Case No.

UNITED STATES SUPREME COURT
OCTOBER 2019 TERM

MICHAEL BOYD and CALIFORNIANS FOR RENEWABLE ENERGY, INC.

Plaintiffs-Appellants-Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees-Respondents.

United States Court of Appeal for the Ninth Circuit, Case No. 17-55297
United States District Court, C.D.Cal., Case No. CV 11-04975 SJO (JCGx)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR TH NINTH CIRCUIT

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QUESTIONS PRESENTED

1. There is an important issue of law as to the scope of the remedies available for violations of the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* which amended the Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., which were each adopted by Congress under the Commerce Clause of the United States Constitution, including prevailing party attorney fees, and/or whether there are any such remedies beyond declaratory and injunctive relief for such violations; and/or the need to synthesize conflicting circuit authority.

2. There is an important issue of law as to the definition of "comprehensive remedies" under federal statutory schemes, in the context of whether 42 U.S.C. §1983 remedies are available for violations under federal statutes – *e.g.* in connection with PURPA – and the implied Congressional intent therein to foreclose 42 U.S.C. §1983 remedies for such statutory violations; and/or the need to synthesize conflicting circuit authority.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held corporation involved in this case.

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The Opinion of the Ninth Circuit ["Second Reported Panel Opinion"] [April 24, 2019] [App.A.1-37] is reported at 922 F.3d. 929 (9th Cir. 2019). The Order of the Ninth Circuit Denying Cross-Petitions for Rehearing and Rehearing En Banc [September 13, 2019] is reported at ___ F.3d ___. [App.A.38-39]. The following decisions and judgments are not reported: Order of District Court Regarding Motions to Dismiss [December 2, 2011] [App.A.40-54]; Amended Order of District Court Regarding Motions to Dismiss [December 13, 2011] [App.A.55-69]; Order of District Court Granting Reconsideration in Part [February 13, 2012] [App.A.70-73]; [Second] Order of District Court Regarding Motions to Dismiss [February 13, 2012] [App.A.73a-73o]; Order of District Court Regarding Motions to Dismiss [March 14, 2012] [App.A.74-82]; Memorandum Decision of the Ninth Circuit [March 6, 2015] [App.A.83-87]; Order of the Ninth Circuit Denying Petition for Rehearing [April 30, 2015] [App.A.88-89]; Order of District Court Denying Leave to Amend [March 31, 2016] [App.A.90-98]; Memorandum Decision of District Court Granting Summary Judgment [December 28, 2016] [App.A.99-118]; Order of District Court Denying Motion to Modify Judgment [February 15, 2017] [App.A.119].

JURISDICTION

Ninth Circuit denied Petition for Rehearing and Rehearing En Banc on September 13, 2019. [App.A.38-39]. The Petition for Writ of Certiorari is being

timely filed on December 12, 2019. Subject matter jurisdiction of the District Court was invoked under 28 U.S.C. §1343. Appellants alleged violations of the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* which amended the Federal Power Act [“FPA”], 16 U.S.C. §791, *et seq*., which were each adopted by Congress under the Commerce Clause of the United States Constitution, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution, seeking remedies thereunder [E.R.[1]859]; and sought remedies therefor under and 42 U.S.C. §1983 [E.R.858].

STATEMENT OF THE CASE

Plaintiffs-Appellants-Petitioners are Michael E. Boyd and CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation [“CARE”], also a qualified facility under PURPA [“QF”]. Petitioner Boyd is a member of CARE. [E.R.054]. References herein to CARE include Petitioner Boyd and Robert Sarvey, officers of CARE. [E.R.054,172]. Robert Sarvey was a co-Plaintiff and co-Appellant in prior proceedings, but is not a Petitioner herein. Solutions for Utilities, Inc. [“SFUI”] was a co-Plaintiff in the initial prior district court proceedings, but has not been a party to any Ninth Circuit proceedings or remand proceedings in the district court, and is not a Petitioner herein. Petitioners are hereinafter collectively referred

[1] “E.R.” refers to the Excerpts of Record in the Ninth Circuit.

to as "Petitioners" or in proceedings below, as CARE Plaintiffs or "Plaintiff CARE".

Defendants-Appellees-Respondents are: Public Utilities Commission of California ["CPUC"] and its member-commissioners whose names have changed over the course of these proceedings. These Respondents are hereinafter collectively referred to as "Respondents" or in proceedings below, as "CPUC Defendants" or "Defendant CPUC".

On December 2, 2011, a CPUC Motion to Dismiss was granted in part and denied in part, as follows [in relevant part][2] [App.A.40-54]:

1. CARE Plaintiffs' Fourth Claim under §1983, as related to First Amendment retaliation, was dismissed as follows:

a. The claim that CPUC had unsuccessfully sought to have CARE Plaintiffs barred from appearing before FERC, in retaliation for the content of prior filings, was dismissed without leave to amend on grounds that CPUC has an absolute legal right to seek relief from what it views as vexatious litigation. [E.R.38].

b. The claim that CPUC had denied or stinted on CARE Plaintiffs' intervenor fee claims, in retaliation for the content of prior filings, was dismissed with leave to amend on grounds that greater specificity was required. [E.R.38].

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[2] The initial order [E.R.76] was twice amended, on December 13, 2011 [E.R.45] [App.A.55-69] and February 13, 2013 [E.R75] [App.A.70-73].

2. SFUI's Third [§1983 remedies for PURPA violations and unconstitutional takings] Claim [substantially similar to CARE Plaintiffs' Third Claim, other than the retaliation allegations] was dismissed, without leave to amend, on grounds that (a) PURPA provides a complex remedial scheme which precludes need for §1983 remedies and (b) the takings allegations fail to state a claim for relief. [E.R.37]. The District Court did not address the same issues in the Fourth Claim [CARE], as being mooted by its standing order re CARE Plaintiffs. [E.R.38].

Following the filing of the Second Amended Complaint on January 9, 2012 [E.R.453], Respondents filed new Motion to Dismiss on January 23, 2012 [E.R.229].

On March 14, 2012, the CPUC Motion to Dismiss was granted in part and denied in part, as follows [in relevant part] [App.A.74-82]: CARE Plaintiffs' Fourth Claim under §1983, as related to First Amendment retaliation, was dismissed without leave to amend, on grounds that the District Court was without jurisdiction under the Johnson Act [28 U.S.C. §1342] to decide the claim that CPUC had denied CARE Plaintiffs' intervenor fee claims, in retaliation for the content of prior filings, because the costs of the fees are included in consumer rates for power. [E.R.28].

The aforementioned actions of CPUC Defendants have occurred by virtue of the actions of its commissioners. [E.R.868-872]. The actions of CPUC Defendants harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization

of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities. [E.R.871-872]. The equitable relief sought under both PURPA and 42 U.S.C. §1983 was tailored to reflect sovereign immunity of CPUC under §1983 claims. [FAC P.76.1] [E.R.881].

Petitioners' Appellants' claims were dismissed on successive motions under Fed.R.Civ.P. 12(b)(1) & 12(b)(6), some of which were reinstated on appeal to the Ninth Circuit in the First Panel Opinion on March 6, 2015, with dismissal of all §1983 claims affirmed [App.A.83-87], followed by denial of rehearing and rehearing en banc on April 30, 2015 [App.A.88-89].

Thereafter, Appellants' Motion to File Fourth Amended Complaint [E.R.093] was granted in part and denied in part, as follows [App.A.90-98]: With no §1983 claims and only PURPA claims, wherein injunctive or declaratory relief were permitted, but equitable damages and attorney fees dismissed [E.R.001-009]. Appellants' narrower Fifth Amended Complaint ["FAC"] was then filed [E.R.170], and Appellants' remaining claims were summarily adjudicated in favor of Respondents. [E.R.027-046].

With the summary judgment order resolving the last of the claims, final judgment was entered on December 28, 2016 [E.R.052] [App.A.99-118]. Following

denial of a timely Motion to Modify Judgment on February 15, 20187 [E.R.047-049] [App.A.119], a timely Notice of Appeal was filed March 7, 2017 [E.R.050].

STATEMENT OF FACTS

A.
LEGAL HISTORY OF PURPA AND IMPLEMENTING FERC REGULATIONS AND DECISIONS

PURPA was an amendment to FPA, and by statutory definition a Small Facility means one with a "production capacity of no more than 80 megawatts ["MW"]. *See American Paper Institute, Inc. v. American Electric Power Service Corp*., 461 U.S. 402, 420 (1983). FERC has issued orders which further subdivide Small Facilities into (a) those with a production capacity of 20MW or less, *see* FERC Order No. 2006, "Standardization of Small Generator Interconnection Agreements and Procedures," Summary; and (b) those with production capacity in excess of 20MW, but no more than 80MW, *see* FERC Order No. 2003, "Standardization of Small Generator Interconnection Agreements and Procedures, Summary & P.17. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

PURPA was directed at both recalcitrant large private utilities and state regulatory authorities, as dual problems "imped[ing] the development of nontraditional generating facilities." *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982). The utilities were found to be "reluctant to purchase power" from them; and

state regulatory authorities were found to "impose[] financial burdens . . . [that] discouraged their development." *See FERC v. Mississippi*, 456 U.S. at 750-51.

To overcome the first problem, PURPA requires FERC to promulgate "rules requiring utilities to . . . purchase electricity from, qualifying cogeneration and Small Facilities [citation omitted] [and] requires each state regulatory authority . . . to implement FERC's rules." *FERC v. Mississippi*, 456 U.S. at 751. To give the requirements teeth, PURPA authorizes FERC to seek enforcement in federal court, 16 U.S.C. §824a-3(h)(2); and failing that, "any qualifying utility may bring [such] suit" after exhausting an administrative complaint process,16 U.S.C. §824a-3(h)(2). *See FERC v. Mississippi*, 456 U.S. at 751; *Industrial Cogenerators v. FERC*, 47 F. 3d 1231, 1233-34 (D.C. Cir. 1995). As determined by the Ninth Circuit herein in an earlier appeal, CARE Plaintiffs had the requisite FERC Order to pursue this action.

That Congress intended state authorities to bear the laboring oar with compliance by regulated facilities, and to rely on that as a means of implementation, is made manifest by the fact that only unregulated utilities are subject to direct enforcement by FERC or to suit in federal court by FERC or a Small Facility. *See FERC v. Mississippi*, 456 U.S. at 751. FERC also promulgated a rule to the effect that

> "electric utilities shall purchase electricity made available by qualifying facilities, . . . and, most important . . . 'make such [physical] interconnections with any qualifying facility as may be necessary to accomplish [PURPA mandated] purchases . . . ."

American Paper Institute, Inc., 461 U.S. at 407. And to underscore the strength of the mandate, FERC rejected – and the Courts affirmed rejection of – utility contentions that they are entitled to an evidentiary hearing when they "are unwilling to make an interconnection with a qualifying facility," *see American Paper Institute, Inc.*, 461 U.S. at 407-410, noting that "[n]o qualifying small power production facility or qualifying cogeneration facility may be exempted" from any part of the provisions or the enforcement thereof, *see American Paper Institute, Inc.*, 461 U.S. at 408, and that "complex procedures" under PURPA like those which apply under the FPA "'would, in most circumstances, significantly frustrate'" the purpose of maximizing small facility power production, *see American Paper Institute, Inc.*, 461 U.S. at 410.

PURPA provided a protection for the utilities by mandating that the cost which may be imposed on the utilities by these "must take" rules would not exceed the utility's "full avoided cost" – or "'incremental cost of alternative electric energy'" – *i.e.* "the cost to the utility of producing the energy itself or purchasing it from an alternative source,"*see American Paper Institute, Inc.*, 461 U.S. at 405-406, in light of the recurring energy and fuel shortages which Congress had found as part of its basis for adoption of PURPA, *see FERC v. Mississippi*, 456 U.S. at 756-57.

On the other hand, PURPA authorized FERC to adopt a purchase price for Small Facilities at up to full avoided cost, with consideration of minimizing costs to consumers and of the public interest, and forbidding discrimination against Small

Facilities. *See American Paper Institute, Inc.*, 461 U.S. at 406-407. FERC found that long-term lower consumer costs and public interests are better served by maximizing energy production from Small Facilities rather than gleaning immediate savings from current authorized purchase prices, and set the required purchase price at full avoided cost, rejecting utility proposals that it be set at a fixed percentage thereof – *i.e.* some lesser amount. *See American Paper Institute, Inc.*, 461 U.S. at 407, 415-18.

Based on the above, and after several efforts to dissuade them, FERC "issued an order adhering to both the full-avoided-cost rule and the interconnection rule." [Citation omitted]." *See American Paper Institute, Inc.*, 461 U.S. at 410. Both were affirmed by the Supreme Court, reasoning that FERC possessed authority to require, for Small Facilities, the maximum rate permitted by law, *see id.*, 461 U.S. at 414, 417 – *i.e.* full avoided cost; and "requir[e] utilities to make physical connections with qualifying facilities in order to consummate purchases . . . authorized by PURPA," *see id.*, 461 U.S. at 418, without evidentiary hearings thereon, whose cost and burdens "would be 'imput[ing] to Congress a purpose to paralyze with one hand what it sought to promote with the other.' [Citations omitted], *see id.*, 461 U.S. at 421."

Thus, FERC adopted, over industry objections, a cost-based process which is revenue neutral to the utilities, and prevents utilities from obtaining short-term retail sales savings for consumers by imposing the cost on Small Facilities which reduces

their economic feasibility and thereby undermines the objectives of PURPA to sustain and increase the number, and thereby the gross capacity, of Small Facilities.

The Supreme Court acknowledged that a cost basis analysis perhaps moves away from market concepts inherent in PURPA / FERC formulae – *i.e.* reduce costs by increasing supply – and towards "public utilities rate-setting that Congress wanted to avoid." *See American Paper Institute, Inc.*, 461 U.S. at 411. California has sought to move in that direction. *See e.g. SCE v. Lynch*, 307 F.3d 794, 801 (9th Cir. 2002). But the Supreme Court nevertheless upheld the entire FERC approved PURPA implementation with full avoided cost and mandated simplified interconnectivity. *See American Paper Institute, Inc.*, 461 U.S. at 413-23. The Court did note that waivers can be sought from FERC and a Small Facility can voluntarily agree to a lesser price. *See American Paper Institute, Inc.*, 461 U.S. at 416.

Commencing in 2005, the Energy Policy Act of 2005 ["EPAA"] allows FERC to remove the avoided costs obligation on an individual utility with QFs that have "nondiscriminatory access to" the relevant energy markets and have less than 20mw output. *See* 16 U.S.C.§ 824a-3(m) (2006); 18 C.F.R §292.309(g) (2010). Pursuant to the EPAA, FERC has terminated CPUC's avoided costs and must purchase obligations with respect to QFs with a capacity greater than 20MW. [18 C.F.R. §292.309(g) (2010)] [E.R.601].

On October 20, 2006, FERC issued New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities (Order 688), amending regulations governing small power production and cogeneration in response to Section 1253 of EPAct 2005 and Section 210(m), establishing a "rebuttable presumption that the requirement that an electric utility enter into new contracts or obligations to purchase from a QF remains in effect, in all markets, for QFs sized 20 MW net capacity or smaller" which could be rebutted by demonstration by the utility "with regard to each small QF that it, in fact, has nondiscriminatory access to the market." [18 C.F.R §292 (2006)]. [E.R.601].

In CPUC Decision D.07-09-040 [pp. 2-4] the CPUC adopted the following capacity payment program that specifically excluded the capital cost of facilities that produce energy subjected to CPUC's SRAC pricing scheme. First, CPUC adopted The Market Index Formula (MIF), which is an updated shortrun avoided cost ["SRAC"] formula for pricing SRAC energy. The MIF is based on CPUC Decision D.01-03-067 Modified Transition Formula but contains both a market-based heat rate component, and an administratively determined heat rate component to calculate the incremental energy rate (IER). Second, CPUC approved Two Standard Contract Options for Expiring or Expired QF Contracts and New QF's: (a) One- to Five-Year As-Available Power Contract: SRAC Energy Payments: pursuant to the MIF; and Payments for As-Available Capacity: Based on Combustion Turbine not renewable

energy [solar] and market energy prices; (b) Longer Term (1-10 Years) Firm, Unit Contingent Contracts: Energy Payments: MIF; and Capacity Payment: based on the market price referent (MPR) less energy-related capital costs. [E.R.601-602].

On October 10, 2010 [since CARE was not notified in advance] purportedly after more than a year and a half of intensive negotiations, three investor-owned utilities, four representatives of Cogeneration qualifying facilities (QFs), and two purported ratepayer advocacy groups developed [without notice to participate to other QF stakeholders like CARE], their purported "Qualifying Facility and Combined Heat and Power Program Settlement Agreement". CPUC proceedings A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025, and R.99-11-022 where consolidated for purposes of the purported settlement. [E.R.605-606].

On August 16, 2010, the CPUC filed with FERC a request for clarification of the FERC Declaratory Order, or, in the alternative, a request for rehearing. [E.R.606-609]. In 133 FERC ¶ 61,059 (Issued October 21, 2010), *CPUC v. CA Utilities* under FERC Docket Nos. EL10-64-001 and EL10-66-001 [E.R.628-644] FERC found that CPUC's MIF and MPR pricing indexed to the variable cost of a CCGT did not comply with PURPA's requirements for a single source renewable type QF based on a "multi-tiered avoided cost rate structure." [E.R.609-610]. *Order Granting*

Clarification and Dismissing Rehearing[3]. [E.R.629][E.R.606-609]: The following was stated re avoided cost and multi-tiered pricing:

> [P.27]: "In *SoCal Edison,* [FERC] stated that, regardless of how the state determines avoided cost, it must in its process reflect prices available from 'all sources *able to sell to the utility* whose avoided cost is being determined. [Fn. excluded].' Thus, under *SoCal Edison*, if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a **natural gas-fired unit**, for example, would **not** be a source 'able to sell' to that utility for the specified renewable resources segment of the utility's energy needs, and thus **would not** be relevant to determining avoided costs for that segment of the utility energy needs. . . . .[4]" [Emphasis added.]

[E.R.641][E.R.606].

> [P.22]: "Pursuant to section 210(a) of PURPA, [FERC] prescribed rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Section 210(b) of PURPA provides that such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of 'the incremental cost to the electric utility of alternative electric energy.' Section 210(d) of PURPA, in turn, defines 'incremental cost of alternative electric energy' as 'the cost to the electric utility of the electric energy which, but for the purchase from

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[3] 133 FERC ¶61,059 (Issued October 21, 2010) , CPUC v. CA Utilities at FERC, Docket No. EL10-64-001 and EL10-66-001.

[4] State may appropriately recognize procurement segmentation by making separate avoided cost calculations. *See Signal Shasta,* 41 FERC ¶61,120 at 61,294 and 61,296, n.4 (CPUC implementation of PURPA with four standard offer contracts, containing different avoided costs for different types of QF sales, not inconsistent with PURPA or FERC regulations.)

[the QF], such utility would generate or purchase from another source.'[5]"

[P.23]: "The Commission implemented this so-called mandatory purchase obligation set forth in PURPA in §292.303 of its regulations, which provides that '[e]ach electric utility shall purchase, in accordance with §292.304, . . . any energy and capacity which is made available from a qualifying facility. . . . [6] §292.304, in turn, requires that the rates for such purchases shall: (1) be just and reasonable to the electric consumer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities.[7] The regulation further provides that nothing in the regulation requires any electric utility to pay more than the 'avoided costs for purchases.'[8] 'Avoided costs' is defined as 'the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility…, such utility would generate itself or purchase from another source."[9] The factors to be considered in determining avoided costs include: (1) the utility's system cost data; (2) the terms of any contract including the duration of the obligation; (3) the availability of capacity or energy from a QF during the system daily and seasonal peak periods; (4) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and (5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.[10] Avoided cost rates may also

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[5] 16 U.S.C. §824a-3 (2006); see *Connecticut Light and Power Company*, 70 FERC ¶ 61,012, at 61,023, 61,028, *reconsideration denied*, 71 FERC ¶ 61,035, at 61,151 (1995), *appeal dismissed*, 117 F.3d 1485 (D.C. Cir. 1997).

[6] 18 C.F.R. §292.303(a) (2010).

[7] 18 C.F.R. §292.304(a)(1) (2010).

[8] 18 C.F.R. §292.304(a)(2) (2010); *see Connecticut*, 70 FERC at 61,023-24, 61,028-030, 71 FERC at 61,151-53.

[9] 18 C.F.R. §292.101(b)(6) (2010).

[10] 18 C.F.R. §292.304(e) (2010).

"differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies."[11]

[E.R.638-639][E.R.606-608].

[P.29]: "As discussed above, permitting states to set a utility's avoided costs based on all sources able to sell to that utility means that where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement."

[P.30]: "We recognize that our decision herein could be read as inconsistent with the instances in *SoCal Edison* where the Commission used 'all sources' but did not include the phrase 'able to sell to the utility.' To the extent that our decision in this order (finding that the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations) can be read as inconsistent with the discussion in *SoCal Edison*, we are overruling *SoCal Edison's* broader language on this issue."

[P.31]: "Turning to the second issue raised in the CPUC's request for clarification, the CPUC states that, for CHP systems located in transmission-constrained areas, a permissible component of avoided cost consideration should be a 10 percent price "adder" (or location "bonus") to reflect the avoided costs of the **construction of distribution and transmission upgrades** that would otherwise be needed.[12] The Commission has previously found that an avoided cost rate may not include a "bonus" or "adder" above the calculated full avoided cost of the purchasing utility, to provide additional compensation for, for

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[11] 18 C.F.R. §292.304(c)(3)(ii) (2010).

[12] CPUC uses term "adder" in its rehearing (CPUC Request for Clarification or Rehearing at 3), but AB1613 Decision refers to it as a 10 percent location "bonus." AB 1613 Decision, 2009 Cal. PUC Lexis 790 at *50.

> example, environmental externalities above avoided costs.[13] But, if the environmental costs "**are real costs that would be incurred by utilities**," then they "may be accounted for in a determination of avoided cost rates."[14] Accordingly, if the CPUC bases the avoided cost "adder" or "bonus" on an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to avoid, such an "adder" or "bonus" would constitute an actual avoided cost determination and would be consistent with PURPA and our regulations.[15] Just as we are not addressing whether the CPUC's offer price under its AB 1613 program is consistent with the avoided cost rate treatment of PURPA, we do not address here whether the specific amount of 10 percent, as opposed to a different amount, is justified by avoided costs. We also note that, although a state may not include a bonus or an adder in the avoided cost rate unless it reflects actual costs avoided, a state may separately provide additional compensation for environmental externalities, outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs).[16]

[E.R.642-643][E.R.608-609].

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[13] *See SoCal Edison*, 71 FERC ¶61,269 at 62,080.

[14] *Id*.

[15] While CPUC has referred to this calculation as an "adder" or "bonus," it can, in fact, be a "real cost[] that would be incurred by [a] utilit[y]" and thus a cost appropriately considered in the calculation of an avoided cost applicable to certain QFs. *SoCal Edison*, 71 FERC ¶ 61,269 at 62,080. *Compare* 18 C.F.R. §292.304(e)(4) (2010) (providing for consideration of line losses avoided by purchases from QF).

[16] *See American Ref-Fuel*, 105 FERC ¶ 61,004 at P.23 (compensation for environmental externalities through RECs is outside PURPA, not part of avoided cost calculation; CPUC may grant subsidies, tax credits to facilities on environmental or other policy grounds, *i.e.* RECs are separate commodities from capacity and energy produced by QF's, not compensation for them. *See CGE Fulton, LLC*, 70 FERC ¶ 61,290, *reconsideration denied*, 71 FERC ¶ 61,232 (1995); *see also SoCal Edison*, 71 FERC ¶ 61,269 at 62,080 ("state may subsidize certain types of generation, for instance wind or other renewables, through tax credits").

In a FERC *Order Denying Rehearing*[17]*:*

> [P.7]: "The Commission found that the concept of a **multi-tiered avoided cost rate** structure can be consistent with the avoided cost rate requirements set forth in PURPA and its regulations.[18]" [Emphasis added].
>
> [P.28]: "In the Clarification Order, the Commission merely expanded on the guidance it provided in the July 15 Order, explaining that, should California choose to do so, implementation of a **multi-tiered avoided cost rate** structure can be consistent with the avoided cost rate requirements set forth in PURPA and the Commission's regulations in that such a cost structure would reflect the costs a utility would avoid.[19]" (emphasis added).

[E.R.609-610].

In FERC *Order on Petitions for Declaratory Order*[20]:

> [P.64]. "We disagree with the characterization of the CPUC'S AB 1613 Decisions as merely establishing an 'offering price' by the purchaser of power. Rather, we agree with the Joint Utilities that the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA."

[E.R.610].

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[17] 134 FERC ¶61,044 (Issued 01.20.11) CPUC, SCE, PG&E, SDG&E, Docket Nos. EL10-64-002,EL10-66-002.

[18] *Clarification Order*[10/21/10] 133 FERC ¶ 61,059 at P.26 (*citing* 16 U.S.C. §§ 824a-3(a), (b),(d) (2006) *and* 18 C.F.R. §§ 292.101(b)(6), 292.304(a) (2010)).

