § 824a-3(f)(1).

The outcome of this case turns on three key requirements under PURPA and its implementing FERC regulations. The first is what the parties have referred to as the "must-take obligation," *see*, *e.g.*, Dkt. No. 152 (Trial Tr.) at 127:8-128:9, which is industry short-hand for the proposition that PURPA requires FERC to encourage small power production with rules that "require electric utilities to offer to . . . purchase electric energy from [qualifying] facilities." 16 U.S.C. § 824a-3(a). FERC's implementing regulations state that "[e]ach electric utility shall purchase . . . any energy and capacity which is made available from a qualifying facility . . . [d]irectly to the electric utility." 18 C.F.R. § 292.303(a)(1). A few exceptions exist for this mandatory purchase obligation, but the parties agree that they do not apply here. Trial Tr. at 130:14-131:7 (CPUC witness Michael Colvin testifying that "the must-take obligation for 20 megawatts and under remains").

The second and third legal requirements that are critical to this case have to do with pricing. PURPA and FERC's regulations not only mandate that electric utilities must purchase energy and capacity from qualifying facilities, they also set certain required terms for those purchases. Under 18 C.F.R. § 292.304(b)(2), utilities must purchase energy and capacity from qualifying facilities at a rate that "equals the avoided costs" of the utility. Under the regulations, "avoided costs" means "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

The regulations also require that qualifying facilities be given a choice in the pricing of the energy sales to the utilities. Under 18 C.F.R. § 292.304(d):

> Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.

The parties agree that section (d)(2) is the pertinent provision in this case because Winding Creek sought a "legally enforceable obligation for the delivery of energy or capacity over a specified term" to secure financing for its planned but unbuilt solar facility.

The Court's prior motion to dismiss orders settled the proper parties in the case, the facilities at issue and the plausible legal claims, all of which have mutated to some degree over the life of this case. Dkt. Nos. 39, 60, 75. The operative complaint is plaintiff's second amended complaint for declaratory and injunctive relief. Dkt. No. 61. Plaintiff is Winding Creek Solar LLC, an owner and developer of solar projects, and Allco Finance Limited is its only member. *Id.* ¶ 10. Defendants are the five Commissioners of the California Public Utilities Commission who

were sued in their official capacities. *Id.* ¶¶ 11-15. The facility at issue is an unbuilt, 1.0-megawatt solar project that Winding Creek plans to construct in Lodi, California (the "Lodi facility"). *Id.* ¶¶ 10, 75. Winding Creek's only remaining legal claim is for "preemption" based on alleged violations of the Supremacy Clause (and not under 42 U.S.C. § 1983). Dkt. No. 75 at 10-11. The Supremacy Clause theory alleges conflicts between the challenged CPUC orders and PURPA. *Id.*

The three specific CPUC orders that plaintiff challenges are: D.12-05-035 (the "May 2012 Order"), D.13-01-041 (the "January 2013 Order") and D.13-05-034 (the "May 2013 Order"). Dkt. No. 61 ¶ 6. As Winding Creek alleges, these orders set the terms on which California's investor-owned utilities such as PG&E must enter into long-term, fixed-price contracts with qualifying facilities such as Winding Creek's Lodi facility. *Id.* ¶¶ 1, 6. The overall procurement program established by these orders is known as the "Re-MAT Program," *see*, *e.g.*, *id.* ¶ 45 (the "Renewable Market-Adjusting Tariff" or "'Re-MAT' for short"), and Winding Creek focuses its attack on two aspects of the program. It challenges the 750-megawatt statewide cap that the program places on the electric utilities' collective obligation to purchase electricity from qualifying facilities. *Id.* ¶¶ 7, 50-54. It also alleges that "the Orders provide for a purchase price that is different than the utilities' avoided costs." *Id.* ¶ 8. Winding Creek asserts that both of these aspects of the Re-MAT program conflict with PURPA and the regulations enacted by FERC pursuant to PURPA. *See id.* ¶¶ 78-101.

Both sides filed for summary judgment (Dkt. Nos. 89, 90) following the Court's third motion to dismiss order, which granted in part and denied in part defendants' motion to dismiss without further leave to amend. Dkt. No. 75. Tracking its complaint, Winding Creek sought summary judgment on the grounds that the Re-MAT Program violates PURPA because (i) it caps the amount of electricity that utilities must purchase from qualifying facilities, and (ii) the rate offered under the program is not based on the utilities' avoided costs. Dkt. No. 89.

Defendants sought summary judgment in their favor on the same issues, but in doing so, they relied heavily on a different CPUC procurement program: the "mandatory Standard Contract that California utilities must offer smaller QFs of 20 MW or less generation capacity under

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PURPA." Dkt. No. 90 at 1. Defendants argued that the Re-MAT program's caps did not violate the utilities' purchase obligation under PURPA because "the Standard Contract is available to Winding Creek." *Id*. at 16. Defendants also argued that Re-MAT pricing is properly based on utilities' avoided cost rates, and that the Standard Contract satisfies the pricing requirements under 18 C.F.R. § 292.304(d)(2). *Id*. at 17-25. Defendants argued that because the Standard Contract fully satisfies PURPA, the CPUC was free to have alternative programs like Re-MAT even if those additional programs may not be PURPA-compliant. Dkt. No. 105 at 15:5-19. The parties' disagreement has now crystallized around the compliance of the Re-MAT Program and the Standard Contract with PURPA and implementing regulations.