[19] Clarification Order, 133 FERC ¶ 61,059 at P 22-26.

[20] 132 FERC ¶61,047, (Issued July 15, 2010), California Public Utilities Comm'n, Docket No. EL10-64-000

While FERC has ruled [per above] that REC's – greenhouse gas pollution credits from alternative power producers – are purely a state matter not implicated by PURPA, mandatory bundling of them with a power supply contract, becomes another device for undercutting full avoided cost. REC's are valuable to utilities not greenhouse gas compliant, and to those who might sell to them, and their mandatory surrender by Small Facilities without further compensation manifestly dilutes the payment, whether for full avoided cost or already less.

B.
CPUC PURPA COMPLIANCE OBLIGATION

The preceding section supplies an historical background and context to what are now disputes in the implementation of a law that has been a continual work in progress for over 30 years, with capital [capacity] costs once routinely included in computation of avoided cost; but no longer, and no likelihood in the future absent intervention by this Court or some other higher authority.

Investor owned [regulated] utility [IOU] power purchase contracts require CPUC approval, such as pre-approved standard offer / pro forma contracts [E.R.633-635]. CPUC views the elements for avoided cost under FERC regulations to be discretionary which it "can consider" but need not, and is unaware of any FERC guidelines thereon. [E.R.659-660][E.R.678]. CPUC's view is that its only mandate is not to exceed avoided cost but may go below it [E.R.660] [E.R.666].

There are three types of fuel: fossil (gas), renewable (solar, wind, bio-energy, geothermal, hydro) and nuclear. [E.R.675]. The California Energy Commission [CEC] certifies renewable energy technology providers. [E.R.693]. Renewable energy plants like solar are more expensive to build, but cheaper in the cost of energy production. [E.R.759].

Although CPUC acknowledges that Investor Owned [regulated] Utilities [IOU's] are obliged to comply with PURPA [E.R.664] and to offer an avoided cost contract to QF's confirmed by the QF CHP Settlement, and that CPUC has power to compel IOU's to enter contracts [E.R.664][E.R.709], CPUC regards it as "unknown" whether it is obliged to compel IOU compliance with PURPA [E.R.664].

CPUC joins IOU's in workshops for QF personnel and others and provides input, but does not perceive its role as providing avoided cost information [E.R.691] and in fact does not do so in workshops or otherwise in regards to avoided cost. [E.R.774-776].

CPUC cannot point to a single instance or policy involving CPUC enforcement of PURPA compliance against an IOU. [E.R.693]; [E.R.716]. One CPUC pricing consideration is lower consumer retail rates [E.R.682], and considers "customer indifference" in connection with its wholesale purchase pricing decisions with the NEM / NSC, FiT and CHP programs, defined as follows: "The customer is on a cost basis not harmed by this purchase." [E.R.687-688]. Lower or below avoided cost

calculations equals cheaper consumer rates and there is a clear tension between these interests [E.R.782-783][E.R.792]; and a competitive process mean cheaper purchase rates [E.R.791-792].

CPUC has theoretical oversight authority over PURPA compliance by IOU's, [E.R.694]. Supplier can file complaint with CPUC, seek mediation, go through the CPUC Consumer Affairs Branch [now made explicit], and petition to modify where a rule or decision is at issue. [E.R.694-695].

The actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities. [E.R.871-872].

The equitable relief sought under PURPA and 42 U.S.C. §1983 was tailored to reflect sovereign immunity of CPUC under §1983 claims. [E.R.881].

C.
FACTS RE DISMISSAL OF CLAIM UNDER 42 U.S.C. §1983 TO REMEDY VIOLATIONS UNDER 16 U.S.C. §824 AND/OR UNCONSTITUTIONAL TAKINGS [FIRST AMENDED COMPLAINT]

The federal statutory rights of Plaintiffs – as set forth in FPA and PURPA, and implementing federal regulations – have been deprived; and/or Plaintiffs were denied

the right to reasonably profit from its business enterprises, thereby constituting an unlawful and unconstitutional taking without just compensation and/or due process of law, as secured by the takings and due process clauses of the United States Constitution. [E.R.872,877]. Plaintiffs also incurred legal costs in seeking remedies therefor in this and other proceedings. [E.R.880].

D.
FACTS RE DISMISSALS OF RETALIATION CLAIMS UNDER FIRST AMENDMENT [42 U.S.C. §1983] [FIRST & SECOND AMENDED COMPLAINTS]

CPUC Defendants have acted in retaliation for the rights exercised by Plaintiff CARE under the First Amendment to the United States Constitution, including but not limited to the right to freedom of speech and the right to petition the government for redress of grievances, and have acted to burden, deter and/or chill the exercise of such rights by Plaintiff CARE, by seeking to bar Plaintiff CARE from petitioning FERC and exercising free speech rights therein, and by making its fee determinations in a manner designed to implement the aforementioned purposes. [E.R.877-78].

With leave to amend, CARE Plaintiffs clarified their claims of retaliation in the denial or minimizing of intervenor attorney fees requests, allegedly based on Plaintiffs' repeated and long-standing complaints that CPUC has been failing to comply with its regulatory duties under PURPA [E.R.474-78], and animus that is inferred in part by the motion made to FERC to bar them from further filings before

FERC [E.R478].

The actions of CPUC have occurred via approvals, by acts of individually named commissioners herein, of refusal to pay attorney fees to CARE Plaintiffs because of CARE's outspoken and repeated criticism of CPUC and its failure to regulate as described herein. [E.R.474-80]. The actions of Defendants were in concert with requisite participation or causation of each of them. [E.R.474-80]. CPUC Defendants have acted in retaliation for the rights exercised by Plaintiff CARE under the First Amendment, including but not limited to the right to petition for redress of grievances, and have acted to burden, deter and/or chill the exercise of such rights by Plaintiff CARE, and by making fee determinations in a manner designed to implement the aforementioned purposes. [E.R.474-80].

E.
FERC NOTICE OF INTENT NOT TO ACT

"In issuing the notice of intent not to act in this proceeding, the Commission was not making a ruling on the merits. . . . the Commission's notice of intent not to act in this case… was merely a procedural order telling the Sweckers that the Commission at that time did not intend to go to court on their behalf, and that they had the right to go to court themselves." *Gregory R. Swecker and Beverly F. Swecker v. Midland Power Cooperative and State of Iowa*, 137 FERC ¶ 61,200, P.40 (2011).

ARGUMENT

I.
PANEL OPINIONS

The Ninth Circuit in the First Panel Opinion affirmed the district court judgments to deny claims for relief for PURPA violations under 42 U.S.C. §1983, [App.A85-87].

The Ninth Circuit in the Second Reported Panel Opinion reaffirmed the prior refusal in the First Panel Opinion to allow claims for relief for PURPA violations under 42 U.S.C. §1983, and the denial of any form of equitable damages or attorney fees under PURPA. [App.A25-28].

II.
PETITIONERS' FORMS OF PURPA REMEDIAL RELIEF SOUGHT UNDER 42 U.S.C. §1983

The elements of a 42 U.S.C. §1983 claim are: (1) Plaintiff was deprived of a right secured by the Constitution or law of the United States [First Amendment], and (2) that such deprivation was by a person acting under color of state law or authority; plus those elements of the constitutional and/or statutory provision establishing the right allegedly deprived, *see Daniels v. Williams*, 474 U.S. 327, 332-33 (1986). In this case, the acts of CPUC Defendants were indisputably under color of state law.

CPUC unsuccessfully sought a FERC Order barring them from further filings, which infers a retaliatory motive for this protected speech, *see Sanchez v. City of*

Santa Ana, 936 F.2d 1027, 1038 (9th Cir. 1991), *cert. den.* 112 S.Ct. 417 (1991), given the CARE Plaintiffs' repeated criticism of CPUC in its FERC filings.

If governmental officials penalize or burden the exercise of First Amendment protected rights to free speech or to seek redress of grievances with more than mere naked threats, or otherwise retaliate for political speech, a federal constitutional claim is stated. *See Elrod v. Burns*, 427 U.S. 347, 356-57 (1976) (political speech & association); *Sloman v. Tadlock*, 21 F.3d 1462, 1469-70 & n.10 (9th Cir. 1994) (speech); *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989) (speech & petition; litigation in courts); *Gaut v. Sunn*, 792 F.2d 874, 875-76 (9th Cir. 1986), *as modified*, 810 F.2d 923, 925 (9th Cir. 1987) (same).

Under a First Amendment claim for retaliation, Plaintiffs meets their burden by allegations that defendants were motivated in part by Plaintiff's protected activity, at which point the defendants can only avoid liability by showing that they would have acted the same way even in the absence of the protected activity. *See Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977); *Sloman*, 21 F.3d at 1469-70 & n.10 (applying *Mt. Healthy* in non-employment context); *Sorrano*, 874 F.2d at 1314-15 (same). It is not sufficient for defendants to prove that they "could" have done so, by reference to plaintiff's conduct, but must establish by competent evidence that they "would" have done so. *See Allen v. Scribner*, 812 F.2d 426, 435 (9th Cir. 1987), *amended*, 828 F.2d 1445 (9th Cir. 1987)*;*

Schwartzman v. Valenzuela, 846 F.2d 1209, 1212 (9th Cir. 1988).

Even under a vexatious litigant scheme, and assuming it is a species of law under which the government is entitled to act adversely "at will", it is nevertheless barred from doing so for a motive prohibited by the First Amendment. *See Board of County Commissioners v. Umbehr,* 518 U.S. 668, 673-74, 684-85 (1996); *Perry v. Sindermann,* 408 U.S. 593, 597 (1972). Under the "dual motives"test there is a burden shifting that requires the government to prove that it would have acted the same in the absence of the protected speech / petition. *See Mt. Healthy City School Dist. Bd. of Educ.*, 429 U.S. at 274 (balanced public interests in valid punishment of misconduct with protected speech interests; employment context); *Sloman,* 21 F.3d at 1468-69 & nn.7 & 9 (extending *Mt. Healthy* to non-employment context).

42 U.S.C. §1983 affords remedies for deprivation of "rights" under statutes as well as the Constitution, *see Maine v. Thiboutot,* 448 U.S. 1 (1980) (§1983 claim for deprivation of any federal statutory right), provided that "Congress has not foreclosed such an enforcement in the statute itself," *Groten v. State of California,* 251 F.3d 844, 848 (9th Cir. 2001) The statute invoked must unambiguously confer a "right" not just some benefit or interest, *see Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002).

> "A statute creates a right enforceable under §1983 if: (1) the statute was intended to benefit the plaintiffs; (2) the statute imposes a binding obligation on the government unit rather than merely expressing a congressional preference for a certain kind of conduct; and (3) the interest asserted by the plaintiff is not so vague or amorphous that it is

beyond the competence of the judiciary to enforce."

Groten, 251 F.3d at 849.

PURPA clearly "focuses" on small and nontraditional energy supplying facilities such as Plaintiffs, who hence are "intended beneficiar[ies]" thereof, *see Groten,* 251 F.3d at 849. PURPA undisputedly "places . . . binding obligations" on CPUC, *see FERC*, 456 U.S. at 751, meeting the second element, *see Groten,* 251 F.3d at 849. The "interest[s] asserted by Plaintiff[s are] not so vague or amorphous that [they are] beyond the competence of the judiciary to enforce" *see Groten,* 251 F.3d at 849, as these matters – avoided cost wholesale prices and actual interconnectivity – are precisely that which CPUC is obliged to enforce under PURPA and FERC implementing regulations, *see FERC*, 456 U.S. at 751; *American Paper Institute, Inc.*, 461 U.S. at 413-23.

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *See Gonzaga University*, 536 U.S. at 284. If the statute that confers the right "does not provide a private right action, an action under 42 U.S.C. §1983 is proper." *Price v. State of Hawaii,* 939 F.2d 702, 706 (9th Cir. 1991). Congress' intent to exclude other remedies like §1983, when not expressly stated, will be implied only when the statute which creates the right also provides a "comprehensive" statutory remedy. *See Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 435 U.S. 1, 19-21 (1981). Congress'

adoption of a broad Federal Tort Claims Act [FTCA] did not implicitly exclude §1983 remedies because the former lacked the damages remedies and deterrents, as well as a jury trial right. *See Carlsson v. Green*, 446 U.S. 14, 20-23 (1980).

The parties focused the discussion on whether PURPA provides "comprehensive" remedial scheme such that 42 U.S.C. §1983 is implicitly excluded by adoption of PURPA. However, the District Court's Second Amended Order sets forth what is described as an "elaborate" remedial scheme under PURPA, refers to it in passing as "comprehensive" without explanation or reference to the authority cited by Plaintiff, and based thereon rules that 42 U.S.C. §1983 provides no remedies for PURPA violations. [E.R.36] [App.A.73a-73o].

The Order does not address material facts averred or alleged as follows: First, PURPA does not authorize a district court enforcement action against a regulated public utility – i.e. PURPA specifically permits suit exclusively against a state regulatory body and unregulated utilities, and against no one else regardless of fault or damages causation, *see Niagara Mohawk Power Corp.*, 306 F.3d at 1268 (cannot even sue FERC) – which is to say that PURPA affords no remedy at all when a regulated utility is involved.

Second, Petitioners added the individual CPUC members as party defendants in substantial part to enable retrospective, individualized and/or damages remedies, plus prevailing party attorneys' fees, available under §1983. Such damages, and/or

individualized or retrospective relief, are indisputedly unavailable under the PURPA statutes in actions such as this; rather, the claims of any PURPA Plaintiffs are confined to an effort to prospectively compel a state regulatory agency to in turn regulate – *i.e.* enforce compliance of – entities subject to its control. This form of specific enforcement, even if granted, could not conceivably afford the kind of expeditious remedy required while awaiting compliance with the law.

Thus, this is not an example of a viable remedial scheme which Plaintiffs merely wish to make more "expansive," but rather nonexistent remedies which Plaintiffs wish to supplement with §1983 to afford the only such remedies possible[21]. *See Carlsson v. Green*, 446 U.S. 14, 20-23 (1980). Instead, the Order, regarding whether §1983 remedies are implicitly excluded by PURPA, ignores the gorilla in the room: regulated "privately owned" utilities, distinct from publicly owned unregulated utilities, *see Cal. Public Utilities Code* §394(a), are simply not bound by federal law under PURPA and FERC implementing regulations. The District Court summarizes PURPA'S remedial scheme, with one material omission: no mention of the remedial

[21] The Supreme Court has ruled that the availability of state remedies has no bearing on whether 42 U.S.C. §1983 affords a remedy for federal law violations in federal court. *See Patsy v. Board of Regents of State of Fla.,* 457 U.S. 496, 500, 503, 506 (1982); *Monroe v. Pape,*365 U.S. 167, 174, 180, 183 (1961) (point of §1983 was that state were not fully trusted to enforce federal rights; federal remedies are supplemental to any state remedies). This skepticism is also reflected in the adoption of PURPA. *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982) (act is directed in part at recalcitrant state regulatory agencies).

distinction between regulated and unregulated utilities, or lack of any effective remedy when a regulatory agency does not enforce PURPA against the latter. [Second Amended Order, pp. 10-12] [E.R.34-36] [App.A.73j-73l].

It is undisputed that when Congress, in adopting a statutory remedy, has not explicitly excluded other remedies, such exclusion will nevertheless be implied only when the statutory remedy is "comprehensive." However, if mere enactment of any remedy suffices, no matter how limited, then "comprehensive" has no meaning whatsoever. This means, in turn, that unregulated utilities are bound to comply with PURPA, while regulated utilities are not – *i.e.* that when Congress specified differential PURPA remedies, it also implicitly meant to create differential compliance obligations. If §1983 remedies are precluded, that will be the net effect – *i.e.* regulated utilities alone will have no obligation to comply with this regulatory scheme under federal law, an absurd result that cannot be inferred to Congressional intent in adopting PURPA, given its express concerns over recalcitrant utilities. *See FERC*, 456 U.S. at 750-51.

The District Court offered no working definition of "comprehensive." If a statutory remedial scheme provides no remedy against an expressly targeted entity, giving it *de facto* release from compliance with federal law, it is anything but "comprehensive" if that word is to be given any meaning at all. It cannot be gainsaid that Congress in 1978 was well aware of §1983 remedies and could – but did not –

expressly state that its remedies are exclusive and courts should not "lightly" infer any exclusion of §1983 remedies. *See Smith v. Robinson*, 468 U.S. 992, 1012 (1984) (repeatedly emphasized comprehensive nature of remedies therein).

In truth, PURPA remedies may involve a complex scheme. There is nothing comprehensive about the remedial scheme.

III.
PETITIONERS' FORMS OF PURPA EQUITABLE REMEDIAL RELIEF SOUGHT UNDER 16 U.S.C. §824

It has been conclusively litigated herein, to this Court of Appeal, that no alternative remedies are available because the PURPA remedies are comprehensive. That leaves a remaining, alternative issue: whether PURPA's equitable remedies includes provision for equitable, make-whole damages. The court herein precluded that remedy, and any provision for attorney fee recovery, by ordering that they may not be included in an amended and supplemental pleading following remand.

When Title VII [42 U.S.C. sec.2000e] only afforded injunctive relief [prior to 1992], the United States Supreme Court inferred a right to recover equitable damages, for the period from culpability to the date of injunctive corrections – *e.g.* back pay – as a form of "make whole" equitable relief. *See Albemarle v. Moody*, 422 U.S. 405 (1975). Without the same inference herein in connection with PURPA remedies, the word "comprehensive" seems to have lost its original vitality.

Likewise, the absence of any attorneys' fees remedy from any source is

precisely the predicate fact that entitles invocation of the "private attorney general" doctrine for recovery of attorney fees in appropriate cases, usually determined after the fact [but preserved in pleadings]. *Cf. Hall v. Cole,* 412 U.S. 1, 13 (1973). Sovereign immunity does not bar recovery of attorney fees from state officials and/agencies. *See Hutto v. Finney*, 437 U.S. 678 (1978).

Plaintiff is entitled to pursue these alternative potential remedies if other avenues of relief under 42 U.S.C. §1983 are foreclosed. The fact distinctions between the Albemarle and Hutto decisions and this PURPA remedial issue misses the point of their citation: the means by which the Supreme Court adapted existing statutory provisions and equitable principles to meet and pursue the remedial purposes of those statutes.

IV.
THE COURT NEEDS TO ADDRESS THE TENSION GOVERNING THE DEFINITION OF "COMPREHENSIVE REMEDIES" IN CONNECTION WITH PURPA REMEDIES AND ANY PRESUMED CONGRESSIONAL INTENT TO FORECLOSE 42 U.S.C. §1983 REMEDIES FOR PURPA VIOLATIONS

The Second Reported Panel Opinion methodically rejects every PURPA based or related remedy invoked by Appellants other than injunctive and declaratory relief, for as implemented claims under PURPA. [App.A.26-28]. In so doing, the Second Reported Panel Opinion joined a legion of Supreme Court and Circuit Court decisions which casually invoke the term "comprehensive remedy" in connection with the

PURPA and other statutory remedial schemes. It was also invoked in the First Panel Opinion for determining when 42 U.S.C. §1983 remedies should be available in claims for violations of federal rights in statutory schemes which are silent on the subject of the Congressional intent.

The Second Reported Panel Opinion cites with approval the First Panel Opinion that ruled that 42 U.S.C. §1983 remedies are not available in claims for violations of federal rights in statutory schemes when the latter affords a comprehensive remedy. [App.A.25]. The First Panel Opinion declared, in affirming dismissal, that "PURPA has a comprehensive remedial scheme" after first stating:

> "That PURPA provides fewer remedies under §1983 is evidence that Congress did not intend to permit a PURPA claim to be brought under §1983. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005)."

[App.A.87].

V.
THERE IS A TENSION BETWEEN TWO LINES OF AUTHORITY GOVERNING ASSESSMENT OF CONGRESSIONAL INTENT TO PERMIT 42 U.S.C. §1983 REMEDIES IN FEDERAL STATUTORY SCHEMES

There is clear authority that when Congress is silent in a regulatory scheme concerning whether 42 U.S.C. §1983 remedies are available, Congressional intent to exclude same will be inferred from the existence in the regulatory scheme of its own "comprehensive remedies." 42 U.S.C. §1983 affords remedies for deprivation of

"rights" under statutes, *see Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), provided that "Congress has not foreclosed such an enforcement in the statute itself," *Groten v. State of California,* 251 F.3d 844, 848 (9th Cir. 2001).

"Once a plaintiff demonstrates that a statute confers an individual right, the right is presumptively enforceable by §1983." *See Gonzaga University*, 536 U.S. at 284. Congress' intent to exclude other remedies like §1983, when not expressly stated, will be implied only when the statute which creates the right also provides a "comprehensive" statutory remedy. *See e.g. Middlesex County Sewage Authority v. National Sea Clammers Ass'n*, 435 U.S. 1, 19-21 (1981). *See also City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121-22 (2005) (summarizing cases cited).

Conversely, other authority infers the Congressional intent to exclude §1983 merely by provision of any remedial scheme that is narrower in scope than §1983, without reference to whether it is "comprehensive." *See City of Rancho Palos Verdes*, 544 U.S. at 121-23.

VI.
THE IMPORT OF THE PANEL DECISION IS TO RENDER MEANINGLESS THE LINE OF DECISIONS EMPLOYING THE AS YET UNDEFINED "COMPREHENSIVE REMEDIES" TEST

Other authority infers the Congressional intent to exclude §1983 merely by provision of any remedial scheme that is narrower in scope than §1983, without reference to whether it is "comprehensive." *See City of Rancho Palos Verdes*, 544

U.S. at 121-23. Hence, if the remedial scheme is not narrower than §1983, there would be no purpose in invoking §1983; and inferring an intent to exclude §1983 merely from the mere existence of a remedial scheme narrower than §1983 produces a rule that eliminates any invocation of §1983, except perhaps when the regulatory scheme affords no remedies whatsoever, *see e.g. Price v. State of Hawaii,* 939 F.2d 702, 706 (9th Cir. 1991) (if statute that confers right does not provide a private right action, an action under §1983 is proper).

This test differs substantially from the one that requires that the remedial scheme, though narrower than §1983, at least be "comprehensive" in scope to warrant the exclusionary inference in Congressional intent, provided that there is some definition of what that means. Undefined, it also means that any remedial scheme infers Congressional intent for exclusion.

The actual holding in *City of Rancho Palos Verdes* is that the particular, and unique, remedial scheme therein would be undermined by the remedial scheme in §1983, which is a test that at least affords some definition. *See City of Rancho Palos Verdes*, 544 U.S. at 122-23. However, this panel makes no such analysis herein and in fact no one has so far cited any aspect of the PURPA remedial scheme which would be hindered, much less undermined, by access to §1983 remedies.

Certainly, there is nothing remotely like the party imbalance concern, in connection with attorney fees awards under 42 U.S.C. §1988. *See City of Rancho*

Palos Verdes, 544 U.S. at 123-24 (large plaintiff entities attacking small local entities). Conversely, in a typical PURPA enforcement case, the Defendants would always be state public regulatory agencies and/or large monopoly power companies, with a broad range of plaintiffs, often very small parties and needing the intended statutory benefits of §1988. *See e.g. Hutto v. Finney*, 437 U.S. 678, 690-700 (1978).

This demonstrates the complete state of confusion with that term and the cited authority. If the fact that a statutory scheme has fewer remedies than 42 U.S.C. §1983 is presumptive proof that Congress did not intend therein that §1983 remedies be available, thereby precluding it, then it naturally follows that §1983 only applies when its remedies are wholly redundant to those of the statutory scheme. If that were the case, it would be high time to put an end to the *Maine v. Thiboutot* line of cases.

Petitioners herein are now in the unique situation of having one appellate panel which rejected §1983 remedies because PURPA affords a comprehensive remedial scheme; and now this panel which has so constricted the PURPA remedial scheme that it is barely above the level of no remedy at all, while still calling it "comprehensive" without any effort to actually define the word "comprehensive" in this or any context. Referring Petitioners to Congress fairly raises the question: just why is this case different from any of those statutory cases that allowed invocation of §1983, especially when based on the "party imbalance" concern in connection with attorney fees awards under 42 U.S.C. §1988, *see City of Rancho Palos Verdes*, 544

U.S. at 123-24, rather than making a referral to Congress?

In a typical PURPA enforcement case, the Defendants are always state public regulatory agencies and/or large monopoly power companies, with a broad range of plaintiffs, often very small parties and needing the intended statutory benefits of §1988. *See e.g. Hutto v. Finney*, 437 U.S. at 690-700.

Petitioners have pleaded repeatedly for a definition of "comprehensive" in this context from Defendants-Appellees-Respondents; from the District Court; from the First Panel; and then the Second Reported Panel. The current state of the law leaves a confusing and uncertain state of the law, where small parties seek in vain to invoke effective remedies for PURPA violations and are barred from invoking §1988 remedies. Many parties and the public interest would benefit if, at least, there is finally a definitive test for when §1983 remedies may be invoked in federal regulatory schemes which have narrower remedies but are otherwise silent respecting §1983.

Or, this panel could remand with directions to the District Court to determine in the first instance whether PURPA and FERC regulations afford comprehensive remedies for PURPA violations.