Needless to say, this dispute takes place in a complex regulatory context. While the dispositive facts turned out to be relatively straightforward, the parties had a marked tendency to resort to industry jargon and inside-baseball arguments in ways that sometimes obscured the basic issues. Consequently, after the summary judgment motion hearing, the Court invited and received an amicus brief jointly filed by PG&E, Southern California Edison Company and San Diego Gas & Electric Company, to which both plaintiff and defendants filed responses. Dkt. Nos. 109, 110, 112. Even then, the Court determined that summary judgment could not be resolved on the papers and held a one-day bench trial on the question of "whether the CPUC's standard contract complies with 18 C.F.R. § 292.304(d)(2)." Dkt. Nos. 117, 148. The parties subsequently submitted post-trial materials. Dkt. Nos. 153-159. This order sets out the Court's findings of fact and conclusions of law from the bench trial, and resolves the pending summary judgment motions with the benefit of those findings and conclusions.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Rule 42(b) of the Federal Rules of Civil Procedure provides that "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." Rule 1 directs that the Rules should generally "be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding." Our circuit has affirmed that "[u]nder Rule 42(b), the district court has broad discretion to bifurcate a

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trial to permit deferral of costly and possibly unnecessary proceedings pending resolution of potentially dispositive preliminary issues." *Jinro America Inc. v. Secure Investments, Inc.*, 266 F.3d 993, 998 (9th Cir. 2001).[1] The Court held the bench trial under these provisions, with no objection by either side. The parties also agreed to try disputed issues to the Court and not a jury. *See*, *e.g.*, Dkt. No. 82 at 16. The Court consequently states its findings and conclusions below under Rule 52(a)(1).

I. THE RE-MAT PROGRAM

1. California has an extensive Renewables Portfolio Standard ("RPS") program that requires investor-owned utilities, electric service providers, and community choice aggregators to significantly increase procurement from eligible renewable energy resources in the coming decades. Dkt. No. 130 ¶ 10.[2] The California legislature established the program in 2002, and expanded it in 2006, 2011 and 2015. *Id.* Many of the legal requirements for the RPS program are codified at California Public Utilities Code Section 399.11 et seq. *Id.* at n.2.

2. The CPUC implements and administers RPS compliance rules for California's retail sellers of electricity, and this includes establishing the terms and conditions of procurement. Dkt. No. 130 ¶ 9.

3. Re-MAT is a market-based RPS program that provides a feed-in tariff for renewable generators sized up to 3 megawatts. Dkt. No. 130 ¶ 11. A feed-in tariff is a policy mechanism designed to accelerate investment in and deployment of renewable energy, and it achieves this by offering long-term contracts to renewable energy producers. *Id.* ¶ 12.

4. The Re-MAT program became operational in October 2013. Dkt. No. 130 ¶ 17.

[1] *See also Stewart v. RCA Corp.*, 790 F.2d 624, 629 (7th Cir. 1986) ("Stewart's complaint did not request a jury trial. If the judge was entitled to resolve disputes at trial, he was entitled to try a single issue under Fed. R. Civ. P. 42(b). There is little point in holding a full trial if a surgical approach can cut away needless disputes. A judge on top of a case can identify dispositive issues, and often these issues can be tried quickly and economically. Thoughtfully used, the trial limited to a single issue can assist litigants, witnesses, and courts alike."); *United States v. Berry*, 862 F.2d 567, 568 (6th Cir. 1988) (affirming district court's grant of United States' motion for summary judgment, "which the district court held in abeyance pending an evidentiary hearing").

[2] This document, defendants' unretained expert report of CPUC employee Cheryl Lee, was admitted as Trial Exhibit 113. Dkt. No. 144 at 8-9; Trial Tr. at 223:10-18.

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5. The Re-MAT program offers three different prices for each of these different product types: (1) baseload (*i.e.*, providing firm energy deliveries at all hours; *e.g.*, geothermal), (2) peaking as-available (*i.e.*, providing non-firm energy deliveries during peak use hours; *e.g.*, solar), and (3) non-peaking as-available (providing non-firm energy deliveries during non-peak use hours; *e.g.*, wind and hydro). The prices for each product type also vary by the utility making the purchase. Dkt. No. 130 ¶¶ 20-24.

6. Within each of these categories, the price (again, by utility and by method of energy generation) can change based on what is essentially an auction that is held every two months. Dkt. No. 130 ¶¶ 40-43; Trial Tr. at 36:16-37:4.