For all of these reasons, these issues are of exceptional importance: (a) what is the definition of "comprehensive remedies" under federal statutory schemes, in the context of whether 42 U.S.C. §1983 remedies are available for violations under such federal statutes – *e.g.* PURPA; and/or (b) the need to synthesize any conflicting

governing authority on these issues.

VII.
THERE IS NO BASIS FOR RESPONDENTS TO CLAIM ABSOLUTE IMMUNITY

With absolute legislative immunity, the courts apply a functional test in the context of their actual activities, while being "quite sparing in recognition of claims to absolute official immunity" and placing the burden of proof on the individual asserting it. *See Kaahumanu v. County of Maui,* 315 F.3d 1215, 1219-20 (9th Cir. 2003). The Court must apply four factors: (1) whether the act is ad hoc decisions or formulation of policy, (2) whether act applies to a few individuals or to the public at large, (3) whether act is formally legislative in character, and (4) whether it bears all the hallmarks of traditional legislation. *See Kaahumanu,* 315 F.3d at 1220 (quotation marks omitted) (and cases cited therein). These factors are each considered in turn, but "are not mutually exclusive." *See Kaahumanu,* 315 F.3d at 1220.

The burden of proof is not met by simply declaring that ratemaking is legislative in nature, with citations to ratemaking cases not involving CPUC or PURPA functions, and with no attempt to identify specific decisions or make the requisite showing in connection therewith.

California law specifies three classes of actions in CPUC proceedings: (1) adjudicative; (2) quasi-legislative; and (3) ratesetting. *See Cal. Public Utilities Code* §1701.1(a). "Quasi-legislative . . . are cases that establish policy, including, but not

limited to, rulemakings and investigations . . . affecting an entire industry." *Cal. Public Utilities Code* §1701.1(c)(1). "Ratesetting . . . are cases in which rates are established for a specific company, including . . . general rate cases, performance-based ratemaking, and other ratesetting mechanisms." *Cal. Public Utilities Code* §1701.1(c)(3). The California Supreme Court has stated that CPUC duties include "supervis[ion] and regulat[ion]" and all other things which are "necessary and convenient" that sound in executive / administrative authority and actions. *See SCE v. Peevey*, 31 Cal.4th 781, 3 Cal.Rptr.3d 703, 710 (2003).

The CPUC treatment of "ratemaking" as separate from "quasi-legislative" combined with the aforementioned factors – including the definition that so closely approximates Criterion No. 2, *see Kaahumanu,* 315 F.3d at 1220 – militate against the conclusion that CPUC ratemaking is legislative in nature and warranting absolute immunity. Given Defendants' failure to meet their burden of proof, absolute legislative immunity is not warranted.

When the issue is a claim for First Amendment retaliation based on CPUC Defendants for either denying or reducing payment of intervenor fee claims in CPUC proceedings, motivated by an intervenor's criticisms of CPUC in FERC filings and otherwise [E.R.38,978] [App.A.73l, 73k-73o], jurisdiction is not foreclosed under the Johnson Act, even though a state code explicitly passed on these fee awards to rate payers per 28 U.S.C. §1342 and *California Public Utilities Code* §1807, because to

so rule would go well beyond the underlying policy considerations of the Johnson Act, while creating a sweeping exception to the free speech protections of the First Amendment, which hardly seems to have been the Congressional intent, *see Connick v. Myers*, 461 U.S. 138, 147 (1983) (Court fashioned test which accommodates public policy of not turning every public employee grievance into federal First Amendment litigation, while also accommodating equally important public policies under First Amendment and remedial provisions of 42 U.S.C. §1983).

The purpose of the Johnson Act is to protect against every ratemaking decision from becoming a constitutional issue to be adjudicated in federal court. *See generally Freehold Cogeneration Associates, L.P. v. Board of Regulatory Commissioners of the State of New Jersey,* 44 F.3d 1178, 1186-87 (3rd Cir. 1995); *Hawaiian Telephone Co. v. Public Utilities Commission of the State of Hawaii,* 827 F.2d 1264, 1273 (9th Cir. 1987). That is no reason to fashion from it a rule of law under which a tangential decision – in which another public policy is implicated, to wit the desire to encourage public First Amendment protected interventions in CPUC proceedings by making fee awards available *see California Public Utilities Code* §§1801, 1801.3(b) & (d), 1802 – becomes a shield for even indisputable motivations to penalize, burden and/or silence public criticism of a public entity. This is all the more imperative when the decision at issue is not a core behavior for which the Johnson Act is designed – *i.e.* they are not strictly speaking a ratemaking determination, despite the indisputable

concomitant, if likely negligible increase in rates.

Put simply, would CPUC be legally shielded by the Johnson Act if it were to issue am explicit policy directive that no intervenor fees would be awarded to any intervenor who in any way criticized CPUC or other state officials? CARE Plaintiffs urge that this cannot be the law, and that this claim should be remanded with instructions to the District Court to permit the claim so long as there is otherwise First Amendment protected speech and the subject matter of the intervention was not a ratemaking issue that is within the core subject of the Johnson Act.

CONCLUSION

Petitioners respectfully request the Supreme Court to grant this Petition for Writ of Certiorari on the issues cited to finally either afford meaningful equitable and attorney fee relief under 16 U.S.C. §824 [PURPA] or under 42 U.S.C. §1983 and §1988; and in so doing finally define with clarity and uniformity when statutory violations are remediable under 42 U.S.C. §1983 per *Maine v. Thibotout*, *i.e.* what does "comprehensive" mean in this context, and when and how it is to be applied.

Dated: December 12, 2019

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Petitioners

Case No.

UNITED STATES SUPREME COURT
OCTOBER 2019 TERM

MICHAEL BOYD, et al.,

Plaintiffs-Appellants-Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees-Respondents.

United States Court of Appeal for the Ninth Circuit, Case No. 17-55297
United States District Court, C.D.Cal., Case No. CV 11-04975 SJO (JCGx)

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

APPENDIX OF PETITIONERS

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIANS FOR RENEWABLE ENERGY, a California Non-Profit Corporation; MICHAEL E. BOYD; ROBERT SARVEY, *Plaintiffs-Appellants*, and SOLUTIONS FOR UTILITIES, INC., a California Corporation, *Plaintiff*, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; MICHAEL R. PEEVEY, TIMOTHY ALAN SIMON, MICHAEL R. FLORIO, CATHERINE J.K. SANDOVAL, MARK J. FERRON, in their individual and official capacities as current Public Utilities Commission of California Members, *Defendants-Appellees*, and RACHEL CHONG, JOHN A. BOHN, DIAN M. GRUENICH, NANCY E.	No. 17-55297 D.C. No. 2:11-cv-04975-SJO-JCG OPINION

RYAN, in their individual capacities as former Public Utilities Commission of California Members; SOUTHERN CALIFORNIA EDISON COMPANY, a California Corporation,
Defendants.

Appeal from the United States District Court
for the Central District of California
S. James Otero, Senior District Judge, Presiding

Argued and Submitted February 6, 2019
Pasadena, California

Filed April 24, 2019

Before: Ronald M. Gould and Jacqueline H. Nguyen,
Circuit Judges, and Algenon L. Marbley,* District Judge.

Opinion by Judge Marbley;
Dissent by Judge Nguyen

* The Honorable Algenon L. Marbley, District Judge for the United States District Court for the Southern District of Ohio, sitting by designation.

SUMMARY[**]

Energy Law

The panel affirmed in part and reversed in part the district court's judgment in favor of the California Public Utilities Commission on small-scale solar energy producers' claims that the CPUC's programs did not comply with the Public Utility Regulatory Policies Act and implementing regulations promulgated by the Federal Energy Regulatory Commission.

Reversing the district court's summary judgment in favor of CPUC, the panel held that PURPA requires utilities to purchase electricity directly from "qualifying facilities," or "QFs," meaning qualifying small power production facilities or cogeneration facilities, and to pay QFs at a rate equal to the utility's "avoided cost." In 2005, the Energy Policy Act eliminated the must-purchase obligations for any QF that FERC determined had nondiscriminatory access to particular markets. In 2011, FERC released California utilities from PURPA's mandatory purchase obligations for QFs over 20 MW and established a presumption that the obligations would apply for QFs 20 MW or smaller, such as plaintiffs. PURPA also includes an interconnection requirement, obligating utilities to connect QFs to the power grid.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

In 2010, CPUC entered into the QF settlement, which, among other things, established a standard contract for QFs with capacity of 20 MW or less. Under California Assembly Bill 1613, CPUC operated a separate program for combined heat and power facilities. CPUC also operated the Feed-in-Tariff or Renewable Market Adjusting Tariff program for renewable generators with capacities of 3 MW or less, as well as the Net Energy Metering Program ("NEM Program") for consumers with capacity of 1 MW or less. Plaintiffs alleged that, through these programs, CPUC was not enforcing (1) PURPA's requirement that utilities pay QF's the "full avoided cost" and (2) PURPA's interconnection requirement.

First, plaintiffs argued that CPUC improperly calculated avoided cost based on multiple sources of electricity, rather than using "multi-tiered pricing" and calculating the avoided costs for each type of electricity. The panel concluded that, in light of two FERC orders interpreting avoided cost, when a state, such as California, has a Renewables Portfolio Standard and the utility is using a QF's energy to meet this "RPS," the utility cannot calculate avoided cost based on energy sources that would not also meet the RPS. Because the district court did not read FERC's order as requiring an avoided cost based on renewable energy where energy from QFs was being used to meet RPS obligations, it did not consider whether utilities were fulfilling any of their RPS obligations through the challenged CPUC programs. The panel therefore remanded the case to the district court for a determination in the first instance of whether CPUC's programs comply with this aspect of PURPA.

Second, plaintiffs argued that several CPUC programs violated PURPA because they did not include capacity costs as part of the full avoided cost. The panel held that if a QF

displaces a utility's need for additional capacity, then the utility is required to include capacity costs as part of avoided cost. The panel concluded that neither the QF Settlement contract price nor a NEM Program price violated PURPA. The panel held that utilities do not violate PURPA in not compensating QFs for Renewable Energy Credits.

Third, plaintiffs argued that the NEM Program violated PURPA's interconnection requirement. The panel held that there was no violation because the regulations allow utilities to charge QFs for connection fees.

The panel affirmed the district court's dismissal of claims for equitable damages and attorney fees. The panel held that the Eleventh Amendment precluded equitable damages because CPUC was an arm of the state. Plaintiffs could not recover attorney fees because PURPA created no attorney fee remedy.

The panel reversed and remanded on the issue of the district court's error in not interpreting FERC's regulations to require state utility commissions to consider whether an RPS changed the calculation of avoided cost. The panel affirmed the district court's judgment in all other respects.

Dissenting in part, Judge Nguyen wrote that the district court's judgment should be affirmed in its entirety. She wrote that CPUC's programs did not conflict with PURPA, and the majority's misreading of the law undercut discretion intended for the states and inflicted significant consequences upon their energy policy.

COUNSEL

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OPINION

MARBLEY, District Judge:

In 1978, Congress enacted the Public Utility Regulatory Policies Act ("PURPA"). PURPA made several changes to energy regulation, particularly to how utilities would interact with small independent energy producers. PURPA charges the Federal Energy Regulatory Commission ("FERC") with enacting implementing regulations. FERC's regulations, in turn, allow state regulatory agencies to determine exactly how they will comply with PURPA and FERC's regulations. The relevant state agency here is the California Public Utilities Commission ("CPUC").

Californians for Renewable Energy ("CARE") and two of its members, Michael E. Boyd and Robert Sarvey, are small-scale solar producers. They allege that CPUC's programs do not comply with PURPA. Specifically, they

argue that CPUC has incorrectly defined the amount that PURPA requires utilities to pay qualifying facilities ("QFs"). CARE argues that PURPA also allows equitable damages and attorney fees.

The district court dismissed CARE's claims for equitable damages and attorney fees and entered summary judgment for CPUC on CARE's PURPA challenges. We affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Statutory Background

Congress enacted PURPA "to encourage the development of cogeneration and small power production facilities, and thus to reduce American dependence on fossil fuels by promoting increased energy efficiency." *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n* ("*IEP*"), 36 F.3d 848, 850 (9th Cir. 1994).

> To achieve this objective, Congress sought to eliminate two significant barriers to the development of alternative energy sources: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional facilities, and (2) the financial burdens imposed upon alternative energy sources by state and federal utility authorities.

Id.

PURPA created a new category of energy producers: qualifying facilities. QFs can be either "small power production facilit[ies] or "cogeneration facilit[ies]." 18 CFR

§§ 292.201 & 292.203. FERC has authority to define the requirements for being a QF. 16 U.S.C. §§ 796(17)(C) & (18)(B).

To address the barriers facing QFs, PURPA required utilities to purchase electricity from QFs, i.e. the mandatory purchase requirement, 16 U.S.C. § 824a-3(a), and to pay QFs rates that "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. § 824a-3(b). Utilities must compensate QFs at a rate equal to the utility's "avoided cost." 18 CFR § 292.304(d). "Avoided cost" is "the incremental cost[] 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(6).

State regulatory agencies have the responsibility of calculating avoided cost, but FERC has set forth factors that states should consider. 18 C.F.R. § 292.304(e). Those factors are:

> (1) the utility's system cost data;
>
> (2) the terms of any contract including the duration of the obligation;
>
> (3) the availability of capacity or energy from a QF during the system daily and seasonal peak periods;
>
> (4) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and

> (5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

Cal. Pub. Util. Comm'n ("*CPUC*"), 133 FERC ¶ 61,059, 61,265, 2010 WL 4144227 (2010). "Avoided cost rates may also 'differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.'" *Id.* at ¶ 61,265–66 (quoting 18 C.F.R. § 292.304(c)(3)(ii)). Avoided cost can also include the capacity costs that the utility avoids by purchasing electricity from QFs. *CPUC*, at ¶ 26.

Congress changed this statutory scheme in 2005 with the Energy Policy Act ("EPAct"). With EPAct, Congress acknowledged that QFs no longer faced the same barriers that prompted PURPA. EPAct thus eliminated the must-purchase obligations for any QF that FERC determined had "nondiscriminatory access to" particular markets as specified in 16 U.S.C. § 824a-3(m). In 2011, FERC released California utilities from PURPA's mandatory purchase obligations for QFs over 20 MW. *Pac. Gas and Elec. Co.*, 135 FERC ¶ 61234, 62305 (2011). FERC established a presumption that the mandatory purchase obligation would apply for QFs 20 MW or smaller unless the utility showed that "each small QF . . . , in fact, has nondiscriminatory access to the market." *New PURPA Section 210(m) Regulations Available to Small Power Production and Cogeneration Facilities* ("Order 668"), 71 Fed. Reg. 64342, 64363 (Oct. 20, 2006). The facilities that CARE represents produce less than 20 MW of energy.

In addition to mandatory purchase requirements, PURPA requires utilities to connect QFs to the power grid.

The interconnection requirement goes hand-in-hand with the mandatory purchase requirement for "[n]o purchase or sale can be completed without an interconnection between the buyer and seller." *Am. Paper Institute, Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 418 (1983). Using its authority under PURPA, FERC promulgated a rule requiring that "any electric utility shall make such interconnection with any qualifying facility as may be necessary to accomplish purchases or sales under [PURPA]." 18 C.F.R. § 292.303(c)(1). FERC's rule also specifies that "[e]ach qualifying facility shall be obligated to pay any interconnection costs which the State regulatory authority . . . may assess against the qualifying facility on a nondiscriminatory basis with respect to other customers with similar load characteristics." 18 C.F.R. § 292.306(a).

B. The Challenged CPUC Programs

In the 1980s, CPUC required utilities to offer one of four standard contracts if a QF requested one. These contracts "differ[ed] primarily in the length of the contract, the availability of capacity and energy from a QF, and the avoided cost rate payments corresponding to such availability." *IEP*, 36 F.3d at 852. This program was successful but did not "accurately reflect[] the avoided cost of . . . utilities." *Solutions for Utilities, Inc. v. Cal. Pub. Utilities Comm.*, CV 11-04975 SJO (JCGx), 2016 WL 7613906, at *5 (C.D. Cal. Dec. 28, 2016). CPUC discontinued using these contracts in the mid-1980s because of "QF oversubscription." *Id.* The elimination of these contracts and the subsequent search for a better mechanism for compensating QFs sparked years of litigation. Rather than use long-term pricing, CPUC moved to using short-run pricing. State legislation in 1996 "set[] forth certain elements to be included in setting [short-term avoided cost

('SRAC')]." Order Instituting Rulemaking to Promote Policy, Program Coordination and Integration in Electric Utility Resource Planning, No. D.07-09-040, 2007 WL 2872674, at *9 (Cal. P.U.C. Sept. 20, 2007). Disputes, however, continued.

This situation was finally resolved in 2010 with the Qualifying Facility and Combined Heat and Power ("CHP") Program Settlement ("QF Settlement"). *Solutions for Utilities, Inc.*, 2016 WL 7613906, at *6. Among other things, the QF Settlement established four standard contracts. *Id.* One of these standard contracts was designed specifically for QFs with capacity of 20 MW or less. *Id.* Any QF 20 MW or smaller may avail itself of this contract, regardless of where the QF sources its energy. This contract sets the price paid to QFs based on both capacity and energy. The price for capacity is a fixed rate while the price for energy is variable, based on the Short Run Avoided Cost ("SRAC").

> "Energy costs are the variable costs associated with the production of electric energy (kilowatt-hours). They represent the cost of fuel, and some operating and maintenance expenses. Capacity costs are the costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities."

Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of PURPA, ("Order 69") 45 Fed. Reg. 12,214, 12,216 (Feb. 25, 1980).

Separate from the QF Settlement, the California legislature, through Assembly Bill 1613, created the Combined Heat and Power Facilities Program on January 1, 2008. *Solutions for Utilities, Inc.*, 2016 WL 7613906, at *6. The CHP Program applies to CHP facilities with capacities under 20 MW. *Id.* Under this law, CPUC set up a different program for compensating CHPs based "on the Market Price Referent ('MPR'), which is defined as the cost to design, build, and operate a 500 MW Combined cycle natural gas turbine generator ('CCGT')." *Id.*

CPUC also operates the Feed-in-Tariff ("FiT") or Renewable Market Adjusting Tariff ("Re-MAT") program. This program applies to renewable generators with capacities of 3 MW or less. *Id.* at 7. Under this program, utilities must purchase electricity at the program-specified rates "until the [utility] meets its proportionate share of a statewide cap of 750 [MWs] cumulative rated generation capacity." *Id.* The Re-MAT price is calculated using three pricing values. First, the Re-MAT takes "the weighted average contract price of [three California utility's] highest priced executed contract resulting from the CPUC's auction held in November 2011 for three different product types." *Id.* Second, Re-MAT uses "a two-month price adjustment 'based on the market response.'" *Id.* Finally, the participating power producer receives "a 'time-of-delivery adjustment' based on the generator's actual energy delivery profile and the individual utility's time-of-delivery factors." *Id.* As CARE describes it, CPUC assumes that market bids take account of capacity costs.

The last CPUC program at issue is the Net Energy Metering ("NEM") Program. The NEM Program was established by state statute, Assembly Bill 920, and took effect in January 2011. *Solutions for Utilities, Inc.*, 2016 WL

7613906, at *7. This program is limited to consumers with capacity of 1 MW or less. *Id.* The NEM Program calculates how much electricity a consumer uses and how much electricity a consumer generates over a twelve-month period. If the consumer generates more electricity than it uses, then the excess electricity goes back into the electrical grid. *Id.* The utility pays the consumer for this electricity based on the default load aggregation point ("DLAP") price. DLAP is "an hourly day-ahead electricity market price," in other words, what "the utility is paying one day out in the marketplace." *Id.* DLAP does not include capacity costs, even as defined by CPUC.

California has also enacted a Renewables Portfolio Standard ("RPS"). The first RPS, enacted in 2002, required utilities to source 33% of their electricity from renewable sources by the end of 2020. Those standards have since been increased to require 50% of a utility's electricity to be from renewable sources by 2030. CPUC represents that "CPUC-regulated utilities have met their 2020 targets and are on track to reach their [2030] targets."[1] Most of these goals have been met by purchasing energy from producers with capacity over 20 MW.

II. Procedural Background

A. CARE v. CPUC I

CARE and Solutions for Utilities Inc. ("SFUI") sued CPUC and Southern California Edison Company ("SCE") in 2011. That suit alleged violations of PURPA and violations of § 1983 based on allegations of suppressing SFUI's and

[1] CPUC's brief states that utilities are on track for their 2050 targets, but it appears that should actually refer to the 2030 targets.

CARE's First Amendment rights. The district court dismissed the § 1983 claims and CARE's PURPA violation claim but left SFUI's PURPA claim. The district court also entered summary judgment for CPUC and SCE, finding that SFUI did not have standing to bring its PURPA claim. CARE appealed. This Court affirmed dismissal of the § 1983 claims but reversed and remanded on CARE's PURPA claim, finding that the CARE Plaintiffs had met PURPA's administrative exhaustion requirement. *Solutions for Utilities, Inc.*, 2016 WL 7613906, at *2.

B. The Current Action

CARE moved for leave to file a fourth amended complaint on March 8, 2016. The district court denied CARE's motion for leave to file without prejudice. In that order, the district court found that CARE could not amend its complaint to assert a claim for equitable damages and attorney fees. CARE then filed an amended complaint on April 14, 2016. CPUC moved for summary judgment. On December 28, 2016, the district court granted summary judgment for CPUC on all claims. This appeal followed.

III. JURISDICTION AND STANDARD OF REVIEW

The district court denied CARE's Motion for Leave to File Fourth Amended Complaint. In that order, the district court found that damages and attorney fees were not available under PURPA. This Court reviews a "denial of a motion to amend a complaint . . . for an abuse of discretion." *Chodos v. West Publishing Co.*, 292 F.3d 992, 1003 (9th Cir. 2002). A denial of leave to file is "strictly reviewed, in light of the strong policy permitting amendment." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 537–38 (9th Cir. 1989) (quoting *Thomas-Lazear v. Federal Bureau of Investigation,* 851 F.3d 1202, 1206 (9th Cir. 1988)). The

"district court does not err in denying leave to amend where the amendment would be futile, or where the amended complaint would be subject to dismissal." *Saul v. United States*, 928 F.2d 829, 843 (9th Cir. 1991) (citations omitted). If the district court is correct in making a finding that "there was no possibility of stating a cause of action . . . . the dismissal would not be an abuse of discretion." *Shermoen v. United States*, 982 F.2d 1312 (9th Cir. 1992).

The district court next granted summary judgment for CPUC on CARE's PURPA challenges. This Court reviews summary judgment orders *de novo*. *Sonner v. Schwabe North America, Inc.*, 911 F.3d 989 (9th Cir. 2018). This Court "[v]iewing the evidence in the light most favorable to the nonmoving party . . . must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc) (citing *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)). On summary judgment, "it is not our 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) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). Rather, "[w]e rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Id.*

We recognize that FERC intended to leave states with discretion in implementing its regulations under PURPA. *Order 69*, 45 Fed. Reg. at 12226 (stating that a state's implementation of avoided cost is satisfactory if it "reasonably accounts for the utility's avoided costs" and encourages "small power production."). But a state's broad authority in determining how to implement PURPA, *IEP*, 36 F.3d at 856, and the corresponding deference due state

utility regulators, does not mean that we abdicate our responsibility to ensure that the state program complies with PURPA. *See, e.g.*, *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 394 (5th Cir. 2014) (explaining that a state is owed deference in PURPA implementation); *Allco Renewable Energy Limited v. Massachusetts Electric Company*, 208 F.Supp.3d 390, 399 (D. Mass. 2016) (noting that a state cannot implement a program that conflicts with PURPA).

IV. ANALYSIS

CARE alleges that CPUC is not enforcing PURPA's requirement that utilities pay QFs the "full avoided cost" and that utilities must connect QFs to the power grid ("mandatory inter-connection"). CARE challenges several of CPUC's programs based on three theories. First, CARE argues that avoided cost cannot be based on the cost for multiple energy sources. Second, CARE argues that avoided cost must also include capacity costs. Third, CARE argues that the NEM Program violates PURPA's mandatory interconnection requirements. CARE also appeals the district court's dismissal of the equitable damages and attorney fees claims under PURPA.

A. Calculating full avoided cost based on a mix of energy sources

CARE argues that CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ("multi-tiered pricing"). CARE argues that if a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating

a single avoided cost based on all the energy sources. CARE argues that several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. CPUC argues that states have discretion in determining how they will comply with PURPA and that, thus, while FERC has said that multi-tiered pricing is permissible, it is not mandatory. While we do not think that PURPA requires utilities to always use multi-tiered pricing, we find that summary judgment was improperly granted here.

In 1995, FERC issued two orders that interpreted "avoided cost."[2] In *N. Little Rock*, FERC stated that "avoided costs are determined . . . by all alternatives available to the purchasing utility . . . [and] include[s] **all** supply alternatives." *N. Little Rock Cogeneration, L.P. and Power Sys., Ltd. v. Entergy Servs., Inc.* ("*N. Little Rock*"), 72 FERC ¶ 61263, 62173, 1995 WL 556544 (Sept. 19, 1995). Similarly, in *SoCal Edison*, FERC stated that avoided cost must "reflect prices available from *all sources* able to sell to the utility whose avoided costs are being determined." *Re Southern California Edison Co.* (*SoCal Edison*), 70 FERC ¶ 61215, 61676 (1995), *reconsideration denied*, 71 FERC ¶ 61269 (1995).