7. After every two-month program period, the Re-MAT price can be adjusted in $4/MWh increments (up to $12/MWh) up or down based on the outcome and price adjustments of the previous program period. The price is designed to respond to changes in generator interest and costs to construct and operate generation facilities, which are understood to be "market supply signals." If there is decreased generator interest in accepting the offer price, the price is adjusted upward to encourage more generators to enter the market; conversely, when more generators are willing to sell at the offer price, the Re-MAT price is adjusted downwards so that ratepayers can benefit from what appear to be increased supply and falling prices. Dkt. No. 130 ¶¶ 40-42; *see also* Dkt. No. 153 ¶ 18 ("Under the design of the Re-MAT program, after the price for the initial program period is set, the price for subsequent periods will adjust up or down based on QFs' willingness to accept the previous period's offer price.").

8. If at least five unaffiliated projects are in the utility's product category queue and the total capacity of the price-accepting project applicants is < 20% of the capacity allocation in that period, then the price is adjusted upward by $4/MWh. If at least five unaffiliated projects are in the utility's product category queue and the total capacity of the price-accepting project applicants is ≥ 100% of the capacity allocation in that period, then the Re-MAT price is adjusted downward. If the two conditions for either increasing or decreasing the price do not exist, then the price stays the same for the next program period. Dkt. No. 130 ¶¶ 41-43; *see also* Dkt. No. 153 ¶¶ 19-21.

1 9. The size of the price adjustment (between $4/MWh to $12/MWh) depends on the
2 number of consecutive program periods for which the increase or decrease conditions have been
3 met, and whether or not a contract has been executed in the prior period. Dkt. No. 130 ¶ 45.
4 10. There was no reasoned basis for CPUC's choice of increments in multiples of $4
5 for these price adjustments as opposed to any other number; the size of these price adjustments
6 was arbitrary. Trial Tr. at 179:13-180:7.
7 11. As the CPUC's own expert declared, the "adjustment component of the ReMAT
8 program ensures that IOUs are not entering into contracts on their ratepayers' behalf that are
9 higher than the market price, while also not setting a price that is lower than what the market will
10 bear." Dkt. No. 130 ¶ 46; *see also* Trial Tr. at 182:13-21 (idea behind Re-MAT price adjustments
11 is that ratepayers "should pay no more than the market or . . . opportunities to procure a similar
12 product elsewhere.").
13 12. During PG&E's first Re-MAT program period, the offer price for peaking as-
14 available facilities like Winding Creek was $89.23 per megawatt hour. Dkt. No. 153 ¶ 16; Dkt.
15 No. 156 ¶ 8; Trial Tr. at 36:1-7. The CPUC established $89.23 as the starting price based on the
16 most recent Renewable Auction Mechanism solicitation at the time of the Re-MAT program's
17 adoption. $89.23/MWh was the weighted average of each of the investor-owned utilities' highest
18 -priced executed Renewable Auction Mechanism contracts. Dkt. No. 130 ¶¶ 38-39; *see also* Dkt.
19 No. 153 ¶¶ 16-17. Since then, the price has changed based on the auction mechanism described
20 above, and it has consistently fallen over time.
21 13. Re-MAT contracts are long-term contracts of 10, 15 or 20 years in duration. The
22 price is fixed for the entire length of the contract, with an all-in (or combined) capacity, energy
23 and renewable energy credit payment based on the offered price, which is adjusted by time-of-
24 delivery factors based on time of year and day that the electricity is generated. Dkt. No. 130 ¶ 32.
25 The contract price and time-of-delivery factors are known at the time of contract execution and
26 they do not change. *Id.* ¶ 49.
27 14. It is undisputed that the Re-MAT program caps the amount of energy a utility must
28 procure through it. There is a statewide program cap of 750MW for all publicly owned utilities.

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Dkt. No. 130 ¶ 15; *see also* Dkt. No. 153 ¶ 5 ("California has placed a 750 MW overall cap on the quantity of Qualifying Facility generation utilities are obligated to purchase under the Re-MAT program.").

15. Public Utilities Code § 399.20(f) sets the program cap and how the MWs are to be allocated among California's three largest investor-owned utilities. Dkt. No. 130 ¶ 25 & n.7. The 750 MW is allocated among the utilities proportionate to their customers' share of the state-wide peak electricity demand. Dkt. No. 153 ¶ 6.

16. PG&E's share of the total cap is 218.8MW. Dkt. No. 130 ¶ 25; Dkt. No. 153 ¶ 7. This program capacity is then divided equally among the three product categories: as-available peaking, as-available non-peaking, and baseload. Dkt. No. 130 ¶ 26; Dkt. No. 153 ¶ 9. So for peaking as-available QFs like Winding Creek's proposed solar facility, PG&E's total purchase obligation under the Re-MAT is 49.949 MW. Dkt. No. 153 ¶ 10.

17. PG&E offers a limited amount of MWs in every Re-MAT program period. Each Re-MAT program period is two months in duration, and the predetermined maximum amount that PG&E may offer in each period is 5 MWs. Dkt. No. 130 ¶¶ 29-30; Dkt. No. 153 ¶ 12 ("the Re-MAT program also places a cap of 5 MW on PG&E's procurement obligation for each category of QF in each program period").

18. The soonest that PG&E's Re-MAT program can be fully subscribed in the peaking as-available category is approximately July 2018. Dkt. No. 130 ¶ 3.