FERC issued an important qualification to this "all sources" requirement in *CPUC*, 133 FERC ¶ 61,059. In *CPUC*, FERC clarified that "if a state required a utility to

[2] The district court found that these FERC decisions are entitled to *Chevron* deference. *Chevron* and its progeny concern deference to agencies when they interpret and apply their own statutes and regulations. Because we are not reviewing FERC's decisions directly, we need not decide what deference, if any, is owed the FERC decisions. We cite these FERC decisions merely as persuasive interpretations from the agency most familiar with interpreting and applying PURPA.

purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source 'able to sell' to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs." *Id.* at ¶ 61267. California has an RPS. The district court dispensed with the argument that an RPS changes the avoided cost calculation, reading the language in *CPUC* as permissive rather than mandatory.

The district court erred in reading FERC's pronouncement in such a way. Although FERC initially stated in *CPUC* that a "state *may* take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy," *CPUC*, 133 FERC at ¶ 61266 (emphasis added), later in *CPUC*, FERC reiterated that when a state has a requirement that utilities source energy from a particular type of generator, "generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement." *Id.* at ¶ 61267. Thus, where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.

This reading of FERC's regulations is consistent with other FERC pronouncements. In FERC's final rule implementing Section 210 of PURPA ("Order 69"), FERC explained that if purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost. But "if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new

capacity . . . should be used." *Order 69*, 45 Fed. Reg. at 12216. In other words, FERC interpreted PURPA to require an examination of the costs that a utility is *actually avoiding*. This comports with PURPA's goal to put QFs on an equal footing with other energy providers. Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.

The dissent misreads the majority opinion when it says we require pricing based on each type of energy source for all avoided cost calculations. We do not hold that the avoided cost must be calculated for each individual *type* of energy. We hold only that where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS. If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so. But it may just as permissibly aggregate all sources that could satisfy its RPS obligations. And if a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources. Neither does this opinion hold that CPUC's programs are de facto impermissible under PURPA. Because we hold that the district court misinterpreted PURPA's requirements, we remand for the district court to make such a determination in the first instance.

Because the district court did not read *CPUC* as requiring an avoided cost based on renewable energy where energy from QFs was being used to meet RPS obligations, it did not consider whether utilities are fulfilling any of their RPS obligations through the challenged CPUC programs. We therefore remand the case to the district court for a

determination in the first instance of whether CPUC's programs comply with this aspect of PURPA.

B. Excluding capacity costs from a full avoided cost calculation

CARE next contends that several CPUC programs violate PURPA because they do not include capacity costs as part of the full avoided cost. In granting summary judgment for CPUC, the district court reasoned that PURPA did not require state regulatory agencies to take into account capacity costs. Rather, the regulations required state utility regulators to consider capacity costs only "to the extent practicable." 18 C.F.R. § 292.304(e). The district court found no genuine dispute of material fact that NEM participants were not being paid avoided cost, nor were utilities required to include capacity costs because NEM customers did not provide capacity to the utility. Finally, the district court found that avoided cost did not require the use of long-run avoided cost ("LRAC") as opposed to SRAC.

It would go too far to say that state regulatory agencies are never required to include capacity costs in an avoided cost calculation. The FERC regulations set forth factors for states to consider in setting avoided cost but states that those factors, including capacity, "shall, to the extent practicable, be taken into account." 18 C.F.R. § 292.304(e). FERC has "made clear that an avoided cost rate need not include capacity costs (as distinct from energy costs) where a QF does not 'permit the purchasing utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility.'" *City of Ketchikan, Alaska*, 94 FERC ¶ 61293, 2001 WL 275023, at *6 (2001) (quoting Order No. 69, FERC Stats. & Regs., Regs. Preambles 1977–1981 ¶ 30,128 at 30,865. FERC Order 69, however, clarifies that capacity

costs are required in some circumstances. Specifically, FERC stated:

> [i]f a qualifying facility offers energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility, then the rates for such a purchase will be based on the avoided capacity and energy costs.

Order 69, 45 FERC at 12216.

Thus, a QF would not be entitled to capacity costs unless it actually displaced the utility's need for additional capacity. If a QF displaces the utility's need for additional capacity, however, the utility is required to include capacity costs as part of avoided costs.

1. The QF Settlement Contract price

CARE challenges the QF Settlement contract price because it does not include capital costs as part of capacity costs.[3] As CARE acknowledges, the QF standard contract does include capacity costs. Although CARE argues that capital costs, as distinct from capacity costs, are required,

[3] Amici Curiae Community Renewable Energy Association and Northwest and Intermountain Power Producers Coalition urge this Court to find that PURPA requires long-term contracts based on a fixed rate. As CARE is challenging the exclusion of capacity costs, rather than whether a rate is long-term or short-term per se, we do not address whether PURPA requires long-term pricing.

CARE has not shown how capital costs differ from capacity costs except for a statement at oral argument that capacity costs are essentially a subset of capital costs. CARE presents no evidence as to why capacity costs, without capital costs, do not accurately reflect a utility's avoided cost. CARE has pointed to "mere conclusory allegations made in [CARE's] own affidavits." *Keenan*, 91 F.3d at 1279. This is not enough to raise a genuine issue of material fact. Thus, summary judgment was appropriate on this question.

2. The NEM Program

CARE next challenges the DLAP price used in the NEM Program because DLAP does not include capacity costs. CPUC acknowledges that NEM participants are not compensated for avoided capacity but argues that participants in the NEM program are not owed capacity costs because they do not provide any capacity for utilities. CPUC also asserts that net metering programs are not PURPA programs.[4]

NEM programs are not, as a general matter, state programs categorically exempt from PURPA. In the very CPUC decision implementing the NEM program, CPUC acknowledged that if customers are compensated in the form of a credit on their utility bill, PURPA does not apply. But if the utility is making a separate payment to customers,

[4] CARE argued at oral argument that CARE's members have repeatedly been denied a standard contract and instead been placed in the NEM program. Such an argument veers into the category of an as-applied challenge that can only be brought in state court. *Allco Renewable Energy Limited v. Massachusetts Electric Company*, 208 F.Supp.3d 390, 396 (D. Mass. 2016) (citing *Exelon Wind 1, LLC*, 766 F.3d at 388).

PURPA applies and the payment must be the full avoided cost.

CPUC is not required to take capacity costs into account in the NEM program. PURPA requires utilities to compensate QFs for capacity costs only when purchasing energy from the QF allows the utility to forgo spending its own money on capacity. FERC has explained that capacity costs are required when "a qualifying facility offers energy of sufficient reliability and with *sufficient legally enforceable guarantees of deliverability* to permit the purchasing electric utility" to forgo capital investments. *Order 69*, 45 FERC at 12216 (emphasis added).

The energy that customers provide to utilities through the NEM Program does not have "sufficient legally enforceable guarantees of deliverability" because customers are not legally required to provide the utility with energy. If, at the end of twelve months, a customer has used more energy than it produced, the customer simply would not provide any energy to the utility. This scenario does not allow utilities to forgo spending on capacity elsewhere because the utility cannot know in advance how much surplus energy NEM participants will provide, and CARE has failed to make any showing that NEM decreases utilities' spending on capacity. Thus, this aspect of the NEM program does not violate PURPA.

3. The Re-MAT and CHP Programs

CARE has given perfunctory treatment to any possible challenge to the Re-MAT and CHP programs, stating only that CPUC operates these programs and that "[a]ll of these programs have one thing in common. Plainly and simply, there is no component for actual avoided capacity costs." Given CARE's bare-bones assertion of the programs'

deficiencies, we decline to speculate as to why CARE believes that these programs allow utilities to forgo capacity spending and will not address these programs on appeal. *See Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1079 n.26 (9th Cir. 2008) (en banc) ("It is well-established that a bare assertion in an appellate brief, with no supporting argument, is insufficient to preserve a claim on appeal."). To the extent, however, that CARE challenges either program for basing capacity costs on a new natural gas facility, rather than renewable energy facilities, the district court should consider such a challenge on remand, consistent with our holdings above regarding avoided cost and capacity cost in the context of an RPS.

4. Renewable Energy Credits ("RECs")

CARE next challenges whether CPUC can allow utilities to condition energy purchases from QFs on transfers of the QF's RECs to the utility. As CARE acknowledged in its brief, RECs are not covered under PURPA; rather, they are considered state programs and do not factor into the avoided cost determination. *See American Ref-Fuel Co.*, 105 FERC ¶ 61,004, 61,008 (2003); *CGE Fulton, LLC*, 70 FERC ¶ 61,290 (1995), *reconsideration denied*, 71 FERC ¶ 61,232 (1995); *SoCal Edison*, 71 FERC at ¶ 62,080. CARE argues, nonetheless, that RECs are valuable to utilities that do not comply with California's greenhouse gas emission standards (and could thus use the RECs to become compliant) and that allowing utilities to require that QFs give RECs to utilities reduces the cost that QFs receive to below full avoided cost. CPUC argues, and CARE appears to acknowledge, that QFs are compensated for RECs under the NEM program.

CARE cites no legal authority in support of its argument that the value of RECs should be considered as reducing the cost that utilities pay QFs. Given FERC's treatment of RECs

as outside the purview of PURPA, however, utilities do not violate PURPA in not compensating QFs for RECs.

C. CPUC's NEM program and PURPA's "must purchase" requirements

CARE alleges that the NEM program violates the mandatory interconnection requirement of PURPA. PURPA requires that utilities "shall make such interconnection with any [QF] as may be necessary to accomplish purchases or sales under this subpart." 18 C.F.R. § 292.303(c). FERC regulations place the burden of paying the cost to connect to the power grid on the QF. 18 C.F.R. § 292.306 (a).

The NEM program does not violate PURPA's mandatory interconnection requirements. Participants in the NEM program are, by definition, connected to the utility's infrastructure. CARE objects to the NEM Program being "imposed unilaterally." While QFs can choose to be compensated based on energy pricing "at the time of delivery" or based on energy pricing at the time a contract is made, 18 CFR § 292.304(d)(2), the interconnection provisions of PURPA merely mandate that utilities connect QFs when needed to comply with PURPA. CARE challenges the imposition of fees, but the regulations specifically allow utilities to charge QFs for the connection fees. Thus, the NEM Program does not violate PURPA.

D. Equitable damages and attorney fees

The district court denied CARE's motion for leave to amend its complaint to add a request for equitable damages and attorney fees. The district court found that CARE had not shown that justice so required equitable damages and said that it would "likely conclude" that PURPA does not authorize damages. The district court concluded that suits

against Commissioners in their official capacity can only seek "prospective injunctive relief" and that Commissioners had absolute immunity. The district court found attorney fees unavailable because PURPA does not have a fee-shifting provision. We affirm.

As this Court previously noted on appeal, "PURPA has a comprehensive remedial scheme." *Solutions for Utilities, Inc. v. Cal. Pub. Utilities Comm'n*, 596 F. App'x 571, 572 (9th Cir. 2015). PURPA allows for suits in federal courts and authorizes "such injunctive or other relief as may be appropriate." 16 U.S.C. § 824a-3(h)(2)(B). This Circuit has yet to rule on whether PURPA authorizes equitable damages. We find it unnecessary to reach that issue, however, because the Eleventh Amendment precludes such damages here.

We have previously held that CPUC is immune from suit "as an arm of the state" based on the Supreme Court's determination in *Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989) that "Congress did not intend states to be subject to suit under Section 1983." *Sable Commc'ns of Cal., Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 191 (9th Cir. 1989). As an arm of the state, CPUC is protected by the Eleventh Amendment. *Air Transportation Ass'n of America v. Public Utilities Comm'n of Cal.*, 833 F.2d 200, 204 (9th Cir. 1987). The Eleventh Amendment bars citizens from suing their own states in federal court. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). A state need not be a "named party to the action." *Id.* Ordinarily, the Eleventh Amendment would bar suit against CPUC for any purposes.

The Supreme Court rejected a claim similar to CARE's claim for equitable damages in *Edelman*. There, the Court found that an award of "retroactive benefits," essentially what CARE seeks here, would be in essence "an award of

damages against the State," *Edelman*, 415 U.S. at 668, and therefore barred by the Eleventh Amendment. *Id.* at 677. Thus, the Eleventh Amendment bars CARE's claim for equitable damages. CARE can, however, sue CPUC under the *Ex Parte Young* exception to the Eleventh Amendment, that allows for "prospective injunctive relief only." *Edelman*, 415 U.S. at 677. CARE's reliance on *Albemarle v. Moody*, 422 U.S. 405 (1975), is to no avail, as *Albemarle* was a suit against private employers, not a state or state agency. CPUC Commissioners in their individual capacity have absolute immunity for "acting in a legislative capacity." *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405–06 (1979).

CARE next argues that the lack of statutory authorization for attorney fees is no bar to their recovery. Attorney fees are not necessarily barred by the Eleventh Amendment. *Hutto v. Finney*, 437 U.S. 678, 690–93 (1978). *Hutto* is distinguishable from CARE's claims because the district court in *Hutto* first found bad faith before imposing attorney fees, making such fees analogous to fines for civil contempt. Here, CARE alleges no bad faith. *Hutto* additionally examined the availability of attorney fees under 42 U.S.C. § 1988, finding that "Congress has plenary power to set aside the States' immunity from retroactive relief in order to enforce the Fourteenth Amendment." *Id.* at 693. But unlike § 1988, PURPA creates no attorney fee remedy.

CARE argues that it is entitled to attorney fees under a private attorney general theory. CARE cannot claim attorney fees, however, under that theory. Under a private attorney general theory, a plaintiff could recover attorney fees if the plaintiff: (1) advanced "the interests of a significant class of persons by (2) effectuating a strong congressional policy." *Brandenburger v. Thompson*,

494 F.2d 885, 888 (9th Cir. 1974). CARE seeks to vindicate the interests of, at a minimum, other solar producers, if not all renewable energy producers. And PURPA evinces a strong policy of encouraging small energy producers. But the Supreme Court long ago foreclosed awarding attorney fees under the private attorney general theory without statutory authorization. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 269–70 (1975). As the Supreme Court made clear in *Alyeska Pipeline*, Congress may authorize attorney fees in federal statutes. Without such statutory authorization, however, the judiciary would be determining which statutory objectives are important enough to merit shifting the burden of attorney fees. *Id.* at 263–64. That is a policy question not suited for judicial resolution. *Id.* at 269–70. Therefore, we cannot impose attorney fees under the private attorney general theory as PURPA makes no provision for such fees.

CARE relies on *Hall v. Cole*, 412 U.S. 1 (1973), to argue for attorney fees under the "private attorney general" theory. *Hall*, however, concerned the "common benefit" theory of attorney fees rather than the private attorney general theory. The common benefit theory does not apply to CARE, as that theory requires a common fund from which to compensate plaintiffs. In other words, that theory operates to spread the cost of litigation among the beneficiaries of the litigation; it does not shift the fees from the plaintiff to the defendant. *See Alyeska Pipeline Serv. Co.*, 421 U.S. at 257–59. Although CARE protests that it is left without a remedy, that is a complaint for Congress, not the courts.

CONCLUSION

The district court erred in not interpreting FERC's regulations to require state utility commissions to consider whether an RPS changed the calculation of avoided cost.

This case is reversed and remanded on that issue. In all other respects, the decision below is affirmed.

AFFIRMED IN PART and REVERSED IN PART.

NGUYEN, Circuit Judge, dissenting in part:

Under the Public Utility Regulatory Policies Act of 1978 ("PURPA") and its implementing rules and regulations, states "play the primary role in calculating avoided costs," and are afforded "a great deal of flexibility" in doing so. *Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994) (quoting Administrative Determination of Full Avoided Costs, 4 FERC Statutes & Regs. ¶ 32,457, at 32,173 (proposed Mar. 16, 1988)). While "a state cannot implement a program that conflicts with PURPA," Maj. Op. at 16 (construing *Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 208 F. Supp. 3d 390, 399 (D. Mass. 2016)), the majority identifies no such conflict in any of the programs at issue here. Because the majority's misreading of the law substantially undercuts the discretion intended for the states and inflicts significant consequences upon their energy policy, I dissent.

I.

A.

Start with the statute itself. PURPA instructs the Federal Energy Regulatory Commission (the "FERC"), "after consultation with representatives of Federal and State regulatory agencies," to develop rules that "require electric utilities to offer to . . . purchase electric energy from [qualifying small power production] facilities" ("QFs").

16 U.S.C. § 824a-3(a). PURPA says little about the rates that utilities must pay for such energy other than that they "shall be just and reasonable to the electric consumers of the electric utility and in the public interest," "shall not discriminate against [QFs]," and cannot "exceed[] the incremental cost to the electric utility of alternative electric energy." *Id.* § 824a-3(b). As FERC interprets these directives, utilities must compensate QFs based on the utilities' "avoided costs," 18 C.F.R. § 292.304(d), which FERC defines as "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the [QF] or [QFs], such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

The flexibility afforded to state regulatory authorities and utilities in determining avoided costs is evident in the regulation providing ratemaking guidance. It directs ratemakers to take certain factors into account "to the extent practicable."[1] 18 C.F.R. § 292.304(e). These factors are framed at an extremely high level of generality to allow states to exercise wide discretion in balancing them.

[1] The factors are (1) data regarding a utility's estimation of avoided costs and costs of planned additional capacity; (2) "[t]he availability of capacity or energy from a [QF]"; (3) "[t]he relationship of the availability of energy or capacity from the [QF] . . . to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use,"; and (4) "[t]he costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a [QF], if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity." *Id.* §§ 292.304(e), 292.302(b)–(d).

None of this statutory and regulatory language suggests that utilities must compensate individual QFs based on the costs that the utility would otherwise have incurred by purchasing the same *type* of energy. For example, a QF selling energy generated from photovoltaic cells is not entitled to receive a rate based on the utility's cost of procuring solar energy from another source. Indeed, the regulations suggest the opposite—that utilities can aggregate energy sources when determining avoided costs. *See* 18 C.F.R. § 292.101(b)(6) (looking to costs avoided by purchasing "from the [QF] or [QFs]"); *see also id.* § 292.304(e)(2)(vi) (directing ratemakers to consider "[t]he individual and aggregate value of energy and capacity from [QFs] on the electric utility's system").

B.

In concluding that a utility using energy from QFs to satisfy state-mandated renewable energy targets "cannot calculate avoided costs based on energy sources that would not also meet [those targets]," Maj. Op. at 18, the majority relies on a single sentence from a FERC order that it misinterprets. *See Cal. Pub. Utils. Comm'n* ("*CPUC*"), 133 FERC ¶ 61,059, 61,261 (2010). In *CPUC*, the question was not whether utilities *must* calculate avoided costs in that manner but whether they *could* do so consistently with PURPA and FERC regulations. Specifically, CPUC sought clarification that utilities setting avoided cost rates could consider factors other than those set forth in 18 C.F.R. § 292.304(e) (the "avoided cost factors") and that avoided costs "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." *CPUC*, 133 FERC at ¶ 61,262.

Then, as now, the ratemaking regulation required each electric utility to establish "standard rates" for energy purchases from QFs that are "consistent with" the avoided cost factors. 18 C.F.R. § 292.304(c)(3)(i). In addition, standard rates "*[m]ay* differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." *Id.* § 292.304(c)(3)(ii) (emphasis added). However, the regulation is not clear whether supply characteristics can be considered only when determining standard rates or whether they can be considered in determining avoided costs generally. FERC explained that supply characteristics can be considered generally. *See CPUC*, 133 FERC at ¶¶ 61,265–66.

> [I]n determining the avoided cost rate, just as a state *may* take into account the cost of the next marginal unit of generation, so as well the state *may* take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy or for a long duration. Therefore, the CPUC *may* take into account actual procurement requirements, and resulting costs, imposed on utilities in California.

Id. at ¶ 61,266 (emphases added).

FERC stressed that "states are allowed a wide degree of latitude in establishing an implementation plan for [determining avoided cost rates], as long as such plans are consistent with [FERC] regulations." *Id.* at ¶ 61,266 (quoting *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61,161, 61,533 (1989)). Because "the determinations that

a state commission makes to implement [PURPA's] rate provisions . . . are by their nature fact-specific and include consideration of many factors," FERC was "reluctant to second guess the state commission's determinations." *Id.*

The majority cherry picks a sentence from *CPUC* to reach its result. That sentence concerns a different decision "support[ing] the proposition that, where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement." *Id.* at ¶ 61,267 (construing *S. Cal. Edison Co.* ("*SoCal Edison*"), 70 FERC ¶ 61,215 (1995)).

The problem, *CPUC* explained, was that "there is language in the *SoCal Edison* proceeding that would seem to permit state commissions to base avoided costs on 'all sources *able to sell to the utility*,' and other language that requires a state commission to take into account 'all sources'" without qualifying language. *Id.* *CPUC* clarified that avoided costs calculations do not have to take into account all alternative sources; rather FERC was "*permitting* states to set a utility's avoided costs based on all sources able to sell to that utility." *Id.* (emphasis added).

Nothing in *CPUC* implies that states are *required* to consider supply characteristics. To the contrary, both in *CPUC* and the regulations it interprets, the repeated use of terms such as "may," "permits," and "consistent with" all suggest that it is a matter of state discretion.

The majority's only other interpretive support is FERC's statement that "if a purchase from a [QF] permits the utility to avoid the addition of new capacity," *i.e.*, new generation

facilities, "then the avoided cost of the new capacity and not the average embedded system cost of capacity should be used." Regulations Implementing PURPA Section 210, 45 Fed. Reg. 12,214, 12,216 (Feb. 25, 1980). But this has nothing to do with consideration of supply characteristics when determining avoided energy costs. Rather, it explains why avoided costs should be based on a utility's "incremental cost" of obtaining alternative energy, 16 U.S.C. § 824a-3(b), rather than the utility's average cost. "Under the principles of economic dispatch, utilities generally turn on last and turn off first their generating units with the highest running cost," so by purchasing energy from a QF, an economically efficient utility "can avoid operating its highest-cost units." Regulations Implementing PURPA Section 210, 45 Fed. Reg. at 12,216.

If anything, this discussion undermines the majority's position. It illustrates "[o]ne way of determining the avoided cost," *id.*, implying that there are others and, more generally, that states have discretion in their calculations. *See id.* at 12,226 ("[T]o the extent that a method of calculating the value of capacity from [QFs] reasonably accounts for the utility's avoided costs, and does not fail to provide the required encouragement of cogeneration and small power production, it will be considered as satisfactorily implementing [FERC] rules.").

"The question . . . is what costs the electric utility is avoiding. Under [FERC] regulations, a *state* may determine that capacity is being avoided . . . to determine the avoided cost rate." *CPUC*, 133 FERC at ¶ 61,266 (emphasis added). The majority usurps the state's prerogative.

II.

This is the wrong case to be deciding these issues in a published decision, which will inflict significant consequences on energy policy throughout our circuit. Plaintiffs' briefing, both here and in the district court, is impenetrable. For example, this is plaintiffs' summary of the argument that the majority finds meritorious:

> [T]hey[2] manipulate the "multi-tiered structure" for pricing, which refers to pegging avoided cost calculations between similar energy sources, which means both in terms of the energy production and, again, capital [capacity] costs. They push for multi-tiered pricing when it serves the utilities, when crafting different contracts for different energy producers; and not when it does not suit them, when renewable energy producers object to an avoided cost computation based on the cheapest source that the utilities can invoke. In either case, the governing rationale is the same: one purpose of PURPA is to expand total capacity and encourage new sources, with policy objectives that include avoidance of risks of shortages, and those objectives are not served by relegating all cost calculations to the cheapest available source which is likely to be existing, aged production facilities.

[2] Plaintiffs are perhaps referring to the CPUC and electric utilities, though it is unclear.

From that, the majority divines an argument "that CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ('multi-tiered pricing')." Maj. Op. at 16.

To the extent plaintiffs have an argument, they seem to be complaining that the CPUC is inconsistent about implementing multi-tiered pricing in a way that always benefits the utilities—not, as the majority seems to assume, that multi-tiered pricing is always required or, for that matter, desirable. Neither the majority nor plaintiffs explain *which* CPUC programs fail to calculate avoided costs by supply source, let alone *how*. The majority leaves it to the district court to make plaintiffs' argument for them in the first instance. I do not envy its task.

Even under the majority's interpretations, I see no obvious problem if plaintiffs' utility considers sources other than solar energy when calculating the costs it avoids by purchasing energy from solar QFs like plaintiffs. Plaintiffs participate in the Net Energy Metering ("NEM") program which, as the majority acknowledges, means that they have no contractual obligation to sell any amount of electricity to the utility. Maj. Op. at 22. This is a relevant consideration in determining a utility's avoided costs, *see* 18 C.F.R. § 292.304(e)(2), because it affects the QF's reliability as a source of solar energy. *See* Regulations Implementing PURPA Section 210, 45 Fed. Reg. at 12,226 ("[T]he value of the service from the [QF] to the electric utility may be affected by the degree to which the [QF] ensures by contract or other legally enforceable obligation that it will continue to provide power."). The CPUC could reasonably find that NEM participants' inherent unreliability in providing solar energy makes them unsuitable as capacity sources to meet a

utility's state-mandated renewable energy requirements. While "the diversity of [solar QFs] *may* collectively comprise the equivalent of [solar] capacity," *id.* at 12,227 (emphasis added), nothing in the regulations compels such a finding.

The programs at issue here were forged in a hard-fought settlement to end a long-running dispute between QFs and the CPUC. *See* Maj. Op. at 11. In a stroke, the majority upends this settlement by calling all of these programs into question. There is no reason to create such regulatory uncertainty.

We should affirm the district court's judgment in its entirety. I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CALIFORNIANS FOR RENEWABLE ENERGY, a California Non-Profit Corporation; MICHAEL E. BOYD; ROBERT SARVEY,

Plaintiffs-Appellants,

and

SOLUTIONS FOR UTILITIES, INC., a California Corporation,

Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; MICHAEL R. PEEVEY; TIMOTHY ALAN SIMON; MICHAEL R. FLORIO; CATHERINE J. K. SANDOVAL; MARK J. FERRON, in their official and individual capacities as current Public Utilities commission of California Members,

Defendants-Appellees,

and

RACHEL CHONG; JOHN A. BOHN; DIAN M. GRUENICH; NANCY E. RYAN, in their individual capacities as former Public Utilities Commission of California Members; SOUTHERN CALIFORNIA EDISON CORP., a California Corporation,

No. 17-55297

D.C. No.
2:11-cv-04975-SJO-JCG
Central District of California,
Los Angeles

ORDER

Defendants.

Before: GOULD and NGUYEN, Circuit Judges, and MARBLEY,* District Judge.

Appellants' Petition for Rehearing is DENIED. Appellees' Petition for Rehearing is DENIED.

The full court has been advised of both Petitions for Rehearing En Banc. No judge of the court has requested a vote on either Petition for Rehearing En Banc. Fed. R. App. P. 35. Both Petitions for Rehearing En Banc are also DENIED.

* The Honorable Algenon L. Marbley, United States District Judge for the Southern District of Ohio, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** December 2, 2011

TITLE: Solutions for Utilities, Inc., et al. v. California Public Utilities Comm'n, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING CPUC DEFENDANTS' MOTION TO DISMISS [Docket No. 32]; **ORDER GRANTING DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO DISMISS** [Docket No. 33]

This matter is before the Court on the motion filed by Defendants California Public Utilities Commission ("CPUC") and current and former commissioners Michael R. Peevey, Timothy Alan Simon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachael Chong, John A. Bohn, Dian M. Gruenich, and Nancy E. Ryan (collectively with CPUC, "CPUC Defendants") to dismiss the First Amended Complaint ("CPUC Motion"). Plaintiffs Solutions for Utilities, Inc. ("SFUI"), CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd, and Robert Sarvey (collectively, "Plaintiffs") filed an Opposition ("CPUC Opposition"), to which the CPUC Defendants replied ("CPUC Reply").

This matter is also before the Court on the motion filed by Defendant Southern California Edison Company ("SCE") to dismiss the First Amended Complaint ("SCE Motion"). Plaintiffs filed an Opposition ("SCE Opposition"), to which SCE replied ("SCE Reply").

The Court found this matter suitable for disposition without oral argument and vacated the hearing set for October 31, 2011. *See* Fed. R. Civ. P. 78(b). For the following reasons, the CPUC Motion is GRANTED and the SCE Motion is GRANTED.

I. STATUTORY AND REGULATORY BACKGROUND

A. Public Utilities Regulatory Policies Act ("PURPA")

In 1978, Congress enacted the Public Utilities Regulatory Policies Act ("PURPA") to encourage the development of cogeneration and small power production facilities, thereby reducing American dependence on fossil fuels. *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 850 (9th Cir. 1994). To achieve this objective, Congress sought to eliminate two barriers to the development of alternative energy sources: (1) the reluctance of traditional electric utilities

to purchase power from and sell power to non-traditional facilities; and (2) the financial burdens imposed upon alternative energy sources by state and federal utility authorities. *Id*.

Section 201 of PURPA designates a group of facilities as Qualifying Facilities ("QFs"), a group that includes any cogeneration facility meeting requirements set by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 796. Section 210 of PURPA creates a market for QFs' energy by requiring FERC to establish regulations that obligate public utilities to sell electric energy to and purchase electric energy from QFs. 16 U.S.C. § 824a-3. PURPA also requires FERC to promulgate regulations to ensure that the rates for these purchases "shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and shall not discriminate against qualifying cogenerators or qualifying small power producers." 16 U.S.C. § 824a-3(b). However, to ensure that the general public, as consumers and ratepayers, is not forced to subsidize QFs, the rates set by FERC cannot exceed the incremental cost to the electric utility of alternative electric energy. *Id*. The incremental cost is defined as the "cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). In other words, the utility companies cannot be forced to pay the QFs a price for energy that is higher than the amount of money it would take the utility to obtain the electric energy another way (either by generating it itself or purchasing it elsewhere).

FERC promulgated regulations pursuant to its mandate under PURPA. Among these regulations, FERC set forth the criteria that cogeneration facilities and small power production facilities must meet to be certified as a QF, including operating and efficiency standards. 18 C.F.R. §§ 292.201-.211. The FERC regulations require utilities to purchase energy from those facilities it has certified as QFs. 18 C.F.R. § 292.303. FERC also required utilities to purchase electric energy from and sell electric energy to QFs at the utility's full "avoided cost" rate. 18 C.F.R. § 292.304(d). "Avoided costs" are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). The "avoided cost" is essentially the same as the "incremental cost," as defined in PURPA. Because PURPA states that the rate (i.e., the price paid to the QFs for electrical energy) cannot be higher than the incremental cost and the FERC regulations state that the rate cannot be less than the avoided cost, PURPA and the FERC regulations, read in conjunction, require the price paid by utilities to be exactly the avoided cost.

The states are in charge of implementing FERC's regulations pertaining to determining avoided costs and setting rates paid to QFs. 16 U.S.C. § 824a-3(f). CPUC is a state agency of constitutional origin that is authorized to fix retail rates and establish rules for California utilities. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Utils. Code § 701. In California, CPUC is the entity responsible for implementing FERC's regulations.

PURPA also provides an enforcement scheme for violations of PURPA and the FERC regulations. *See Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000). If a state

regulatory authority (such as CPUC) fails to properly implement FERC's regulations, FERC can bring an enforcement action against the state regulatory agency in federal court. 16 U.S.C. § 824a-3(h)(2). If FERC does not bring such an action on its own, any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. *Id*. If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id*. If the public utility commission **does** implement FERC's regulations, but a utility (such as SCE) violates the public utility commission's requirements, an aggrieved party can sue for damages based on that violation **in state court only**. 16 U.S.C. §§ 824a-3(g)(2), 2633.

B. Rule 21

Effective in 2003, the California Legislature adopted the California Renewables Portfolio Standard Program, which required all California electric corporations to procure a minimum quantity of electricity each year from renewable energy sources. CAL. PUB. UTIL. CODE § 399.11 *et seq.* Beginning in 2007, the California Legislature required that each electrical corporation file with CPUC a standard tariff for renewable energy output produced at an electric generation facility (defined as a public water or wastewater agency that is a retail customer of an electrical corporation with an effective capacity of not more than one megawatt and is an eligible renewable energy source) for terms of up to 20 years at a price referred to as the market price referent ("MPR"), which would be determined by the CPUC. CAL. PUB. UTIL. CODE §§ 399.20, 399.15(c).

The CPUC adopted a tariff and standard purchase contracts that electric corporations like SCE were required to offer to eligible public water and wastewater agencies. *See generally* CPUC Decision 07-07-027 (2007).[1] The rate in these standard contracts is the MPR, as determined by the CPUC. *Id*. The contracts provide that in purchasing the energy output of the seller, the utility would also acquire the renewable energy credits ("RECs") associated with that output. *Id*. An REC is a certificate of proof that a unit of electricity was generated and delivered by an eligible renewable energy resource. CAL. PUB. UTIL. CODE § 399.12(e).

CPUC authorized utilities to use "Rule 21," a CPUC-approved tariff, which provides for an "orderly and timely" interconnection between the utilities and sellers. CPUC Decision 07-07-027. CPUC also expanded the program to require utilities (such as SCE) to offer similar standard purchase contracts to small producers of renewable energy who are utility customers (such as SFUI). *Id*. CPUC required the utilities to notify potentially interested or affected customers of the availability of the new opportunity under Rule 21. *Id*. The California legislature codified CPUC's expansion of the program in 2008. CAL. PUB. UTIL. CODE § 399.20.

[1] The Court takes judicial notice of this CPUC Decision because it satisfies the requirements of Federal Rule of Evidence 201.

CPUC approved a specific form of a power purchase contract and ordered the utilities (including SCE) to offer it to eligible sellers. CPUC Decision 07-07-027. The program is called the California Renewable Energy Small Tariff ("CREST") program, and the CPUC-approved power purchase contract is known as a CREST contract. *Id*. Participation in the CREST program is voluntary. *Id*. CPUC did not invoke any of its powers under PURPA or the FERC guidelines in establishing Rule 21 or adopting the CREST program. CPUC Decision 08-02-010.[2] The CREST program does not require the seller to be a QF.

The parties to this action agree that Rule 21 and the CREST program are not intended to (and indeed do not) implement PURPA or the FERC regulations. The only extent to which Rule 21 and the CREST program are related to PURPA and the FERC regulations is that entities who meet the criteria to be certified as a QF under the FERC regulations may also have the option of entering a CREST contract with one of the major California utilities.

With this statutory and regulatory backdrop in mind, the Court turns to the allegations in this case.

II. ALLEGATIONS FROM THE FIRST AMENDED COMPLAINT

The First Amended Complaint ("FAC") sets forth the following allegations.

A. SFUI's Allegations

Plaintiff SFUI is and at all relevant times was an electric utility within the class of small power production facilities and nontraditional electricity generating facilities contemplated by PURPA and the FERC regulations. (FAC ¶ 25.) SFUI is currently certified as a QF. (FAC ¶ 25.) The FAC does not indicate **when** SFUI was certified as a QF. As explained below, it appears that SFUI was not certified as a QF for most if not all of the time period during which the events allegedly leading to Defendants' liability occurred, but rather SFUI became certified as a QF subsequent to the events described in the FAC.

SCE is the owner of the power grid in the region where SFUI hoped to interconnect and supply energy. (FAC ¶ 14.) Prior to or during May 2008, SFUI, which met the criteria to be certified as a QF, attempted to supply electric power to SCE. (FAC ¶¶ 26-26.5.) SFUI hoped to receive the benefit of the contract terms to which QFs are entitled under PURPA and the FERC regulations, namely a purchase price for its energy equal to the avoided cost. (FAC ¶¶ 26-26.5.)

In May 2008, however, SCE falsely represented to SFUI that in order to secure interconnection to SCE's power grid and operate as a small power generating facility as contemplated and

[2] The Court takes judicial notice of this CPUC Decision because it satisfies the requirements of Federal Rule of Evidence 201.

encouraged by PURPA, the correct avenue was to comply with Rule 21 and seek a CREST contract. (FAC ¶ 26.1.) SCE told SFUI that obtaining QF certification from FERC was not necessary and indeed, would be counter-productive. (FAC ¶ 26.1.) SFUI relied on this representation from SCE **and did not seek to be certified as a QF**, even though it was eligible. (FAC ¶ 26.) Instead, SFUI pursued a CREST contract and achieved the first position in the queue for interconnection with SCE's grid. (FAC ¶ 26.4.)

Upon reaching the first position in the queue, SFUI realized that the CREST contract did not allow SFUI to obtain its PURPA rights. For instance, the rate to be paid for electric energy was the MPR, which was much lower than the avoided cost. (FAC ¶¶ 26.4, 35(c).) The CREST contract also required SFUI to assign its RECs to SCE as part of the transaction without providing any additional compensation to SFUI. (FAC ¶¶ 26.3, 35(f).) Since RECs are assets of value, requiring SFUI to assign its RECs to SCE without additional consideration served to further lower the price SFUI would receive for its energy under the CREST contract. SFUI also found other terms of the CREST contract to be damaging to the energy seller, such as a "unilateral curtailment power," which imposed on the seller (SFUI) revenue uncertainties that effectively denied SFUI the opportunity to obtain developer financing. (FAC ¶¶ 26.3, 35(d)-(e).)

Once SFUI realized that the CREST contract was not to its liking, SFUI could not resort to other options, such as becoming certified as a QF under PURPA, without losing its first position in the queue and being compelled to take a much lower position in another queue. (FAC ¶ 26.4.) As a consequence, SFUI was prevented from being able to operate as a viable and profitable small power generating facility; instead, SFUI was forced to sell out in order to mitigate its damages and prevent a total loss. (FAC ¶ 26.5.)

The FAC alleges:

> SFUI made repeated and long-standing efforts to obtain contracts with SCE in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of the refusal of SCE to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff SFUI to secure same.

(FAC ¶ 29.) However, other than the one specific incident described above (regarding SFUI's being allegedly duped by SCE into pursuing a CREST contract in 2008), the FAC does not indicate what the "repeated and long-standing" efforts to obtain a contract with SCE have been.

The FAC alleges a conspiracy between SCE and the CPUC Defendants to circumvent PURPA and the FERC regulations. (FAC ¶¶ 17-18.1, 27, 49-51.)

On March 11, 2011, SFUI petitioned FERC to bring an enforcement action against CPUC and SCE, but on May 19, 2011, FERC declined to do so. (FAC ¶ 30.)

B. CARE's Allegations

The CARE organization represents electric utilities that are QFs. (FAC ¶ 28.) The FAC alleges:

> CARE made repeated and long-standing efforts to obtain contracts with local power grid providers in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of refusal of the local power grid providers to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff CARE to secure same.

(FAC ¶ 31.) Plaintiffs Boyd and Sarvey (collectively with CARE, "CARE Plaintiffs") are members of CARE. (FAC ¶ 32.) Boyd and Sarvey are apparently QFs (FAC 2 (Introduction)), although this is not made clear in the FAC. The FAC does not list any of CARE's other members. Nowhere in the FAC are there specific allegations of what efforts any of CARE's members have made to obtain contracts with local power grid providers. The FAC does not even state which power grid providers allegedly refused to abide with PURPA. In short, the FAC is completely devoid of any specific allegations pertaining to CARE, its members, or the efforts made by CARE or its members to obtain PURPA contracts. All that the FAC alleges with respect to CARE is the vague and conclusory allegation that CARE and its members attempted to obtain PURPA contracts, but were unable to do so because the power grid providers refused to abide by PURPA and CPUC refused to enforce PURPA.

On January 28, 2011, CARE, on behalf of itself and its members, petitioned FERC to bring an enforcement action against CPUC and local power grid providers, but on March 17, 2011, FERC declined to do so. (FAC ¶ 32.) On or about July 9, 2011, CARE, Boyd, and Sarvey again petitioned FERC to bring an enforcement action. (FAC ¶ 32.) As of the filing of the FAC, that petition was pending. (FAC ¶ 32.)

CPUC, allegedly in retaliation for CARE's decision to petition FERC regarding CPUC's alleged misconduct, sought to have FERC deem CARE to be a vexatious litigant and bar CARE from submitting any additional petitions to FERC. (FAC ¶ 62(c).) The FAC also alleges that CPUC made "its fee determinations in a manner designed to [limit, burden, deter, or chill CARE's freedom of speech and right to petition]" (FAC ¶ 62(c)), although the FAC does not explain in what way the fee determinations served this purpose.

C. Causes of Action

The FAC sets forth five causes of action. The first is a claim for enforcement of PURPA, brought by all Plaintiffs against only the CPUC Defendants. Plaintiffs claim that CPUC's use of Rule 21 and the CREST contract violate PURPA and the FERC regulations that implement PURPA. (FAC ¶¶ 27, 37.) Because CPUC has not complied with or enforced PURPA and the FERC regulations,

"Plaintiffs have been frustrated in their efforts to enter the energy market, and prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its implementing regulations." (FAC ¶ 33.) In addition to the grievances noted above (such as setting the rate in the CREST contract as the MPR instead of avoided cost, forcing the seller to assign its RECs to the utility, and including "weasel clauses" such as the unilateral curtailment powers), Plaintiffs also claim that the utilities impose artificial barriers to small power production facilities trying to interconnect with its grids, such as:

> with CPUC approval, [] enter[ing] into contracts with larger energy suppliers who cannot interconnect for many years, and then posit[ing] those contracts as a basis for claiming that there is no interconnection capacity for Plaintiffs and other immediately available small power production facilities and nontraditional electricity generating facilities.

(FAC ¶ 35(b).)

The second cause of action is a claim under 42 U.S.C. § 1983 brought by SFUI against the individual current and former commissioner defendants and SCE. The cause of action claims that, under color of state law, these defendants deprived SFUI of its statutory PURPA rights and that because defendants' actions denied SFUI the right to reasonably profit from its business enterprises, defendants' actions constitute an unlawful and unconstitutional taking without just compensation or due process. (FAC ¶ 44.)

The third cause of action is also a claim under 42 U.S.C. § 1983. This claim is brought only by CARE against the individual current and former commissioner defendants. CARE alleges that, under color of state law, the individual current and former commissioner defendants violated CARE's First Amendment rights of freedom of speech and right to petition by attempting to bar CARE from petitioning FERC to bring enforcement actions against CPUC. (FAC ¶ 62(c).) This claim also alleges that defendants deprived CARE of its statutory rights under PURPA and its right to reasonably and economically operate its nonprofit business enterprise, constituting an unlawful and unconstitutional taking without just compensation or due process of law. (FAC ¶ 62(b).)

The fourth cause of action is for equitable, injunctive, and declaratory relief brought by CARE and SFUI against the CPUC Defendants. CARE and SFUI seek a declaration that the conduct of the CPUC Defendants is unlawful and an injunction requiring the CPUC Defendants to "remedy each and all of the particulars described" throughout the FAC "and the consequences thereof." (FAC ¶¶ 74-75.)

The fifth cause of action, for equitable and declaratory relief, is brought by SFUI against SCE. This count seeks an order declaring SCE's conduct unlawful.

The CPUC Defendants and SCE have moved to dismiss the FAC in its entirety.

II. DISCUSSION

A. Claim 1: Enforcement of PURPA

The first cause of action is an enforcement action brought by all Plaintiffs against the CPUC Defendants to enforce PURPA. The CPUC Defendants argue that this Court lacks subject matter jurisdiction to hear this claim. First, the CARE Plaintiffs failed to exhaust their administrative remedies. (CPUC Mot. 8-9.) Second, none of the CPUC Defendants' alleged conduct constitutes an "implementation" claim, which can be heard in federal court; rather, all of the allegations in the first count are "as applied" claims that can only be heard in state court. (*Id*. 8.) The CPUC Defendants also argue that even if the Court has subject matter jurisdiction, Plaintiffs lack statutory standing and have failed to state a claim. (*Id*. 13-15.)

1. Failure to Exhaust Administrative Remedies

PURPA provides that any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. 16 U.S.C. § 824a-3(h)(2). If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id*.

CARE, on behalf of itself and its members, twice petitioned FERC to bring an enforcement action against CPUC. (FAC ¶ 32.) CARE claims to have filed the first petition on January 28, 2011, which FERC denied on March 17, 2011. (FAC ¶ 32.) However, FERC rejected this January 28 petition only because it was procedurally inappropriate - it was tacked on to a request for rehearing of FERC's denial of CARE's complaint against several utilities. *CARE v. PG&E*, 134 F.E.R.C. ¶ 61, 207, at ¶ 12 (2011). Then in July 2011, after filing this action, the CARE Plaintiffs filed another enforcement petition with FERC. (FAC ¶ 32.) FERC declined to bring an enforcement action and issued a letter authorizing CARE to sue in the appropriate forum on September 12, 2011. (CPUC Opp'n 10.) This action, however, was filed June 10, 2011, and the FAC was filed August 10, 2011.

Because this action predates the CARE Plaintiffs' exhaustion of their administrative remedies, the Court lacks subject matter jurisdiction over the CARE Plaintiffs' PURPA enforcement claim. *See Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002). The fact that the CARE Plaintiffs' FERC petition has been rejected subsequent to the filing of this action does not suddenly invest the Court with subject matter jurisdiction. The Court lacked subject matter jurisdiction when this action was filed; therefore, the Court cannot hear the action. *Cf. Thome v. US Food and Drug Admin.*, No. 11-CV-00676, 2011 WL 3206910, at *2 (N.D. Cal. July 27, 2011) (holding that because the original plaintiff lacked standing, the court had no subject matter jurisdiction, and thus could not consider anything filed thereafter in the action, including amended pleadings that attempt to cure the jurisdictional problem by swapping in a plaintiff with standing). To hold otherwise would permit litigants to ignore PURPA's requirement that aggrieved parties first

petition FERC before bringing their own enforcement actions, instead permitting them to file FERC petitions and district court actions concurrently, knowing that any jurisdictional deficiency could be cured within 60 days.

Because the CARE Plaintiffs did not exhaust their administrative remedies prior to bringing this action, the Court lacks subject matter jurisdiction over the CARE Plaintiffs' PURPA enforcement action. Count 1 must be dismissed with prejudice as to the CARE Plaintiffs.

2. "As Applied" Claims

The CPUC Defendants concede that SFUI did exhaust its administrative remedies, but they argue that the Court also lacks subject matter jurisdiction over SFUI's PURPA-enforcement claim because its allegations constitute an "as applied" claim that must be heard in state court. (CPUC Mot. 8.) The PURPA rule they quote - 16 U.S.C. § 824a-3 - does not draw a distinction between an "implementation" claim and an "as applied" claim. The cited FERC decision - *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of PURPA*, 23 F.E.R.C. ¶ 61,304, 1983 FERC LEXIS 2583, at **10-11 (May 31, 1983) - does draw a distinction between "implementation" claims and "as applied" claims, but the distinction there drawn is between claims **against the public utilities commission** (deemed to be "implementation" claims) and claims **against a utility** that fails to comply with the public utilities commission's regulations (deemed to be "as applied" claims). *Id*. In this action, SFUI claims that CPUC's policies - primarily the approval of Rule 21 and the CREST contract - violate PURPA. Under the FERC decision the CPUC Defendants cite, this would be an implementation claim properly in federal court.

The only authority the CPUC Defendants cite that supports the proposition that federal courts lack subject matter jurisdiction over claims that CPUC policies violate PURPA because they are "as applied" is *Mass. Inst. of Tech. v. Dep't of Pub. Utils.*, 941 F. Supp. 233, 236-38 (D. Mass. 1996). The Court is not bound by this decision from the District of Massachusetts and does not find the reasoning in that case to be persuasive. The more straightforward reading of PURPA's judicial review and enforcement provisions (16 U.S.C. §§ 824a-3(g)-(h)) is that claims against a public utilities commission for actions or omissions that violate PURPA may be brought in federal court provided the plaintiff first petitions FERC and FERC takes no enforcement action of its own within 60 days. 16 U.S.C. § 824a-3(h)(2)(B). Where the public utilities commission has complied with PURPA by promulgating regulations but a utility has refused to abide by those regulations, actions against the utility must be brought in state court. 16 U.S.C. § 824a-3(g).

Accordingly, the Court has subject matter jurisdiction over SFUI's claim for PURPA enforcement.

3. Standing

The CPUC Defendants next argue that even if the Court has jurisdiction, SFUI lacks statutory standing to bring a claim for PURPA enforcement because SFUI is not a QF. The FAC is

ambiguous on this issue, as discussed above. The FAC alleges that SFUI is a QF. (FAC ¶ 25.) However, the FAC does not indicate **when** SFUI was certified as a QF. And the main factual allegation in the FAC is that, due to SCE's misrepresentations, SFUI **did not seek certification as a QF**, even though it was eligible (FAC ¶ 26), but pursued a CREST contract instead (FAC ¶ 26.4).

In addition to the concrete factual allegations in the FAC (regarding SCE tricking SFUI into pursuing a CREST contract rather than a contract that would give SFUI PURPA rights), the FAC also alleges generically:

> SFUI made repeated and long-standing efforts to obtain contracts with SCE in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of the refusal of SCE to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff SFUI to secure same.

(FAC ¶ 29.) Read in the light most favorable to SFUI, this allegation refers to other unsuccessful attempts SFUI made to obtain PURPA contracts besides the one attempt that FAC actually describes in detail. This allegation, combined with the allegation that SFUI is a QF, demonstrates that SFUI has standing to bring this claim. While the allegations are not sufficient to survive a motion to dismiss, as discussed in the next section, the allegations are sufficient to confer standing.

4. Failure to State a Claim

The fatal deficiency to SFUI's PURPA-enforcement claim is that it has failed to sufficiently allege that SFUI **attempted to get a PURPA-compliant contract and was unable to do so**. All the FAC alleges is that SFUI hoped to get a PURPA-compliant contract, SCE duped SFUI into pursuing a CREST contract instead, and then after waiting in the wrong queue, SFUI realized the inferiority of the CREST contract and regretted waiting in the wrong queue. If PURPA-compliant contracts are available to QFs in California but SFUI did not follow the proper procedures to get such a contract, it does not have a cause of action against the CPUC Defendants.