II. THE STANDARD CONTRACT

19. The Standard Contract for QFs of 20 MW or less is a product of the QF Settlement, which resolved years of litigation between QFs and their trade associations, utilities, the CPUC and other parties. Dkt. No. 156 ¶¶ 17, 19. The agreement settled disputes over the terms and availability of contracts between QFs and utilities, and took effect in December 2010. Dkt. No. 153 ¶ 32.

20. Winding Creek is not a party to the QF Settlement. Dkt. No. 156 ¶ 18; Dkt. No. 153 ¶ 33. It can, however, enter into a Standard Contract if it so desires. Trial Tr. at 38:17-19.

21. The average term for a Standard Contract is 10 years. Trial Tr. at 41:1-4; *see also id*. at 111:8-12 (term can be up to 7 or 12 years).

22. The pricing for the Standard Contract has two components -- one for capacity, for which the price is fixed, and another for energy. Trial Tr. at 22:4-23; Dkt. No. 156 at ¶¶ 20-21. The capacity payment is essentially a payment for the amount of energy a facility could deliver at any given time, as having that energy available to it increases a utility's ability to meet an increased demand for electricity more quickly. Trial Tr. at 21:4-15. The energy payment on the other hand is for the actual energy that is delivered from the QF to the utility. *Id*. at 21:16-18. For intermittent resources like solar, it is the energy component that counts for probably 80 percent of the revenues. *Id*. at 42:13-15.

23. The energy price for the Standard Contract is a formula rate for which some inputs are known, but at least three of the inputs are not known at the time the contract is signed. Trial Tr. at 22:4-23. The three market-based variable inputs are: a gas index (or burner tip gas price), a market heat rate, and a location adjustment factor. Dkt. No. 156 ¶ 21. (The other three inputs for the formula are: variable operations and maintenance, a time of use factor, and greenhouse gas compliance costs. Dkt. No. 153 ¶ 38.)

24. The burner tip gas price is essentially the price for natural gas, which can vary significantly over time. Trial Tr. at 35:18-20, 27:8-25. The gas input is based on a monthly index updated on the first business day of each month, based on the last week of the previous month. Dkt. No. 156 ¶ 21; Dkt. No. 153 ¶ 42.

25. The market heat rate is a measure of the efficiency of the assumed avoided gas-fired generator. Trial Tr. at 35:7-9. The market heat rate varies monthly and its value for purposes of the formula is updated on the 5th business day of each month. Dkt. No. 153 ¶ 41.

26. The third key variable is the locational difference. Trial Tr. at 28:17-19. That factor is based on locational marginal prices, and consequently does not yet exist for an unbuilt facility like the Lodi facility at issue in this case. Trial Tr. at 29:3-23. The location adjustment factor is a site-specific factor that varies to reflect the fact that the cost of energy from a particular

location varies due to changes in the local energy markets. It varies monthly and is identified 30 days after generation occurs and is then applied to the prior month's payment. Dkt. No. 153 ¶ 43.

27. This formula is the only way that the price of energy is calculated for a QF under the Standard Offer Contract. Trial Tr. at 34:9-15. The output of the formula can exhibit significant volatility over time. Trial Tr. at 30:9-31:21.

28. The CPUC cannot say what the output of the formula, *i.e.*, the energy price, will be for any given time in the future during a utility's contract period with a QF without knowing how the variables will be filled in on a month-by-month basis with actual market data. Trial Tr. at 116:13-17.

29. Procurement through the Standard Contract for QFs 20MW or Less is not capped. Dkt. No. 156 ¶ 19.

III. WINDING CREEK

30. Plaintiff Winding Creek Solar LLC is a developer of solar generating facilities and currently seeks to develop a 1-megawatt solar generating facility in Lodi, California. Dkt. No. 156 ¶ 1; Dkt. No. 153 ¶ 1.

31. During PG&E's first Re-MAT program period, when the offer price was $89.23 per megawatt hour, Winding Creek could not participate because it was not among the projects at or near enough the head of the queue. Dkt. No. 156 ¶ 8. The order for this first queue was determined randomly for all the generators that had submitted timely applications; subsequently the queue has formed on a first-come, first-served basis. Dkt. No. 153 ¶ 14. For each program period, PG&E proceeds in order of the queue, asking each generator if it will accept a contract at the program price for that period. *Id.* ¶ 15.

32. Winding Creek was offered a contract at $77.23/MWh in March 2014, but it declined. It was offered another contract at $65.23/MWh in May 2014, but Winding Creek declined that also. Dkt. No. 156 ¶ 9; Dkt. No. 153 ¶ 30. Winding Creek has since remained eligible during every Re-MAT period to accept an offer but it has chosen not to do so. Dkt. No. 156 ¶¶ 9, 15. Winding Creek currently occupies the first place in PG&E's Re-MAT queue for peaking as-available facilities. Dkt. No. 153 ¶ 31.

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1 33. Winding Creek has the option of entering into a Standard Contract if it so desires.
2 Trial Tr. at 38:17-19.