The parties all agree that Rule 21 and the CREST program were not promulgated to effectuate PURPA. None of the parties has pointed the Court to the particular CPUC regulations or decisions that **do** implement PURPA. However, the FAC does not allege a wholesale failure on the part of the CPUC Defendants to implement PURPA and the FERC regulations. (*See generally* FAC.) In the absence of evidence (or even allegations) to the contrary, the Court assumes that such

implementing regulations exist.[3] The FAC merely alleges that by authorizing SCE to offer SFUI (which met the eligibility requirements to be certified as a QF) the CREST contract instead of a PURPA-compliant contract, the CPUC Defendants violated PURPA and the FERC regulations.

Thus, the Court gleans the following allegation from the FAC: small power production facilities and nontraditional electricity generating facilities in California that meet the eligibility requirements to be certified as a QF have **two options**: (1) they can be certified as a QF and exercise their PURPA rights; **or** (2) they can choose not to exercise their PURPA rights and pursue a CREST contract instead. And according to SFUI, because the CREST contract does not comply with the terms PURPA mandates (including that the rate be the avoided cost), the CPUC Defendants' approval of the CREST contract violates PURPA.

This allegation concedes that SFUI was free, at the outset, to pursue **either** QF certification and a PURPA contract **or** the CREST contract. This is not a sufficient allegation of a PURPA violation. Perhaps SFUI regrets that it pursued the option that turned out, in hindsight, to be less attractive. Perhaps SFUI can state a claim against SCE for erroneously telling SFUI that the way to obtain its PURPA rights was by pursuing a CREST contract instead of seeking QF certification and pursuing a PURPA-compliant contract. But according to the allegations in the FAC, the option of pursuing QF certification and a PURPA-compliant contract was always available to SFUI: SFUI just never took that option.

The only way SFUI's allegations could amount to a PURPA violation is if PURPA mandates that **all contracts** between utility companies and small power production facilities and nontraditional electricity generating facilities **must comply** with PURPA's terms. In essence, this would be a preemption argument - an argument that for entities eligible to be QFs, PURPA-compliant contracts **and no others** may be used. Plaintiffs have not made this preemption argument, and the law does not support it. While utilities are required to **offer** QFs a contract that complies with PURPA and the FERC regulations (including a rate set at the full avoided cost), the Supreme Court has held that "a qualifying facility and a utility may negotiate a contract setting a price that is lower than the full-avoided-cost rate." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 416 (1983). Accordingly, PURPA-compliant contracts are not the only allowable contracts between utilities and QFs. So long as utilities offer a PURPA-compliant contract, they may also offer non-PURPA-compliant contracts (such as the CREST contract) as an alternative.

The FAC does not allege that the CPUC Defendants have failed to implement PURPA. The FAC does not allege that SCE refuses to offer PURPA-compliant contracts to QFs. The FAC does not allege any specific attempt made by SFUI to obtain a PURPA-compliant contract that was

[3] While the CPUC Defendants do not point to the PURPA-implementing regulations it has promulgated, it does contend that "since the early 1980's, the CPUC has approved standard offer PURPA contracts which are currently in effect." (CPUC Mot. 15:)

unsuccessful.[4] In the absence of these allegations, SFUI has failed to state a claim that the CPUC Defendants failed to implement or have violated PURPA.

SFUI's first cause of action is therefore dismissed with leave to amend.

B. Claim 2: SFUI's § 1983 Action

Claim 2 is brought by SFUI only against the individual former and current commissioners and SCE. It alleges that, under color of state law, these defendants deprived SFUI of its rights under PURPA and because the defendants' action deprived SFUI of its right to profit from its business, the actions also constituted an unconstitutional and unlawful taking. (FAC ¶¶ 44-61.)

1. Denial of PURPA Rights

Section 1983 cannot be used to create a remedy for violation of a federal statute that provides for its own remedies.

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981) (citations omitted). As discussed above, PURPA provides a comprehensive remedial scheme, permitting aggrieved small power production facilities such as SFUI to sue for PURPA violations either against public utilities commissions (in federal court, after unsuccessfully petitioning FERC to bring an enforcement action) or against utilities (in state court only). In light of this comprehensive statutory scheme, SFUI may not sue under § 1983 for violations of its PURPA rights.

2. Taking Without Just Compensation

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[4] To plead sufficiently, a plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009). As explained above, the incident the FAC describes in detail was not an attempt to get a PURPA-compliant contract. It was an attempt to get a CREST contract followed by regret that a PURPA-compliant contract had not been pursued. The general, vague, conclusory allegation in paragraph 29 is insufficient to state a claim.

SFUI claims that it was "denied its right to reasonably profit from its business enterprises, thereby constituting an unlawful and unconstitutional taking without just compensation and/or due process of law." (FAC ¶ 44.b.) SFUI has made clear that the "taking" is based on the alleged PURPA violations. "[I]f there were no PURPA violations, then there was no taking from SFUI; and if there were, one consequence [of the PURPA violations] was the taking." (SCE Opp'n 12.)

The Court notes at the outset that SFUI has not alleged a taking of "property" in the traditional sense. SFUI has not alleged that the commissioners have taken (or restricted SFUI's use or enjoyment of) the physical land it owns, the machinery on the land, or the energy SFUI produces. The alleged actions do not force SFUI to use their assets or property in any particular manner, and they do not forbid SFUI from using their assets or property in any manner of its choosing. Rather, the allegation is that, by not implementing PURPA, SFUI was unable to access its statutory right to contract with a utility company and receive a certain rate for its energy, preventing SFUI from realizing the profits it expected to make from its business venture. The expectation of profits, however, is not a property interest protected by the Takings Clause. "Reduced profits are damages; they are not themselves a kind of 'property' that can be the subject of a Takings Clause claim." *Yee v. MobileHome Park Rental Review Bd.*, 62 Cal. App. 4th 1409, 1422 (1998.) Indeed, the government makes any number of regulations that affect the profitability of various business ventures. Even regulations that completely ban the trade of previously legal goods have been held not to constitute a taking. *See Andrus v. Allard*, 444 U.S. 51 (1979) (law banning the sale of any part of an eagle - even preexisting artifacts of eagles legally killed before the passage of the Eagle Protection Act - is not an unconstitutional taking).

Even if the commissioners egregiously violated PURPA and denied SFUI the rights to which it is statutorily entitled, this would not constitute an unconstitutional taking of profits. If the commissioners failed to implement PURPA or violated PURPA, the proper avenue for redress is an enforcement action under PURPA.[5] SFUI cannot turn its claim that it suffered damages in the form of lost profits because of a PURPA violation into a claim for an unconstitutional taking of those profits. Because even the most egregious violation of PURPA could not give rise to a claim under the Takings Clause, Claim 2 must be dismissed with prejudice.

C. Claim 3: CARE's § 1983 Action

CARE's § 1983 action rests on three theories. The first two - that the individual commissioners denied CARE its PURPA rights and engaged in actions that amounted to an unlawful and unconstitutional taking - must be dismissed with prejudice for the same reasons discussed above.

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[5] And if PURPA did not already provide an enforcement mechanism, the proper form of redress would be to bring a § 1983 action for violation of PURPA, not a § 1983 action for an unconstitutional taking.

CARE also attempts to state a § 1983 claim based on the alleged violation of their First Amendment rights to free speech and right to petition the government.

CARE alleges that, in retaliation for its decision to petition FERC to bring an enforcement action against CPUC, the commissioners took two actions intended to chill CARE's First Amendment rights: (1) they attempted to have FERC ban CARE from petitioning FERC any further; and (2) they made fee determinations in a manner designed to chill CARE from exercising its First Amendment rights. (FAC ¶ 62.c.)

The first allegation cannot support a First Amendment claim. While parties have the right to bring their grievances to court, "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983.) Any attempt to have a party declared a vexatious litigant is, in some sense, "in retaliation" for the other party's decision to bring suit. Nevertheless, a government entity is entitled to seek to have an arbiter deem a party to be a vexatious litigant, with all the punitive consequences attendant to such a determination. *See, e.g.,* CAL. CODE CIV. PROC. §§ 391-391.7 (permitting defendants, including governmental defendants, to request that a court find party to be a vexatious litigant); *Wolfe v. George*, 486 F.3d 1120 (9th Cir. 2007) (holding California's vexatious litigant statute to be constitutional).

The second allegation - that the commissioners' fee determinations were set in such an manner and for the purpose of chilling CARE's right to petition - could support a First Amendment violation if adequately pled. However, the FAC is devoid of any concrete allegations to support the conclusory claim that fees were set in such a manner as to chill CARE's First Amendment rights. In the absence of any specific allegations (When did the commissioners set the fees? What were the fees for? Against whom were the fees levied? In what way did the fee determination affect CARE's First Amendment rights?), this cause of action must be dismissed.

In the absence of any concrete allegations, it is premature to determine whether the commissioners have a valid defense of absolute immunity or whether the Johnson Act, 28 U.S.C. § 1342, precludes the claims. It is unclear whether the fees that allegedly impacted CARE's First Amendment rights were levied against an entire class of QF-eligible power producers, in which case legislative immunity would likely preclude such a suit, or whether the fees were levied solely against CARE. Thus, CARE's § 1983 cause of action for violation of its First Amendment rights is dismissed without prejudice.

D. Claims 4 and 5: Equitable, Injunctive, and Declaratory Relief

Because the Court has dismissed all of Plaintiffs' claims under PURPA and § 1983, the claims for equitable, injunctive, and declaratory relief must also be dismissed. All that remains is to determine whether the dismissal is with prejudice.

The CPUC Defendants argue that the Eleventh Amendment bars the claim for equitable relief because the claim is based on violations of state law. (CPUC Mot. 19-20.) While the conduct complained of is conduct by state actors, Plaintiffs' claims are not for violations of state law. On the contrary, one of the only things that is clear in the FAC is that the claims are for violations of PURPA and the federal FERC regulations. Thus, the language the CPUC Defendants cite from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) - that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law" - is of no moment. Plaintiffs do not want the Court to instruct the CPUC Defendants on how to conform their conduct to state law; they want the Court to instruct the CPUC Defendants on how to conform their conduct to federal laws and regulations. Claims 4 and 5 are dismissed without prejudice. These claims are dismissed with prejudice only to the extent that they concern the CARE Plaintiffs' allegations of PURPA violations that were not properly petitioned to FERC prior to filing this action.

III. RULING

For the foregoing reasons, the Court **GRANTS** the CPUC Defendants' Motion to Dismiss and **GRANTS** SCE's Motion to Dismiss, disposing of the claims as follows:

(1) Claim 1 is **DISMISSED WITH PREJUDICE** as to the CARE Plaintiffs for failure to exhaust administrative remedies;
(2) To the extent Claim 1 concerns SCE's alleged 2008 misrepresentations and encouragement that SFUI pursue a CREST contract, the Claim is **DISMISSED WITH PREJUDICE**; to the extent Claim 1 concerns SFUI's other unsuccessful attempts to obtain PURPA rights, the Claim is **DISMISSED WITH LEAVE TO AMEND**;
(3) Claim 2 is **DISMISSED WITH PREJUDICE**;
(4) To the extent Claim 3 concerns deprivation of PURPA rights, unconstitutional or unlawful takings, or attempts to bar the CARE Plaintiffs from petitioning FERC, Claim 3 is **DISMISSED WITH PREJUDICE**; to the extent Claim 3 is based on retaliatory fee determinations, the Claim is **DISMISSED WITH LEAVE TO AMEND**;
(5) Claims 4 and 5 are **DISMISSED WITH LEAVE TO AMEND**; to the extent Claims 4 and 5 rest on the CARE Plaintiffs' allegations of PURPA violations, these Claims are **DISMISSED WITH PREJUDICE** for failure to exhaust administrative remedies.

Plaintiffs' Second Amended Complaint is due January 9, 2012. Failure to file by this date will result in dismissal with prejudice as to the entire case for failure to prosecute.

IT IS SO ORDERED.

Vmo

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** December 13, 2011

TITLE: Solutions for Utilities, Inc., et al. v. California Public Utilities Comm'n, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): AMENDED ORDER GRANTING CPUC DEFENDANTS' MOTION TO DISMISS [Docket No. 32]; **AMENDED ORDER GRANTING DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO DISMISS** [Docket No. 33]

This matter is before the Court on the motion filed by Defendants California Public Utilities Commission ("CPUC") and current and former commissioners Michael R. Peevey, Timothy Alan Simon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachael Chong, John A. Bohn, Dian M. Gruenich, and Nancy E. Ryan (collectively with CPUC, "CPUC Defendants") to dismiss the First Amended Complaint ("CPUC Motion"). Plaintiffs Solutions for Utilities, Inc. ("SFUI"), CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd, and Robert Sarvey (collectively, "Plaintiffs") filed an Opposition ("CPUC Opposition"), to which the CPUC Defendants replied ("CPUC Reply").

This matter is also before the Court on the motion filed by Defendant Southern California Edison Company ("SCE") to dismiss the First Amended Complaint ("SCE Motion"). Plaintiffs filed an Opposition ("SCE Opposition"), to which SCE replied ("SCE Reply").

The Court found this matter suitable for disposition without oral argument and vacated the hearing set for October 31, 2011. *See* Fed. R. Civ. P. 78(b). For the following reasons, the CPUC Motion is GRANTED and the SCE Motion is GRANTED.

I. STATUTORY AND REGULATORY BACKGROUND

A. Public Utilities Regulatory Policies Act ("PURPA")

In 1978, Congress enacted the Public Utilities Regulatory Policies Act ("PURPA") to encourage the development of cogeneration and small power production facilities, thereby reducing American dependence on fossil fuels. *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 850 (9th Cir. 1994). To achieve this objective, Congress sought to eliminate two barriers to the development of alternative energy sources: (1) the reluctance of traditional electric utilities

to purchase power from and sell power to non-traditional facilities; and (2) the financial burdens imposed upon alternative energy sources by state and federal utility authorities. *Id*.

Section 201 of PURPA designates a group of facilities as Qualifying Facilities ("QFs"), a group that includes any cogeneration facility meeting requirements set by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 796. Section 210 of PURPA creates a market for QFs' energy by requiring FERC to establish regulations that obligate public utilities to sell electric energy to and purchase electric energy from QFs. 16 U.S.C. § 824a-3. PURPA also requires FERC to promulgate regulations to ensure that the rates for these purchases "shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and shall not discriminate against qualifying cogenerators or qualifying small power producers." 16 U.S.C. § 824a-3(b). However, to ensure that the general public, as consumers and ratepayers, is not forced to subsidize QFs, the rates set by FERC cannot exceed the incremental cost to the electric utility of alternative electric energy. *Id*. The incremental cost is defined as the "cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). In other words, the utility companies cannot be forced to pay the QFs a price for energy that is higher than the amount of money it would take the utility to obtain the electric energy another way (either by generating it itself or purchasing it elsewhere).

FERC promulgated regulations pursuant to its mandate under PURPA. Among these regulations, FERC set forth the criteria that cogeneration facilities and small power production facilities must meet to be certified as a QF, including operating and efficiency standards. 18 C.F.R. §§ 292.201-.211. The FERC regulations require utilities to purchase energy from those facilities it has certified as QFs. 18 C.F.R. § 292.303. FERC also required utilities to purchase electric energy from and sell electric energy to QFs at the utility's full "avoided cost" rate. 18 C.F.R. § 292.304(d). "Avoided costs" are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). The "avoided cost" is essentially the same as the "incremental cost," as defined in PURPA. Because PURPA states that the rate (i.e., the price paid to the QFs for electrical energy) cannot be higher than the incremental cost and the FERC regulations state that the rate cannot be less than the avoided cost, PURPA and the FERC regulations, read in conjunction, require the price paid by utilities to be exactly the avoided cost.

The states are in charge of implementing FERC's regulations pertaining to determining avoided costs and setting rates paid to QFs. 16 U.S.C. § 824a-3(f). CPUC is a state agency of constitutional origin that is authorized to fix retail rates and establish rules for California utilities. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Utils. Code § 701. In California, CPUC is the entity responsible for implementing FERC's regulations.

PURPA also provides an enforcement scheme for violations of PURPA and the FERC regulations. *See Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000). If a state

regulatory authority (such as CPUC) fails to properly implement FERC's regulations, FERC can bring an enforcement action against the state regulatory agency in federal court. 16 U.S.C. § 824a-3(h)(2). If FERC does not bring such an action on its own, any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. *Id*. If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id*. If the public utility commission **does** implement FERC's regulations, but a utility (such as SCE) violates the public utility commission's requirements, an aggrieved party can sue for damages based on that violation **in state court only**. 16 U.S.C. §§ 824a-3(g)(2), 2633.

B. Rule 21

Effective in 2003, the California Legislature adopted the California Renewables Portfolio Standard Program, which required all California electric corporations to procure a minimum quantity of electricity each year from renewable energy sources. CAL. PUB. UTIL. CODE § 399.11 *et seq.* Beginning in 2007, the California Legislature required that each electrical corporation file with CPUC a standard tariff for renewable energy output produced at an electric generation facility (defined as a public water or wastewater agency that is a retail customer of an electrical corporation with an effective capacity of not more than one megawatt and is an eligible renewable energy source) for terms of up to 20 years at a price referred to as the market price referent ("MPR"), which would be determined by the CPUC. CAL. PUB. UTIL. CODE §§ 399.20, 399.15(c).

The CPUC adopted a tariff and standard purchase contracts that electric corporations like SCE were required to offer to eligible public water and wastewater agencies. *See generally* CPUC Decision 07-07-027 (2007).[1] The rate in these standard contracts is the MPR, as determined by the CPUC. *Id*. The contracts provide that in purchasing the energy output of the seller, the utility would also acquire the renewable energy credits ("RECs") associated with that output. *Id*. An REC is a certificate of proof that a unit of electricity was generated and delivered by an eligible renewable energy resource. CAL. PUB. UTIL. CODE § 399.12(e).

CPUC authorized utilities to use "Rule 21," a CPUC-approved tariff, which provides for an "orderly and timely" interconnection between the utilities and sellers. CPUC Decision 07-07-027. CPUC also expanded the program to require utilities (such as SCE) to offer similar standard purchase contracts to small producers of renewable energy who are utility customers (such as SFUI). *Id*. CPUC required the utilities to notify potentially interested or affected customers of the availability of the new opportunity under Rule 21. *Id*. The California legislature codified CPUC's expansion of the program in 2008. CAL. PUB. UTIL. CODE § 399.20.

[1] The Court takes judicial notice of this CPUC Decision because it satisfies the requirements of Federal Rule of Evidence 201.

CPUC approved a specific form of a power purchase contract and ordered the utilities (including SCE) to offer it to eligible sellers. CPUC Decision 07-07-027. The program is called the California Renewable Energy Small Tariff ("CREST") program, and the CPUC-approved power purchase contract is known as a CREST contract. *Id*. Participation in the CREST program is voluntary. *Id*. CPUC did not invoke any of its powers under PURPA or the FERC guidelines in establishing Rule 21 or adopting the CREST program. CPUC Decision 08-02-010.[2] The CREST program does not require the seller to be a QF.

The parties to this action agree that Rule 21 and the CREST program are not intended to (and indeed do not) implement PURPA or the FERC regulations. The only extent to which Rule 21 and the CREST program are related to PURPA and the FERC regulations is that entities who meet the criteria to be certified as a QF under the FERC regulations may also have the option of entering a CREST contract with one of the major California utilities.

With this statutory and regulatory backdrop in mind, the Court turns to the allegations in this case.

II. ALLEGATIONS FROM THE FIRST AMENDED COMPLAINT

The First Amended Complaint ("FAC") sets forth the following allegations.

A. SFUI's Allegations

Plaintiff SFUI is and at all relevant times was an electric utility within the class of small power production facilities and nontraditional electricity generating facilities contemplated by PURPA and the FERC regulations. (FAC ¶ 25.) SFUI is currently certified as a QF. (FAC ¶ 25.) The FAC does not indicate **when** SFUI was certified as a QF. As explained below, it appears that SFUI was not certified as a QF for most if not all of the time period during which the events allegedly leading to Defendants' liability occurred, but rather SFUI became certified as a QF subsequent to the events described in the FAC.

SCE is the owner of the power grid in the region where SFUI hoped to interconnect and supply energy. (FAC ¶ 14.) Prior to or during May 2008, SFUI, which met the criteria to be certified as a QF, attempted to supply electric power to SCE. (FAC ¶¶ 26-26.5.) SFUI hoped to receive the benefit of the contract terms to which QFs are entitled under PURPA and the FERC regulations, namely a purchase price for its energy equal to the avoided cost. (FAC ¶¶ 26-26.5.)

In May 2008, however, SCE falsely represented to SFUI that in order to secure interconnection to SCE's power grid and operate as a small power generating facility as contemplated and

[2] The Court takes judicial notice of this CPUC Decision because it satisfies the requirements of Federal Rule of Evidence 201.

encouraged by PURPA, the correct avenue was to comply with Rule 21 and seek a CREST contract. (FAC ¶ 26.1.) SCE told SFUI that obtaining QF certification from FERC was not necessary and indeed, would be counter-productive. (FAC ¶ 26.1.) SFUI relied on this representation from SCE **and did not seek to be certified as a QF**, even though it was eligible. (FAC ¶ 26.) Instead, SFUI pursued a CREST contract and achieved the first position in the queue for interconnection with SCE's grid. (FAC ¶ 26.4.)

Upon reaching the first position in the queue, SFUI realized that the CREST contract did not allow SFUI to obtain its PURPA rights. For instance, the rate to be paid for electric energy was the MPR, which was much lower than the avoided cost. (FAC ¶¶ 26.4, 35(c).) The CREST contract also required SFUI to assign its RECs to SCE as part of the transaction without providing any additional compensation to SFUI. (FAC ¶¶ 26.3, 35(f).) Since RECs are assets of value, requiring SFUI to assign its RECs to SCE without additional consideration served to further lower the price SFUI would receive for its energy under the CREST contract. SFUI also found other terms of the CREST contract to be damaging to the energy seller, such as a "unilateral curtailment power," which imposed on the seller (SFUI) revenue uncertainties that effectively denied SFUI the opportunity to obtain developer financing. (FAC ¶¶ 26.3, 35(d)-(e).)

Once SFUI realized that the CREST contract was not to its liking, SFUI could not resort to other options, such as becoming certified as a QF under PURPA, without losing its first position in the queue and being compelled to take a much lower position in another queue. (FAC ¶ 26.4.) As a consequence, SFUI was prevented from being able to operate as a viable and profitable small power generating facility; instead, SFUI was forced to sell out in order to mitigate its damages and prevent a total loss. (FAC ¶ 26.5.)

The FAC alleges:

> SFUI made repeated and long-standing efforts to obtain contracts with SCE in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of the refusal of SCE to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff SFUI to secure same.

(FAC ¶ 29.) However, other than the one specific incident described above (regarding SFUI's being allegedly duped by SCE into pursuing a CREST contract in 2008), the FAC does not indicate what the "repeated and long-standing" efforts to obtain a contract with SCE have been.

The FAC alleges a conspiracy between SCE and the CPUC Defendants to circumvent PURPA and the FERC regulations. (FAC ¶¶ 17-18.1, 27, 49-51.)

On March 11, 2011, SFUI petitioned FERC to bring an enforcement action against CPUC and SCE, but on May 19, 2011, FERC declined to do so. (FAC ¶ 30.)

B. CARE's Allegations

The CARE organization represents electric utilities that are QFs. (FAC ¶ 28.) The FAC alleges:

> CARE made repeated and long-standing efforts to obtain contracts with local power grid providers in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of refusal of the local power grid providers to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff CARE to secure same.

(FAC ¶ 31.) Plaintiffs Boyd and Sarvey (collectively with CARE, "CARE Plaintiffs") are members of CARE. (FAC ¶ 32.) Boyd and Sarvey are apparently QFs (FAC 2 (Introduction)), although this is not made clear in the FAC. The FAC does not list any of CARE's other members. Nowhere in the FAC are there specific allegations of what efforts any of CARE's members have made to obtain contracts with local power grid providers. The FAC does not even state which power grid providers allegedly refused to abide with PURPA. In short, the FAC is completely devoid of any specific allegations pertaining to CARE, its members, or the efforts made by CARE or its members to obtain PURPA contracts. All that the FAC alleges with respect to CARE is the vague and conclusory allegation that CARE and its members attempted to obtain PURPA contracts, but were unable to do so because the power grid providers refused to abide by PURPA and CPUC refused to enforce PURPA.

On January 28, 2011, CARE, on behalf of itself and its members, petitioned FERC to bring an enforcement action against CPUC and local power grid providers, but on March 17, 2011, FERC declined to do so. (FAC ¶ 32.) On or about July 9, 2011, CARE, Boyd, and Sarvey again petitioned FERC to bring an enforcement action. (FAC ¶ 32.) As of the filing of the FAC, that petition was pending. (FAC ¶ 32.)

CPUC, allegedly in retaliation for CARE's decision to petition FERC regarding CPUC's alleged misconduct, sought to have FERC deem CARE to be a vexatious litigant and bar CARE from submitting any additional petitions to FERC. (FAC ¶ 62(c).) The FAC also alleges that CPUC made "its fee determinations in a manner designed to [limit, burden, deter, or chill CARE's freedom of speech and right to petition]" (FAC ¶ 62(c)), although the FAC does not explain in what way the fee determinations served this purpose.