3 **SUMMARY JUDGMENT**

4 **I. LEGAL STANDARDS**

5 Under Rule 56 of the Federal Rules of Civil Procedure, a "party may move for summary
6 judgment, identifying each claim or defense -- or the part of each claim or defense -- on which
7 summary judgment is sought. The court shall grant summary judgment if the movant shows that
8 there is no genuine dispute as to any material fact and the movant is entitled to judgment as a
9 matter of law." Fed. R. Civ. P. 56(a).

10 The party moving for summary judgment always bears the initial burden of demonstrating
11 the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323
12 (1986). When the moving party also bears the ultimate burden of proof at trial, it can meet this
13 initial burden by "com[ing] forward with evidence which would entitle it to a directed verdict if
14 the evidence went uncontroverted at trial." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*,
15 213 F.3d 474, 480 (9th Cir. 2000). When the moving party does not bear the ultimate burden of
16 proof, it can meet its initial burden on summary judgment by "'showing' -- that is, pointing out to
17 the district court -- that there is an absence of evidence to support the nonmoving party's case."
18 *Celotex*, 477 U.S. at 325. Once this initial burden of production has been met by the moving
19 party, the burden then shifts to the nonmoving party to "produce evidence to support its claim or
20 defense." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1103 (9th Cir.
21 2000); *see also C.A.R.*, 213 F.3d at 480. "If the nonmoving party fails to produce enough
22 evidence to create a genuine issue of material fact, the moving party wins the motion for summary
23 judgment." *Nissan Fire*, 210 F.3d at 1103 (citing *Celotex*, 477 U.S. at 322). Conversely, if the
24 nonmoving party "produces enough evidence to create a genuine issue of material fact, the
25 nonmoving party defeats the motion." *Id.*

26 A dispute is genuine "if the evidence is such that a reasonable jury could return a verdict"
27 for either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it
28 could affect the outcome of the suit under the governing law. *Id.* at 248-49. To determine

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whether there exists a genuine dispute as to any material fact, a court must view the evidence in the light most favorable to the non-moving party, drawing all justifable inferences in that party's favor. *Id*. at 255. A principal purpose of summary judgment "is to isolate and dispose of factually unsupported claims." *Celotex*, 477 U.S. at 323-24.

In resolving a summary judgment motion, it is not the Court's task "to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quotations omitted). Rather, it is entitled to rely on the nonmoving party to "identify with reasonable particularity the evidence that precludes summary judgment." *Id*.; *see also* Fed. R. Civ. P. 56(c)(3) ("The court need consider only the cited materials, but it may consider other materials in the record.").

II. THE RE-MAT PROGRAM IS NOT COMPLIANT WITH PURPA

Despite the complex regulatory and factual background here, the key legal issues turned out to be straightforward, and the scope of the parties' actual dispute quite narrow. As an initial matter, the Court concludes that the Re-MAT Program is not PURPA-compliant in at least two independent ways. Defendants implicitly recognize this non-compliance in the heavy emphasis they place on the Standard Contract Program.

One area of Re-MAT's non-compliance is the program cap. It is undisputed that the CPUC imposed a 750 MW statewide cap for the program overall, which is further subdivided into a 5 MW cap for PG&E for each category of QF in each Re-MAT program period. *See* Findings of Fact and Conclusions of Law ("FFCL"), *supra*, ¶¶ 14-17. At the same time, it is also undisputed that PURPA and the implementing FERC regulations contain a "must-take obligation" -- a mandatory purchase obligation on the part of utilities to buy "any energy and capacity which is made available from a qualifying facility" -- which remains in place for facilities like the Lodi facility. *See* p. 2, *supra*; *see also* 16 U.S.C. § 824a-3(a), 18 C.F.R. § 292.303(a)(1), and Trial Tr. at 130:14-131:7. The plain meaning of this requirement is that utilities must buy all of the energy and capacity offered by QFs. It does not require significant legal analysis to conclude that CPUC's imposition of caps in the Re-MAT program violates the must-take obligation.

1 The other area of non-compliance involves pricing. Here, too, the Court finds that the
2 issue is straightforward. Prices generated by the Re-MAT program's reverse auction procedure do
3 not satisfy the definition of "avoided costs" in FERC's regulations. Under 18 C.F.R.
4 § 292.101(b)(6), "avoided costs" means "the incremental costs to an electric utility of electric
5 energy or capacity or both which, but for the purchase from the qualifying facility or qualifying
6 facilities, such utility would generate itself or purchase from another source." PURPA itself
7 requires that in prescribing rules for utilities to purchase electric energy from a qualifying facility,
8 the rates may not "exceed[] the incremental cost to the electric utility of alternative electric
9 energy." 16 U.S.C. § 824a-3(b). The "incremental cost of alternative electric energy" is in turn
10 defined as "the cost to the electric utility of the electric energy which, but for the purchase from [a
11 QF], such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d).
12 In light of these definitions, it would make sense to look to a spot market price or similar
13 indicator for electricity. It makes much less sense to use a complex auction procedure burdened
14 with arbitrary rules, such as a randomly selected two-month time period (as opposed to any other)
15 and price adjustments applied in $4 increments -- a method that even the CPUC witness
16 acknowledged was without a reasoned basis. *See* FFCL ¶¶ 5-10. The reverse auction procedure
17 strays too far from basing prices on a utility's but-for cost, which the statute and regulations
18 require.
19
20 **III. THE STANDARD CONTRACT DOES NOT EXCUSE RE-MAT NON-COMPLIANCE**
21 Because Winding Creek has shown the Re-MAT program's non-compliance on these two
22 requirements, the burden shifts to defendants to demonstrate why summary judgment should not
23 be entered for Winding Creek. They do not meet their burden.
24 As defendants acknowledge, only two programs are at issue in this case: "The CPUC has
25 developed numerous programs that are compliant with [PURPA], but have identified only two of
26 these programs for which WCS can qualify: the Renewable Market Adjusting Tariff (Re-MAT)
27 program; and the Standard Contract for QFs 20 MW or Less." Dkt. No. 156 ¶ 5 (citing Lee
28 Unretained Expert Report, ¶¶ 55-59). Defendants' primary defense in this case is that the

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Standard Contract satisfies PURPA, and so the CPUC is free to have additional programs that are not PURPA-compliant, including a non-compliant Re-MAT Program. Dkt. No. 90. That point makes some analytical sense, and for summary judgment purposes the Court accepts it as true. But it does not save defendants because they have not shown that PURPA and its implementing FERC regulations are fully satisfied through the Standard Contract in and of itself, or even in combination with Re-MAT.

Here is why. The text of 18 C.F.R. § 292.304(d)(2) clearly states that, "at the option of the qualifying facility exercised prior to the beginning of the term," the QF may sell energy or capacity at a rate determined by either "(i) [t]he avoided costs calculated at the time of delivery; or (ii) [t]he avoided costs calculated at the time the obligation is incurred." Winding Creek agrees that the Standard Contract provides a rate based on an "avoided cost." *See* Dkt. No. 153 ¶ 35 ("The rate contained in the Standard Contract is an 'avoided cost' rate, which is defined as a cost that the utility would otherwise incur if it had to buy power from a non-QF source."). But the Standard Contract does not -- and cannot -- offer both of the pricing options that PURPA gives to QFs.

The evidence against the CPUC emerges directly from the defendants' own trial testimony and post-trial submissions. At trial, Michael Colvin, a CPUC employee, expressly testified that the Standard Contract complies with both 18 C.F.R. § 292.304(d)(2)(i) and (d)(2)(ii). Trial Tr. at 119:21-121:15; *see also* Dkt. No. 155 at 6. This testimony effectively acknowledged that the Standard Contract does not offer the legally required price option choice to QFs. *See* Trial Tr. at 121:10-15 (Q: "So in your mind, in your view, there is no meaningful difference between (d)(2)(i) and (d)(2)(ii) in the way that the price paid to the QF would be calculated, is that right?" A: "Correct. For purposes of this contract.").

In post-trial briefing, defendants tried to escape from this testimony by declaring Colvin to be "in error," and stating that "[t]he CPUC here concedes that the Standard Contract for 20 MW or Less is a contract under 18 C.F.R. § 292.304(d)(2)(ii), but is not a contract under 18 C.F.R. § 292.304(d)(2)(i)." Dkt. No. 155 at 6. This effort to bury Colvin's testimony is wholly unpersuasive. As an initial matter, defendants championed Colvin as an expert on contract pricing

1 for QFs, and relied heavily on his statements before his testimony in court. *See*, *e.g.*, Dkt. No.
2 134. After taking evidence about Colvin's long experience at the CPUC, and hearing his
3 testimony on the stand, the Court has no doubt that he was a knowledgeable and competent
4 witness who fully understood the questions posed to him and the answers he gave at trial. The
5 Court also finds his testimony was credible. Defendants' about-face on Colvin as a witness and
6 his testimony is not well-taken.

7 In addition, defendants' post-trial attacks on Colvin are all in the form of statements by
8 lawyers and not based on evidence before the Court. A lawyer's argument does not trump a fact
9 witness's testimony at trial. That is all the more true here because other facts undermine
10 defendants' contentions. Under 18 C.F.R. § 292.304(d)(2), there are two pricing options that must
11 be provided, and defendants have not identified how those two options are on offer through one or
12 more programs that are available to Winding Creek. Defendants acknowledge, as they must, that
13 "a single formula or pricing mechanism does not comply with both 18 C.F.R. § 292.304(d)(2)(i)
14 and (d)(2)(ii) under PURPA." Dkt. No. 159 at 2. And yet they go on to say that both Re-MAT
15 and the Standard Contract "satisfy 18 C.F.R. § 292.304(d)(2)(ii)." *Id.* They do not identify any
16 program that even arguably satisfies 18 C.F.R. § 292.304(d)(2)(i). This violates PURPA and
17 FERC's implementing regulations. *See Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 208 F.
18 Supp. 3d 390, 398 (D. Mass. 2016) ("The MDPU rule, by providing only the spot market rate,
19 eliminates the QF's ability to choose the latter pricing option [*i.e.*, 'calculated at the time the
20 obligation is incurred']. As such, the MDPU rule fails to properly implement FERC's regulations,
21 as mandated by PURPA section 210(f)(1). 16 U.S.C. § 824a-3(f)(1).").