C. Causes of Action

The FAC sets forth five causes of action. The first is a claim for enforcement of PURPA, brought by all Plaintiffs against only the CPUC Defendants. Plaintiffs claim that CPUC's use of Rule 21 and the CREST contract violate PURPA and the FERC regulations that implement PURPA. (FAC ¶¶ 27, 37.) Because CPUC has not complied with or enforced PURPA and the FERC regulations,

"Plaintiffs have been frustrated in their efforts to enter the energy market, and prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its implementing regulations." (FAC ¶ 33.) In addition to the grievances noted above (such as setting the rate in the CREST contract as the MPR instead of avoided cost, forcing the seller to assign its RECs to the utility, and including "weasel clauses" such as the unilateral curtailment powers), Plaintiffs also claim that the utilities impose artificial barriers to small power production facilities trying to interconnect with its grids, such as:

> with CPUC approval, [] enter[ing] into contracts with larger energy suppliers who cannot interconnect for many years, and then posit[ing] those contracts as a basis for claiming that there is no interconnection capacity for Plaintiffs and other immediately available small power production facilities and nontraditional electricity generating facilities.

(FAC ¶ 35(b).)

The second cause of action is a claim under 42 U.S.C. § 1983 brought by SFUI against the individual current and former commissioner defendants and SCE. The cause of action claims that, under color of state law, these defendants deprived SFUI of its statutory PURPA rights and that because defendants' actions denied SFUI the right to reasonably profit from its business enterprises, defendants' actions constitute an unlawful and unconstitutional taking without just compensation or due process. (FAC ¶ 44.)

The third cause of action is also a claim under 42 U.S.C. § 1983. This claim is brought only by CARE against the individual current and former commissioner defendants. CARE alleges that, under color of state law, the individual current and former commissioner defendants violated CARE's First Amendment rights of freedom of speech and right to petition by attempting to bar CARE from petitioning FERC to bring enforcement actions against CPUC. (FAC ¶ 62(c).) This claim also alleges that defendants deprived CARE of its statutory rights under PURPA and its right to reasonably and economically operate its nonprofit business enterprise, constituting an unlawful and unconstitutional taking without just compensation or due process of law. (FAC ¶ 62(b).)

The fourth cause of action is for equitable, injunctive, and declaratory relief brought by CARE and SFUI against the CPUC Defendants. CARE and SFUI seek a declaration that the conduct of the CPUC Defendants is unlawful and an injunction requiring the CPUC Defendants to "remedy each and all of the particulars described" throughout the FAC "and the consequences thereof." (FAC ¶¶ 74-75.)

The fifth cause of action, for equitable and declaratory relief, was brought by SFUI against SCE. This count sought an order declaring SCE's conduct unlawful. Pursuant to stipulation of Plaintiffs and SCE, the Court dismissed this cause of action without prejudice on September 8, 2011. (Req. to Dismiss Fifth Claim, Sept. 6, 2011, ECF No. 30; Sept. 8, 2011 Order, ECF No. 35.)

The CPUC Defendants and SCE have moved to dismiss the FAC in its entirety.

II. DISCUSSION

A. Claim 1: Enforcement of PURPA

The first cause of action is an enforcement action brought by all Plaintiffs against the CPUC Defendants to enforce PURPA. The CPUC Defendants argue that this Court lacks subject matter jurisdiction to hear this claim. First, the CARE Plaintiffs failed to exhaust their administrative remedies. (CPUC Mot. 8-9.) Second, none of the CPUC Defendants' alleged conduct constitutes an "implementation" claim, which can be heard in federal court; rather, all of the allegations in the first count are "as applied" claims that can only be heard in state court. (*Id*. 8.) The CPUC Defendants also argue that even if the Court has subject matter jurisdiction, Plaintiffs lack statutory standing and have failed to state a claim. (*Id*. 13-15.)

1. Failure to Exhaust Administrative Remedies

PURPA provides that any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. 16 U.S.C. § 824a-3(h)(2). If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id*.

CARE, on behalf of itself and its members, twice petitioned FERC to bring an enforcement action against CPUC. (FAC ¶ 32.) CARE claims to have filed the first petition on January 28, 2011, which FERC denied on March 17, 2011. (FAC ¶ 32.) However, FERC rejected this January 28 petition only because it was procedurally inappropriate - it was tacked on to a request for rehearing of FERC's denial of CARE's complaint against several utilities. *CARE v. PG&E*, 134 F.E.R.C. ¶ 61, 207, at ¶ 12 (2011). Then in July 2011, after filing this action, the CARE Plaintiffs filed another enforcement petition with FERC. (FAC ¶ 32.) FERC declined to bring an enforcement action and issued a letter authorizing CARE to sue in the appropriate forum on September 12, 2011. (CPUC Opp'n 10.) This action, however, was filed June 10, 2011, and the FAC was filed August 10, 2011.

Because this action predates the CARE Plaintiffs' exhaustion of their administrative remedies, the Court lacks subject matter jurisdiction over the CARE Plaintiffs' PURPA enforcement claim. *See Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002). The fact that the CARE Plaintiffs' FERC petition has been rejected subsequent to the filing of this action does not suddenly invest the Court with subject matter jurisdiction. The Court lacked subject matter jurisdiction when this action was filed; therefore, the Court cannot hear the action. *Cf. Thome v. US Food and Drug Admin.*, No. 11-CV-00676, 2011 WL 3206910, at *2 (N.D. Cal. July 27, 2011) (holding that because the original plaintiff lacked standing, the court had no subject matter

jurisdiction, and thus could not consider anything filed thereafter in the action, including amended pleadings that attempt to cure the jurisdictional problem by swapping in a plaintiff with standing). To hold otherwise would permit litigants to ignore PURPA's requirement that aggrieved parties first petition FERC before bringing their own enforcement actions, instead permitting them to file FERC petitions and district court actions concurrently, knowing that any jurisdictional deficiency could be cured within 60 days.

Because the CARE Plaintiffs did not exhaust their administrative remedies prior to bringing this action, the Court lacks subject matter jurisdiction over the CARE Plaintiffs' PURPA enforcement action. Count 1 must be dismissed with prejudice as to the CARE Plaintiffs.

2. "As Applied" Claims

The CPUC Defendants concede that SFUI did exhaust its administrative remedies, but they argue that the Court also lacks subject matter jurisdiction over SFUI's PURPA-enforcement claim because its allegations constitute an "as applied" claim that must be heard in state court. (CPUC Mot. 8.) The PURPA rule they quote - 16 U.S.C. § 824a-3 - does not draw a distinction between an "implementation" claim and an "as applied" claim. The cited FERC decision - *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of PURPA*, 23 F.E.R.C. ¶ 61,304, 1983 FERC LEXIS 2583, at **10-11 (May 31, 1983) - does draw a distinction between "implementation" claims and "as applied" claims, but the distinction there drawn is between claims **against the public utilities commission** (deemed to be "implementation" claims) and claims **against a utility** that fails to comply with the public utilities commission's regulations (deemed to be "as applied" claims). *Id*. In this action, SFUI claims that CPUC's policies - primarily the approval of Rule 21 and the CREST contract - violate PURPA. Under the FERC decision the CPUC Defendants cite, this would be an implementation claim properly in federal court.

The only authority the CPUC Defendants cite that supports the proposition that federal courts lack subject matter jurisdiction over claims that CPUC policies violate PURPA because they are "as applied" is *Mass. Inst. of Tech. v. Dep't of Pub. Utils.*, 941 F. Supp. 233, 236-38 (D. Mass. 1996). The Court is not bound by this decision from the District of Massachusetts and does not find the reasoning in that case to be persuasive. The more straightforward reading of PURPA's judicial review and enforcement provisions (16 U.S.C. §§ 824a-3(g)-(h)) is that claims against a public utilities commission for actions or omissions that violate PURPA may be brought in federal court provided the plaintiff first petitions FERC and FERC takes no enforcement action of its own within 60 days. 16 U.S.C. § 824a-3(h)(2)(B). Where the public utilities commission has complied with PURPA by promulgating regulations but a utility has refused to abide by those regulations, actions against the utility must be brought in state court. 16 U.S.C. § 824a-3(g).

Accordingly, the Court has subject matter jurisdiction over SFUI's claim for PURPA enforcement.

///

3. Standing

The CPUC Defendants next argue that even if the Court has jurisdiction, SFUI lacks statutory standing to bring a claim for PURPA enforcement because SFUI is not a QF. The FAC is ambiguous on this issue, as discussed above. The FAC alleges that SFUI is a QF. (FAC ¶ 25.) However, the FAC does not indicate **when** SFUI was certified as a QF. And the main factual allegation in the FAC is that, due to SCE's misrepresentations, SFUI **did not seek certification as a QF**, even though it was eligible (FAC ¶ 26), but pursued a CREST contract instead (FAC ¶ 26.4).

In addition to the concrete factual allegations in the FAC (regarding SCE tricking SFUI into pursuing a CREST contract rather than a contract that would give SFUI PURPA rights), the FAC also alleges generically:

> SFUI made repeated and long-standing efforts to obtain contracts with SCE in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of the refusal of SCE to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff SFUI to secure same.

(FAC ¶ 29.) Read in the light most favorable to SFUI, this allegation refers to other unsuccessful attempts SFUI made to obtain PURPA contracts besides the one attempt that FAC actually describes in detail. This allegation, combined with the allegation that SFUI is a QF, demonstrates that SFUI has standing to bring this claim. While the allegations are not sufficient to survive a motion to dismiss, as discussed in the next section, the allegations are sufficient to confer standing.

4. Failure to State a Claim

The fatal deficiency to SFUI's PURPA-enforcement claim is that it has failed to sufficiently allege that SFUI **attempted to get a PURPA-compliant contract and was unable to do so**. All the FAC alleges is that SFUI hoped to get a PURPA-compliant contract, SCE duped SFUI into pursuing a CREST contract instead, and then after waiting in the wrong queue, SFUI realized the inferiority of the CREST contract and regretted waiting in the wrong queue. If PURPA-compliant contracts are available to QFs in California but SFUI did not follow the proper procedures to get such a contract, it does not have a cause of action against the CPUC Defendants.

The parties all agree that Rule 21 and the CREST program were not promulgated to effectuate PURPA. None of the parties has pointed the Court to the particular CPUC regulations or decisions that **do** implement PURPA. However, the FAC does not allege a wholesale failure on the part of the CPUC Defendants to implement PURPA and the FERC regulations. (*See generally* FAC.) In the absence of evidence (or even allegations) to the contrary, the Court assumes that such

implementing regulations exist.[3] The FAC merely alleges that by authorizing SCE to offer SFUI (which met the eligibility requirements to be certified as a QF) the CREST contract instead of a PURPA-compliant contract, the CPUC Defendants violated PURPA and the FERC regulations.

Thus, the Court gleans the following allegation from the FAC: small power production facilities and nontraditional electricity generating facilities in California that meet the eligibility requirements to be certified as a QF have **two options**: (1) they can be certified as a QF and exercise their PURPA rights; **or** (2) they can choose not to exercise their PURPA rights and pursue a CREST contract instead. And according to SFUI, because the CREST contract does not comply with the terms PURPA mandates (including that the rate be the avoided cost), the CPUC Defendants' approval of the CREST contract violates PURPA.

This allegation concedes that SFUI was free, at the outset, to pursue **either** QF certification and a PURPA contract **or** the CREST contract. This is not a sufficient allegation of a PURPA violation. Perhaps SFUI regrets that it pursued the option that turned out, in hindsight, to be less attractive. Perhaps SFUI can state a claim against SCE for erroneously telling SFUI that the way to obtain its PURPA rights was by pursuing a CREST contract instead of seeking QF certification and pursuing a PURPA-compliant contract. But according to the allegations in the FAC, the option of pursuing QF certification and a PURPA-compliant contract was always available to SFUI: SFUI just never took that option.

The only way SFUI's allegations could amount to a PURPA violation is if PURPA mandates that **all contracts** between utility companies and small power production facilities and nontraditional electricity generating facilities **must comply** with PURPA's terms. In essence, this would be a preemption argument - an argument that for entities eligible to be QFs, PURPA-compliant contracts **and no others** may be used. Plaintiffs have not made this preemption argument, and the law does not support it. While utilities are required to **offer** QFs a contract that complies with PURPA and the FERC regulations (including a rate set at the full avoided cost), the Supreme Court has held that "a qualifying facility and a utility may negotiate a contract setting a price that is lower than the full-avoided-cost rate." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 416 (1983). Accordingly, PURPA-compliant contracts are not the only allowable contracts between utilities and QFs. So long as utilities offer a PURPA-compliant contract, they may also offer non-PURPA-compliant contracts (such as the CREST contract) as an alternative.

The FAC does not allege that the CPUC Defendants have failed to implement PURPA. The FAC does not allege that SCE refuses to offer PURPA-compliant contracts to QFs. The FAC does not allege any specific attempt made by SFUI to obtain a PURPA-compliant contract that was

[3] While the CPUC Defendants do not point to the PURPA-implementing regulations it has promulgated, it does contend that "since the early 1980's, the CPUC has approved standard offer PURPA contracts which are currently in effect." (CPUC Mot. 15:)

unsuccessful.[4] In the absence of these allegations, SFUI has failed to state a claim that the CPUC Defendants failed to implement or have violated PURPA.

SFUI's first cause of action is therefore dismissed with leave to amend.

B. Claim 2: SFUI's § 1983 Action

Claim 2 is brought by SFUI only against the individual former and current commissioners and SCE. It alleges that, under color of state law, these defendants deprived SFUI of its rights under PURPA and because the defendants' action deprived SFUI of its right to profit from its business, the actions also constituted an unconstitutional and unlawful taking. (FAC ¶¶ 44-61.)

1. Denial of PURPA Rights

Section 1983 cannot be used to create a remedy for violation of a federal statute that provides for its own remedies.

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981) (citations omitted). As discussed above, PURPA provides a comprehensive remedial scheme, permitting aggrieved small power production facilities such as SFUI to sue for PURPA violations either against public utilities commissions (in federal court, after unsuccessfully petitioning FERC to bring an enforcement action) or against utilities (in state court only). In light of this comprehensive statutory scheme, SFUI may not sue under § 1983 for violations of its PURPA rights.

2. Taking Without Just Compensation

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[4] To plead sufficiently, a plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009). As explained above, the incident the FAC describes in detail was not an attempt to get a PURPA-compliant contract. It was an attempt to get a CREST contract followed by regret that a PURPA-compliant contract had not been pursued. The general, vague, conclusory allegation in paragraph 29 is insufficient to state a claim.

SFUI claims that it was "denied its right to reasonably profit from its business enterprises, thereby constituting an unlawful and unconstitutional taking without just compensation and/or due process of law." (FAC ¶ 44.b.) SFUI has made clear that the "taking" is based on the alleged PURPA violations. "[I]f there were no PURPA violations, then there was no taking from SFUI; and if there were, one consequence [of the PURPA violations] was the taking." (SCE Opp'n 12.)

The Court notes at the outset that SFUI has not alleged a taking of "property" in the traditional sense. SFUI has not alleged that the commissioners have taken (or restricted SFUI's use or enjoyment of) the physical land it owns, the machinery on the land, or the energy SFUI produces. The alleged actions do not force SFUI to use their assets or property in any particular manner, and they do not forbid SFUI from using their assets or property in any manner of its choosing. Rather, the allegation is that, by not implementing PURPA, SFUI was unable to access its statutory right to contract with a utility company and receive a certain rate for its energy, preventing SFUI from realizing the profits it expected to make from its business venture. The expectation of profits, however, is not a property interest protected by the Takings Clause. "Reduced profits are damages; they are not themselves a kind of 'property' that can be the subject of a Takings Clause claim." *Yee v. MobileHome Park Rental Review Bd.*, 62 Cal. App. 4th 1409, 1422 (1998.) Indeed, the government makes any number of regulations that affect the profitability of various business ventures. Even regulations that completely ban the trade of previously legal goods have been held not to constitute a taking. *See Andrus v. Allard*, 444 U.S. 51 (1979) (law banning the sale of any part of an eagle - even preexisting artifacts of eagles legally killed before the passage of the Eagle Protection Act - is not an unconstitutional taking).

Even if the commissioners egregiously violated PURPA and denied SFUI the rights to which it is statutorily entitled, this would not constitute an unconstitutional taking of profits. If the commissioners failed to implement PURPA or violated PURPA, the proper avenue for redress is an enforcement action under PURPA.[5] SFUI cannot turn its claim that it suffered damages in the form of lost profits because of a PURPA violation into a claim for an unconstitutional taking of those profits. Because even the most egregious violation of PURPA could not give rise to a claim under the Takings Clause, Claim 2 must be dismissed with prejudice.

C. Claim 3: CARE's § 1983 Action

CARE's § 1983 action rests on three theories. The first two - that the individual commissioners denied CARE its PURPA rights and engaged in actions that amounted to an unlawful and unconstitutional taking - must be dismissed with prejudice for the same reasons discussed above.

[5] And if PURPA did not already provide an enforcement mechanism, the proper form of redress would be to bring a § 1983 action for violation of PURPA, not a § 1983 action for an unconstitutional taking.

CARE also attempts to state a § 1983 claim based on the alleged violation of their First Amendment rights to free speech and right to petition the government.

CARE alleges that, in retaliation for its decision to petition FERC to bring an enforcement action against CPUC, the commissioners took two actions intended to chill CARE's First Amendment rights: (1) they attempted to have FERC ban CARE from petitioning FERC any further; and (2) they made fee determinations in a manner designed to chill CARE from exercising its First Amendment rights. (FAC ¶ 62.c.)

The first allegation cannot support a First Amendment claim. While parties have the right to bring their grievances to court, "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983.) Any attempt to have a party declared a vexatious litigant is, in some sense, "in retaliation" for the other party's decision to bring suit. Nevertheless, a government entity is entitled to seek to have an arbiter deem a party to be a vexatious litigant, with all the punitive consequences attendant to such a determination. *See, e.g.,* CAL. CODE CIV. PROC. §§ 391-391.7 (permitting defendants, including governmental defendants, to request that a court find party to be a vexatious litigant); *Wolfe v. George*, 486 F.3d 1120 (9th Cir. 2007) (holding California's vexatious litigant statute to be constitutional).

The second allegation - that the commissioners' fee determinations were set in such an manner and for the purpose of chilling CARE's right to petition - could support a First Amendment violation if adequately pled. However, the FAC is devoid of any concrete allegations to support the conclusory claim that fees were set in such a manner as to chill CARE's First Amendment rights. In the absence of any specific allegations (When did the commissioners set the fees? What were the fees for? Against whom were the fees levied? In what way did the fee determination affect CARE's First Amendment rights?), this cause of action must be dismissed.

In the absence of any concrete allegations, it is premature to determine whether the commissioners have a valid defense of absolute immunity or whether the Johnson Act, 28 U.S.C. § 1342, precludes the claims. It is unclear whether the fees that allegedly impacted CARE's First Amendment rights were levied against an entire class of QF-eligible power producers, in which case legislative immunity would likely preclude such a suit, or whether the fees were levied solely against CARE. Thus, CARE's § 1983 cause of action for violation of its First Amendment rights is dismissed without prejudice.

D. Claim 4: Equitable, Injunctive, and Declaratory Relief

Because the Court has dismissed all of Plaintiffs' claims under PURPA and § 1983, the claims for equitable, injunctive, and declaratory relief must also be dismissed. All that remains is to determine whether the dismissal is with prejudice.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO.: CV 11-04975 SJO (JCGx) **DATE: December 13, 2011**

The CPUC Defendants argue that the Eleventh Amendment bars the claim for equitable relief because the claim is based on violations of state law. (CPUC Mot. 19-20.) While the conduct complained of is conduct by state actors, Plaintiffs' claims are not for violations of state law. On the contrary, one of the only things that is clear in the FAC is that the claims are for violations of PURPA and the federal FERC regulations. Thus, the language the CPUC Defendants cite from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) - that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law" - is of no moment. Plaintiffs do not want the Court to instruct the CPUC Defendants on how to conform their conduct to state law; they want the Court to instruct the CPUC Defendants on how to conform their conduct to federal laws and regulations. Claim 4 is dismissed without prejudice. This claim is dismissed with prejudice only to the extent that it concerns the CARE Plaintiffs' allegations of PURPA violations that were not properly petitioned to FERC prior to filing this action.

III. RULING

For the foregoing reasons, the Court **GRANTS** the CPUC Defendants' Motion to Dismiss and **GRANTS** SCE's Motion to Dismiss, disposing of the claims as follows:

(1) Claim 1 is **DISMISSED WITH PREJUDICE** as to the CARE Plaintiffs for failure to exhaust administrative remedies;
(2) To the extent Claim 1 concerns SCE's alleged 2008 misrepresentations and encouragement that SFUI pursue a CREST contract, the Claim is **DISMISSED WITH PREJUDICE**; to the extent Claim 1 concerns SFUI's other unsuccessful attempts to obtain PURPA rights, the Claim is **DISMISSED WITH LEAVE TO AMEND**;
(3) Claim 2 is **DISMISSED WITH PREJUDICE**;
(4) To the extent Claim 3 concerns deprivation of PURPA rights, unconstitutional or unlawful takings, or attempts to bar the CARE Plaintiffs from petitioning FERC, Claim 3 is **DISMISSED WITH PREJUDICE**; to the extent Claim 3 is based on retaliatory fee determinations, the Claim is **DISMISSED WITH LEAVE TO AMEND**;
(5) Claim 4 is **DISMISSED WITH LEAVE TO AMEND**; to the extent Claim 4 rests on the CARE Plaintiffs' allegations of PURPA violations, these Claims are **DISMISSED WITH PREJUDICE** for failure to exhaust administrative remedies.

Plaintiffs' Second Amended Complaint is due January 9, 2012. Failure to file by this date will result in dismissal with prejudice as to the entire case for failure to prosecute.

IT IS SO ORDERED.

Vmo

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** February 13, 2012

TITLE: Solutions for Utilities, Inc., et al. v. California Public Utilities Comm'n, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR RECONSIDERATION [Docket No. 62]; **ORDER DENYING PLAINTIFFS' *EX PARTE* APPLICATION TO STAY** [Docket Nos. 69, 70]

This matter is before the Court on the Motion to Reconsider, Modify, and/or Clarify Amended Orders on Defendants' Motion to Dismiss ("Motion") filed by Plaintiffs Solutions for Utilities, Inc. ("SFUI"), CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd, and Robert Sarvey (collectively, "Plaintiffs") on December 30, 2011. Defendants California Public Utilities Commission ("CPUC") and current and former commissioners Michael R. Peevey, Timothy Alan Simon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachael Chong, John A. Bohn, Dian M. Gruenich, and Nancy E. Ryan (collectively with CPUC, "CPUC Defendants") filed an opposition ("CPUC Opposition"). Defendant Southern California Edison Company ("SCE") also filed an opposition ("SCE Opposition"). Plaintiffs filed a reply brief ("Reply") responding to both the CPUC Opposition and the SCE Opposition.

This matter is also before the Court on Plaintiffs' *Ex Parte* Application to Stay SCE's Request for Sanctions and Reset as a Noticed Motion or, alternatively, to Enlarge the Time and Length for Filing an Opposition ("*Ex Parte* Application"). SCE filed an opposition ("*Ex Parte* Opposition"), to which Plaintiffs replied ("*Ex Parte* Reply").

The Court found this matter suitable for disposition without oral argument and vacated the hearing set for February 6, 2012. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Motion is **GRANTED IN PART AND DENIED IN PART**. The *Ex Parte* Application is **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

On December 13, 2011, the Court issued an Amended Order granting the CPUC Defendants' Motion to Dismiss the First Amended Complaint and granting SCE's Motion to Dismiss the First

Amended Complaint. (Dec. 13, 2011 Order, ECF No. 61.)[1] The December 13, 2011 Order gave Plaintiffs leave to amend certain causes of action, but provided a deadline of January 9, 2012, to file their Second Amended Complaint. (Dec. 13, 2011 Order 15.) Plaintiffs filed the instant Motion on December 30, 2011, asking the Court to reconsider its December 13, 2011 Order. Plaintiffs noticed the Motion to be heard on February 6, 2012. (Not. of Mot., ECF No. 62.) Plaintiffs then filed their Second Amended Complaint on January 9, 2012. (Sec. Am. Compl., ECF No. 64.)

On January 13, 2012, the CPUC Defendants and SCE filed oppositions to the Motion. The SCE Opposition, in addition to urging the Court to deny the Motion, seeks sanctions against Plaintiffs. (SCE Opp'n 15-18, Jan. 13, 2012, ECF No. 66.) Plaintiffs filed their *Ex Parte* Application on January 23, 2012, seeking a stay of the Court's determination of SCE's request for sanctions,[2] or in the alternative, an enlargement of time to file a response to SCE's request for sanctions and an enlargement of the page limit. (*See generally Ex Parte* Appl., ECF No. 69.)

II. DISCUSSION

A. Court's Local Rules

The Central District of California provides the following rule with respect to Motions for Reconsideration:

> A motion for reconsideration of the decision on any motion may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision. No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion.