22 Defendants make several post-trial arguments about why the programs available to
23 Winding Creek still satisfy PURPA. None of them are persuasive. Defendants suggest that they
24 need not comply with FERC regulations at all because "PURPA itself does not mandate the
25 requirements under 18 C.F.R. § 292.304(d)(2)(i) and (ii)." Dkt. No. 155 at 6. In a similar vein,
26 they repeatedly invoke the "broad authority and wide discretion" that should be afforded to the
27 CPUC. *See*, *e.g.*, *id.* at 1. But as the *Allco* court noted, whatever latitude the state agency is to be
28 given "to implement FERC's PURPA rules does not justify an implementation that plainly

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1 conflicts with those rules." 208 F. Supp. 3d at 399. Our circuit has also underscored this
2 uncontroversial principle in a case that defendants repeatedly cite. In *Independent Energy*
3 *Producers Association v. California Public Utilities Commission*, 36 F.3d 848 (9th Cir. 1994), the
4 court carefully examined FERC's regulations and concluded that a CPUC program is preempted
5 "under federal law" citing to a FERC regulation. *See* 36 F.3d at 859 (concluding that CPUC
6 program is "also preempted under federal law. *See* 18 C.F.R. § 292.303(c)"). Even the snippet
7 defendants quote from a Supreme Court case states that a State commission can comply with
8 PURPA "by issuing regulations, by resolving disputes on a case-by-case basis, or by taking any
9 other action *reasonably designed to give effect to FERC's rules*." *FERC v. Mississippi*, 456 U.S.
10 742, 751 (1982) (emphasis added; quoted by defendants at Dkt. No. 155 at 1). FERC's
11 regulations undeniably carry the force of law, and defendants are not free to ignore them just
12 because the regulatory requirements do not appear in the text of PURPA itself.

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13 Defendants also make much of two FERC decisions that addressed Winding Creek's
14 challenges to the Re-MAT program. *See*, *e.g.*, Dkt. No. 155 at 7 (citing *Winding Creek Solar*
15 *LLC*, 151 FERC ¶ 61,103, 2015 WL 2151303 (May 8, 2015), and *Winding Creek Solar LLC*, 153
16 FERC ¶ 61,027, 2015 WL 6083932 (Oct. 15, 2015)). These decisions do not speak to the salient
17 issues here. The May 2015 "Notice of Intent Not to Act and Declaratory Order" simply states that
18 the Standard Contract provides a "long-term PURPA contract at an avoided cost rate." 2015 WL
19 2151303, at *2. And the October 15, 2015 "Order Denying Request for Reconsideration" states
20 that FERC sees no reason to change its prior decision that "the Re-MAT program is consistent
21 with PURPA, because it is an alternative to a primary PURPA program, the Standard Contract for
22 QFs 20 MW or Under, which is consistent with PURPA." 2015 WL 6083932, at *2. Neither
23 order even mentions, let alone meaningfully discusses, the two pricing options that are required
24 under 18 C.F.R. § 292.304(d)(2)(i) and (ii), or how the Standard Contract, the Re-MAT program,
25 or some combination of the two, satisfies those requirements. And because the FERC decisions
26 are consequently not germane, the Court finds that it need not reach questions of the level of
27 deference it must afford to these decisions.
28

Rather than attempting to show how the Standard Contract (by itself or with the Re-MAT program) might satisfy the price option requirements for QFs, defendants actually put both programs -- the only programs available to Winding Creek -- in the same pricing category, and then insist that the CPUC need not satisfy the regulations at all. This is a misguided approach and the Court rejects it. As a consequence, defendants' argument that it does not matter that the Re-MAT program is not PURPA-complaint because the Standard Contract already does all that is required under PURPA must also be rejected.

Returning to the cap issue, there is no dispute that participation in the Re-MAT program is capped. Participation in the Standard Contract program is not capped. But because the Standard Contract program does not by itself fully satisfy the pricing requirements under PURPA, the absence of caps in the Standard Contract program does not give the CPUC leeway to violate PURPA with a Re-MAT cap. Put differently, even if the Standard Contract program and the Re-MAT program in combination provided the two different pricing options under 18 C.F.R. § 292.304(d)(2)(i) or (d)(2)(ii), that would not be enough because of the Re-MAT program's caps. Winding Creek does not, as the law mandates, have access to an uncapped program offering, at its election, either a rate under 18 C.F.R. § 292.304(d)(2)(i) or (d)(2)(ii). Consequently, defendants have not carried their burden against summary judgment for Winding Creek.[3]

IV. STANDING AND ADMINISTRATIVE EXHAUSTION

Defendants have again raised Article III standing and administrative exhaustion arguments, which were previously denied and are denied again here. Defendants say that "WCS could have accepted an offer of $77.23/MWh on March 1, 2014, and it declined to do so," and argue on that basis that "self-inflicted harm is not an injury for constitutional standing purposes." Dkt. No. 155

[3] Defendants' motion to reopen the summary judgment proceedings is denied. Dkt. No. 131. The request is based on "newly-understood facts that (1) plaintiff Winding Creek Solar LLC (WCS) will not face a cap on PG&E's Re-MAT program for at least sixteen months, and (2) the Re-MAT program's performance demonstrates that solar developers will accept Re-MAT contracts at lower avoided cost rates as their costs have fallen." *Id.* at 1. These arguments have no bearing on the issues that drive the Court's resolution of Winding Creek's summary judgment motion. Winding Creek has shown that it is being denied an option to sell energy to PG&E on terms required by federal law. That other solar developers have opted not to complain about the same options has no bearing on Winding Creek's correctness in doing so.

1 at 21-22. This is nothing more than an ill-taken request for reconsideration of the Court's prior
2 standing decision. The Court has already found that Winding Creek has Article III standing for
3 this litigation. *See* Dkt. No. 75 at 11-12 (finding sufficient plaintiff's allegations that its lost
4 "opportunity to enter into a contract with [PG&E] on terms required by federal law" is its injury in
5 fact, as well as the allegation that the "current impermissible price offered . . . 'is the only
6 remaining barrier to plaintiff's ability to obtain the financing needed to construct the Lodi
7 facility"). Defendants make no effort to establish a proper basis for reconsideration of this ruling,
8 *see* Civil L.R. 7-9, and the Court declines to do so.

9 Defendants also raise an administrative exhaustion argument against Winding Creek's
10 "attack" on the Standard Contract. Dkt. No. 159 at 5. In general, PURPA provides qualifying
11 facilities with the right to file suit in the United States district courts if State agencies like the
12 CPUC fail to properly implement FERC's rules. 16 U.S.C. § 824a-3(h)(2)(B). But this right to
13 file suit arises only after the "electric utility, qualifying cogenerator or qualifying small power
14 producer" has first "petition[ed] the Commission [*i.e.*, FERC] to enforce the requirements of
15 subsection (f)" and FERC has not initiated an enforcement action itself within 60 days of the
16 petition. *Id.* Defendants believe that "WCS's failure to challenge the validity of the CPUC's
17 primary PURPA program pursuant to 18 C.F.R. § 292.301 raises a new failure of WCS to exhaust
18 its administrative remedies." Dkt. No. 159 at 5.

19 This is unavailing. The Standard Contract is not a program Winding Creek affirmatively
20 challenged in the first instance. Rather, it became an issue in the case -- and plaintiff raised a
21 challenge to it -- only because defendants put the program forward in opposition to Winding
22 Creek's summary judgment motion. There is no administrative exhaustion bar here.

23 **V. RELIEF**

24 Consequently, on the record before the Court, summary judgment is appropriate for
25 Winding Creek. The question of relief is now ripe. Winding Creek asks the Court to find that it is
26 entitled to a contract with PG&E under the Re-MAT program at the initial offering price of
27 $89.23/MWh. *See* Dkt. No. 154 at 16 (requesting that the Court order "the CPUC to award
28 Winding Creek with a contract for $89.23 per MWh").

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That goes too far. There is a difference between an implementation claim and an as-applied challenge. *See Solutions for Utilities, Inc v. Cal. Pub. Util. Comm'n*, No. CV 11-04975 SJO (JCGx), 2016 WL 7613906, at *15 (C.D. Cal. Dec. 28, 2016) ("An implementation claim is a claim that a state agency has failed to implement FERC's PURPA regulations or has implemented them in a way that is inconsistent with FERC's regulations. Such claims are brought in federal court . . . . Meanwhile, an as-applied claim challenges the application of a state agency's rules to an individual petitioner and is reserved to the state courts.") (quotations omitted); *see also Allco*, 208 F. Supp. 3d at 397 ("Allco's remedy for the MDPU's allegedly improper implementation of the FERC regulations is an implementation claim against the MDPU and, once the FERC regulations are properly implemented by the state, an as-applied claim against the utility to enforce the state implementation.").

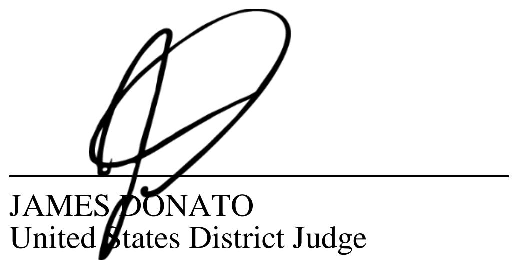
In this case, while an implementation challenge was properly brought and is now upheld, the request for a specific contract at a specific price is an as-applied challenge that does not belong in this forum. The Court grants only the declaratory and injunctive relief requested by plaintiff (Dkt. No. 61 at 24, Prayer for Relief, subsections (a)-(d)), and goes no further.

CONCLUSION

Summary judgment is granted for plaintiff and against defendants.

IT IS SO ORDERED.

Dated: December 6, 2017



JAMES DONATO
United States District Judge