C.D. Cal. Local Rule 7-18. The Court's initial standing order states that this rule will be strictly enforced. (Standing Order ¶ 12, June 20, 2011, ECF No. 4.)

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[1] A detailed factual background of the case is provided in the December 13, 2011 Order. The Court will not rehash that background here.

[2] Plaintiffs want the Court to require SCE to bring its request for sanctions as a separate normally-noticed motion for sanctions. (*See generally Ex Parte* Appl., ECF No. 69.)

B. Plaintiffs' Arguments

Plaintiffs present a number of arguments regarding aspects of the Court's December 13, 2011, Order that they want the Court to reconsider. According to Plaintiffs:

1. Throughout the Order, it was inappropriate for the Court to dismiss the causes of action "with prejudice." If the Court wished to dismiss causes of action without leave to amend, then "without leave to amend" should have been the phrasing used. (Mot. 1-3.)
2. The Court failed to make rulings with respect to Plaintiffs Michael E. Boyd and Robert Sarvey. (Mot. 3-4.)
3. The Court should have granted leave to amend CARE's first cause of action (Mot. 4-7.)
4. The Court should not have split SFUI's first cause of action into allegations pertaining to the California Renewable Energy Small Tariff ("CREST") Contract and allegations pertaining more broadly to Public Utilities Regulatory Policies Act ("PURPA") enforcement, granting leave to amend the latter but not the former. (Mot. 8-11.)
5. The Court was incorrect that PURPA has a remedial scheme that precludes a civil action under 42 U.S.C. § 1983 for deprivation of PURPA rights. (Mot. 11-13.)
6. The Court was incorrect that Plaintiffs failed to state a cause of action under § 1983 for violations of the Takings Clause of the United States Constitution. (Mot. 14-15.)
7. The Court was incorrect that Plaintiffs failed to state a cause of action under § 1983 for violations of the First Amendment. (Mot. 16-19.)
8. The Court made many of its rulings *sua sponte* without permitting Plaintiffs a chance to oppose or otherwise express their views. (*See generally* Mot.)

1. Dismissals "With Prejudice"

Plaintiffs argue that a dismissal "with prejudice" means that a decision was made on the merits, such that the claim is subject to *res judicata* if Plaintiffs were to try to bring the claim in a separate action. (Mot. 1-3.) Because the Court's dismissal of CARE's first cause of action was on grounds of ripeness (failure to exhaust administrative remedies), Plaintiffs argue the dismissal should not be given claim-preclusive effect. (Mot. 1-3.) Plaintiffs point out that a dismissal "without leave to amend" is different than a dismissal "with prejudice" - the former simply means that the plaintiff cannot revive a certain claim in the active proceeding, while the latter means that the plaintiff cannot revive the claim in any subsequent proceeding. (Mot. 1-3.)

It was not the Court's intention to conclusively hold that all of the dismissals contained in the December 13, 2011 Order would have *res judicata* effect such that Plaintiff could not bring those claims in a separate action. To clarify any ambiguity, the Court will reissue the December 13, 2011 Order replacing the words "with prejudice" with the words "without leave to amend," and replacing the words "without prejudice" with the words "with leave to amend." The normal rules of issue preclusion and claim preclusion will apply to the dismissals. If Plaintiffs attempt to subsequently bring those same claims in a separate action, the defendants in the subsequent

action are free to argue that the claims are barred by *res judicata*. The issue can be resolved by the appropriate arbiter.

2. Plaintiffs' Remaining Arguments

None of Plaintiffs' remaining arguments has merit. All of the arguments either could have been raised in the briefing on the underlying motions to dismiss, or (in most cases) **were in fact made** in the briefing on the motions to dismiss. Plaintiffs' Motion, from section I.B through the end (pages 3-19), is in direct violation of Local Rule 7-18, which requires a motion for reconsideration to be based on either: (a) a material difference in fact or law from that presented to the Court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision; (b) the emergence of new material facts or a change of law occurring after the time of such decision; or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision.

Plaintiffs have simply attempted to re-argue the same points they unsuccessfully argued to the Court the first time around. This is expressly forbidden by Local Rule 7-18: "No motion for reconsideration shall in any manner repeat any oral or written argument made in support of or in opposition to the original motion." The Court assures Plaintiffs that it understood and considered their arguments when it ruled on the underlying motions to dismiss. The Court will not endeavor to re-explain its reasoning in this Order.

3. SCE's Request for Sanctions

In light of the fact that there is some merit to Plaintiffs' first argument - that it is preferable for the Court to phrase the dismissals as "without leave to amend" instead of "with prejudice" - the Court will exercise its discretion and not impose sanctions. The Court acknowledges that the remainder of Plaintiffs' Motion is frivolous and counsels Plaintiffs that failure to comply strictly with Local Rule 7-18 may result in sanctions in the future. Because the Court exercises its discretion and opts not to impose sanctions, the Court **DENIES** Plaintiffs' *Ex Parte* Application.

III. RULING

For the foregoing reasons, the Court **GRANTS IN PART AND DENIES IN PART** Plaintiffs' Motion for Reconsideration. The Court will re-issue the December 13, 2011 Order replacing the words "with prejudice" with the words "without leave to amend," and replacing the words "without prejudice" with the words "with leave to amend." In all other respects, the Motion for Reconsideration is **DENIED**. The Court does not impose sanctions and **DENIES** Plaintiffs' *Ex Parte* Application.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** February 13, 2012

TITLE: Solutions for Utilities, Inc., et al. v. California Public Utilities Comm'n, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFF:	**COUNSEL PRESENT FOR DEFENDANT:**
Not Present	Not Present

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PROCEEDINGS (in chambers): AMENDED ORDER GRANTING CPUC DEFENDANTS' MOTION TO DISMISS [Docket No. 32]; **AMENDED ORDER GRANTING DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO DISMISS** [Docket No. 33]

This matter is before the Court on the motion filed by Defendants California Public Utilities Commission ("CPUC") and current and former commissioners Michael R. Peevey, Timothy Alan Simon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachael Chong, John A. Bohn, Dian M. Gruenich, and Nancy E. Ryan (collectively with CPUC, "CPUC Defendants") to dismiss the First Amended Complaint ("CPUC Motion"). Plaintiffs Solutions for Utilities, Inc. ("SFUI"), CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd, and Robert Sarvey (collectively, "Plaintiffs") filed an Opposition ("CPUC Opposition"), to which the CPUC Defendants replied ("CPUC Reply").

This matter is also before the Court on the motion filed by Defendant Southern California Edison Company ("SCE") to dismiss the First Amended Complaint ("SCE Motion"). Plaintiffs filed an Opposition ("SCE Opposition"), to which SCE replied ("SCE Reply").

The Court found this matter suitable for disposition without oral argument and vacated the hearing set for October 31, 2011. *See* Fed. R. Civ. P. 78(b). For the following reasons, the CPUC Motion is GRANTED and the SCE Motion is GRANTED.

I. STATUTORY AND REGULATORY BACKGROUND

A. Public Utilities Regulatory Policies Act ("PURPA")

In 1978, Congress enacted the Public Utilities Regulatory Policies Act ("PURPA") to encourage the development of cogeneration and small power production facilities, thereby reducing American dependence on fossil fuels. *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n*, 36 F.3d 848, 850 (9th Cir. 1994). To achieve this objective, Congress sought to eliminate two barriers to the development of alternative energy sources: (1) the reluctance of traditional electric utilities

to purchase power from and sell power to non-traditional facilities; and (2) the financial burdens imposed upon alternative energy sources by state and federal utility authorities. *Id*.

Section 201 of PURPA designates a group of facilities as Qualifying Facilities ("QFs"), a group that includes any cogeneration facility meeting requirements set by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 796. Section 210 of PURPA creates a market for QFs' energy by requiring FERC to establish regulations that obligate public utilities to sell electric energy to and purchase electric energy from QFs. 16 U.S.C. § 824a-3. PURPA also requires FERC to promulgate regulations to ensure that the rates for these purchases "shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and shall not discriminate against qualifying cogenerators or qualifying small power producers." 16 U.S.C. § 824a-3(b). However, to ensure that the general public, as consumers and ratepayers, is not forced to subsidize QFs, the rates set by FERC cannot exceed the incremental cost to the electric utility of alternative electric energy. *Id*. The incremental cost is defined as the "cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). In other words, the utility companies cannot be forced to pay the QFs a price for energy that is higher than the amount of money it would take the utility to obtain the electric energy another way (either by generating it itself or purchasing it elsewhere).

FERC promulgated regulations pursuant to its mandate under PURPA. Among these regulations, FERC set forth the criteria that cogeneration facilities and small power production facilities must meet to be certified as a QF, including operating and efficiency standards. 18 C.F.R. §§ 292.201-.211. The FERC regulations require utilities to purchase energy from those facilities it has certified as QFs. 18 C.F.R. § 292.303. FERC also required utilities to purchase electric energy from and sell electric energy to QFs at the utility's full "avoided cost" rate. 18 C.F.R. § 292.304(d). "Avoided costs" are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source. 18 C.F.R. § 292.101(b)(6). The "avoided cost" is essentially the same as the "incremental cost," as defined in PURPA. Because PURPA states that the rate (i.e., the price paid to the QFs for electrical energy) cannot be higher than the incremental cost and the FERC regulations state that the rate cannot be less than the avoided cost, PURPA and the FERC regulations, read in conjunction, require the price paid by utilities to be exactly the avoided cost.

The states are in charge of implementing FERC's regulations pertaining to determining avoided costs and setting rates paid to QFs. 16 U.S.C. § 824a-3(f). CPUC is a state agency of constitutional origin that is authorized to fix retail rates and establish rules for California utilities. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Utils. Code § 701. In California, CPUC is the entity responsible for implementing FERC's regulations.

PURPA also provides an enforcement scheme for violations of PURPA and the FERC regulations. *See Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000). If a state

regulatory authority (such as CPUC) fails to properly implement FERC's regulations, FERC can bring an enforcement action against the state regulatory agency in federal court. 16 U.S.C. § 824a-3(h)(2). If FERC does not bring such an action on its own, any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. *Id*. If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id*. If the public utility commission **does** implement FERC's regulations, but a utility (such as SCE) violates the public utility commission's requirements, an aggrieved party can sue for damages based on that violation **in state court only**. 16 U.S.C. §§ 824a-3(g)(2), 2633.

B. Rule 21

Effective in 2003, the California Legislature adopted the California Renewables Portfolio Standard Program, which required all California electric corporations to procure a minimum quantity of electricity each year from renewable energy sources. CAL. PUB. UTIL. CODE § 399.11 *et seq.* Beginning in 2007, the California Legislature required that each electrical corporation file with CPUC a standard tariff for renewable energy output produced at an electric generation facility (defined as a public water or wastewater agency that is a retail customer of an electrical corporation with an effective capacity of not more than one megawatt and is an eligible renewable energy source) for terms of up to 20 years at a price referred to as the market price referent ("MPR"), which would be determined by the CPUC. CAL. PUB. UTIL. CODE §§ 399.20, 399.15(c).

The CPUC adopted a tariff and standard purchase contracts that electric corporations like SCE were required to offer to eligible public water and wastewater agencies. *See generally* CPUC Decision 07-07-027 (2007).[1] The rate in these standard contracts is the MPR, as determined by the CPUC. *Id*. The contracts provide that in purchasing the energy output of the seller, the utility would also acquire the renewable energy credits ("RECs") associated with that output. *Id*. An REC is a certificate of proof that a unit of electricity was generated and delivered by an eligible renewable energy resource. CAL. PUB. UTIL. CODE § 399.12(e).

CPUC authorized utilities to use "Rule 21," a CPUC-approved tariff, which provides for an "orderly and timely" interconnection between the utilities and sellers. CPUC Decision 07-07-027. CPUC also expanded the program to require utilities (such as SCE) to offer similar standard purchase contracts to small producers of renewable energy who are utility customers (such as SFUI). *Id*. CPUC required the utilities to notify potentially interested or affected customers of the availability of the new opportunity under Rule 21. *Id*. The California legislature codified CPUC's expansion of the program in 2008. CAL. PUB. UTIL. CODE § 399.20.

[1] The Court takes judicial notice of this CPUC Decision because it satisfies the requirements of Federal Rule of Evidence 201.

CPUC approved a specific form of a power purchase contract and ordered the utilities (including SCE) to offer it to eligible sellers. CPUC Decision 07-07-027. The program is called the California Renewable Energy Small Tariff ("CREST") program, and the CPUC-approved power purchase contract is known as a CREST contract. *Id*. Participation in the CREST program is voluntary. *Id*. CPUC did not invoke any of its powers under PURPA or the FERC guidelines in establishing Rule 21 or adopting the CREST program. CPUC Decision 08-02-010.[2] The CREST program does not require the seller to be a QF.

The parties to this action agree that Rule 21 and the CREST program are not intended to (and indeed do not) implement PURPA or the FERC regulations. The only extent to which Rule 21 and the CREST program are related to PURPA and the FERC regulations is that entities who meet the criteria to be certified as a QF under the FERC regulations may also have the option of entering a CREST contract with one of the major California utilities.

With this statutory and regulatory backdrop in mind, the Court turns to the allegations in this case.

II. ALLEGATIONS FROM THE FIRST AMENDED COMPLAINT

The First Amended Complaint ("FAC") sets forth the following allegations.

A. SFUI's Allegations

Plaintiff SFUI is and at all relevant times was an electric utility within the class of small power production facilities and nontraditional electricity generating facilities contemplated by PURPA and the FERC regulations. (FAC ¶ 25.) SFUI is currently certified as a QF. (FAC ¶ 25.) The FAC does not indicate **when** SFUI was certified as a QF. As explained below, it appears that SFUI was not certified as a QF for most if not all of the time period during which the events allegedly leading to Defendants' liability occurred, but rather SFUI became certified as a QF subsequent to the events described in the FAC.

SCE is the owner of the power grid in the region where SFUI hoped to interconnect and supply energy. (FAC ¶ 14.) Prior to or during May 2008, SFUI, which met the criteria to be certified as a QF, attempted to supply electric power to SCE. (FAC ¶¶ 26-26.5.) SFUI hoped to receive the benefit of the contract terms to which QFs are entitled under PURPA and the FERC regulations, namely a purchase price for its energy equal to the avoided cost. (FAC ¶¶ 26-26.5.)

In May 2008, however, SCE falsely represented to SFUI that in order to secure interconnection to SCE's power grid and operate as a small power generating facility as contemplated and

[2] The Court takes judicial notice of this CPUC Decision because it satisfies the requirements of Federal Rule of Evidence 201.

encouraged by PURPA, the correct avenue was to comply with Rule 21 and seek a CREST contract. (FAC ¶ 26.1.) SCE told SFUI that obtaining QF certification from FERC was not necessary and indeed, would be counter-productive. (FAC ¶ 26.1.) SFUI relied on this representation from SCE **and did not seek to be certified as a QF**, even though it was eligible. (FAC ¶ 26.) Instead, SFUI pursued a CREST contract and achieved the first position in the queue for interconnection with SCE's grid. (FAC ¶ 26.4.)

Upon reaching the first position in the queue, SFUI realized that the CREST contract did not allow SFUI to obtain its PURPA rights. For instance, the rate to be paid for electric energy was the MPR, which was much lower than the avoided cost. (FAC ¶¶ 26.4, 35(c).) The CREST contract also required SFUI to assign its RECs to SCE as part of the transaction without providing any additional compensation to SFUI. (FAC ¶¶ 26.3, 35(f).) Since RECs are assets of value, requiring SFUI to assign its RECs to SCE without additional consideration served to further lower the price SFUI would receive for its energy under the CREST contract. SFUI also found other terms of the CREST contract to be damaging to the energy seller, such as a "unilateral curtailment power," which imposed on the seller (SFUI) revenue uncertainties that effectively denied SFUI the opportunity to obtain developer financing. (FAC ¶¶ 26.3, 35(d)-(e).)

Once SFUI realized that the CREST contract was not to its liking, SFUI could not resort to other options, such as becoming certified as a QF under PURPA, without losing its first position in the queue and being compelled to take a much lower position in another queue. (FAC ¶ 26.4.) As a consequence, SFUI was prevented from being able to operate as a viable and profitable small power generating facility; instead, SFUI was forced to sell out in order to mitigate its damages and prevent a total loss. (FAC ¶ 26.5.)

The FAC alleges:

> SFUI made repeated and long-standing efforts to obtain contracts with SCE in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of the refusal of SCE to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff SFUI to secure same.

(FAC ¶ 29.) However, other than the one specific incident described above (regarding SFUI's being allegedly duped by SCE into pursuing a CREST contract in 2008), the FAC does not indicate what the "repeated and long-standing" efforts to obtain a contract with SCE have been.

The FAC alleges a conspiracy between SCE and the CPUC Defendants to circumvent PURPA and the FERC regulations. (FAC ¶¶ 17-18.1, 27, 49-51.)

On March 11, 2011, SFUI petitioned FERC to bring an enforcement action against CPUC and SCE, but on May 19, 2011, FERC declined to do so. (FAC ¶ 30.)

B. CARE's Allegations

The CARE organization represents electric utilities that are QFs. (FAC ¶ 28.) The FAC alleges:

> CARE made repeated and long-standing efforts to obtain contracts with local power grid providers in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of refusal of the local power grid providers to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff CARE to secure same.

(FAC ¶ 31.) Plaintiffs Boyd and Sarvey (collectively with CARE, "CARE Plaintiffs") are members of CARE. (FAC ¶ 32.) Boyd and Sarvey are apparently QFs (FAC 2 (Introduction)), although this is not made clear in the FAC. The FAC does not list any of CARE's other members. Nowhere in the FAC are there specific allegations of what efforts any of CARE's members have made to obtain contracts with local power grid providers. The FAC does not even state which power grid providers allegedly refused to abide with PURPA. In short, the FAC is completely devoid of any specific allegations pertaining to CARE, its members, or the efforts made by CARE or its members to obtain PURPA contracts. All that the FAC alleges with respect to CARE is the vague and conclusory allegation that CARE and its members attempted to obtain PURPA contracts, but were unable to do so because the power grid providers refused to abide by PURPA and CPUC refused to enforce PURPA.

On January 28, 2011, CARE, on behalf of itself and its members, petitioned FERC to bring an enforcement action against CPUC and local power grid providers, but on March 17, 2011, FERC declined to do so. (FAC ¶ 32.) On or about July 9, 2011, CARE, Boyd, and Sarvey again petitioned FERC to bring an enforcement action. (FAC ¶ 32.) As of the filing of the FAC, that petition was pending. (FAC ¶ 32.)

CPUC, allegedly in retaliation for CARE's decision to petition FERC regarding CPUC's alleged misconduct, sought to have FERC deem CARE to be a vexatious litigant and bar CARE from submitting any additional petitions to FERC. (FAC ¶ 62(c).) The FAC also alleges that CPUC made "its fee determinations in a manner designed to [limit, burden, deter, or chill CARE's freedom of speech and right to petition]" (FAC ¶ 62(c)), although the FAC does not explain in what way the fee determinations served this purpose.

C. Causes of Action

The FAC sets forth five causes of action. The first is a claim for enforcement of PURPA, brought by all Plaintiffs against only the CPUC Defendants. Plaintiffs claim that CPUC's use of Rule 21 and the CREST contract violate PURPA and the FERC regulations that implement PURPA. (FAC ¶¶ 27, 37.) Because CPUC has not complied with or enforced PURPA and the FERC regulations,

"Plaintiffs have been frustrated in their efforts to enter the energy market, and prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its implementing regulations." (FAC ¶ 33.) In addition to the grievances noted above (such as setting the rate in the CREST contract as the MPR instead of avoided cost, forcing the seller to assign its RECs to the utility, and including "weasel clauses" such as the unilateral curtailment powers), Plaintiffs also claim that the utilities impose artificial barriers to small power production facilities trying to interconnect with its grids, such as:

> with CPUC approval, [] enter[ing] into contracts with larger energy suppliers who cannot interconnect for many years, and then posit[ing] those contracts as a basis for claiming that there is no interconnection capacity for Plaintiffs and other immediately available small power production facilities and nontraditional electricity generating facilities.

(FAC ¶ 35(b).)

The second cause of action is a claim under 42 U.S.C. § 1983 brought by SFUI against the individual current and former commissioner defendants and SCE. The cause of action claims that, under color of state law, these defendants deprived SFUI of its statutory PURPA rights and that because defendants' actions denied SFUI the right to reasonably profit from its business enterprises, defendants' actions constitute an unlawful and unconstitutional taking without just compensation or due process. (FAC ¶ 44.)

The third cause of action is also a claim under 42 U.S.C. § 1983. This claim is brought only by CARE against the individual current and former commissioner defendants. CARE alleges that, under color of state law, the individual current and former commissioner defendants violated CARE's First Amendment rights of freedom of speech and right to petition by attempting to bar CARE from petitioning FERC to bring enforcement actions against CPUC. (FAC ¶ 62(c).) This claim also alleges that defendants deprived CARE of its statutory rights under PURPA and its right to reasonably and economically operate its nonprofit business enterprise, constituting an unlawful and unconstitutional taking without just compensation or due process of law. (FAC ¶ 62(b).)

The fourth cause of action is for equitable, injunctive, and declaratory relief brought by CARE and SFUI against the CPUC Defendants. CARE and SFUI seek a declaration that the conduct of the CPUC Defendants is unlawful and an injunction requiring the CPUC Defendants to "remedy each and all of the particulars described" throughout the FAC "and the consequences thereof." (FAC ¶¶ 74-75.)

The fifth cause of action, for equitable and declaratory relief, was brought by SFUI against SCE. This count sought an order declaring SCE's conduct unlawful. Pursuant to stipulation of Plaintiffs and SCE, the Court dismissed this cause of action without prejudice on September 8, 2011. (Req. to Dismiss Fifth Claim, Sept. 6, 2011, ECF No. 30; Sept. 8, 2011 Order, ECF No. 35.)

The CPUC Defendants and SCE have moved to dismiss the FAC in its entirety.

II. DISCUSSION

A. Claim 1: Enforcement of PURPA

The first cause of action is an enforcement action brought by all Plaintiffs against the CPUC Defendants to enforce PURPA. The CPUC Defendants argue that this Court lacks subject matter jurisdiction to hear this claim. First, the CARE Plaintiffs failed to exhaust their administrative remedies. (CPUC Mot. 8-9.) Second, none of the CPUC Defendants' alleged conduct constitutes an "implementation" claim, which can be heard in federal court; rather, all of the allegations in the first count are "as applied" claims that can only be heard in state court. (*Id*. 8.) The CPUC Defendants also argue that even if the Court has subject matter jurisdiction, Plaintiffs lack statutory standing and have failed to state a claim. (*Id*. 13-15.)

1. Failure to Exhaust Administrative Remedies

PURPA provides that any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. 16 U.S.C. § 824a-3(h)(2). If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id*.

CARE, on behalf of itself and its members, twice petitioned FERC to bring an enforcement action against CPUC. (FAC ¶ 32.) CARE claims to have filed the first petition on January 28, 2011, which FERC denied on March 17, 2011. (FAC ¶ 32.) However, FERC rejected this January 28 petition only because it was procedurally inappropriate - it was tacked on to a request for rehearing of FERC's denial of CARE's complaint against several utilities. *CARE v. PG&E*, 134 F.E.R.C. ¶ 61, 207, at ¶ 12 (2011). Then in July 2011, after filing this action, the CARE Plaintiffs filed another enforcement petition with FERC. (FAC ¶ 32.) FERC declined to bring an enforcement action and issued a letter authorizing CARE to sue in the appropriate forum on September 12, 2011. (CPUC Opp'n 10.) This action, however, was filed June 10, 2011, and the FAC was filed August 10, 2011.

Because this action predates the CARE Plaintiffs' exhaustion of their administrative remedies, the Court lacks subject matter jurisdiction over the CARE Plaintiffs' PURPA enforcement claim. *See Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1269-70 (2d Cir. 2002). The fact that the CARE Plaintiffs' FERC petition has been rejected subsequent to the filing of this action does not suddenly invest the Court with subject matter jurisdiction. The Court lacked subject matter jurisdiction when this action was filed; therefore, the Court cannot hear the action. *Cf. Thome v. US Food and Drug Admin.*, No. 11-CV-00676, 2011 WL 3206910, at *2 (N.D. Cal. July 27, 2011) (holding that because the original plaintiff lacked standing, the court had no subject matter

jurisdiction, and thus could not consider anything filed thereafter in the action, including amended pleadings that attempt to cure the jurisdictional problem by swapping in a plaintiff with standing). To hold otherwise would permit litigants to ignore PURPA's requirement that aggrieved parties first petition FERC before bringing their own enforcement actions, instead permitting them to file FERC petitions and district court actions concurrently, knowing that any jurisdictional deficiency could be cured within 60 days.

Because the CARE Plaintiffs did not exhaust their administrative remedies prior to bringing this action, the Court lacks subject matter jurisdiction over the CARE Plaintiffs' PURPA enforcement action. Count 1 must be dismissed without leave to amend as to the CARE Plaintiffs.

2. "As Applied" Claims

The CPUC Defendants concede that SFUI did exhaust its administrative remedies, but they argue that the Court also lacks subject matter jurisdiction over SFUI's PURPA-enforcement claim because its allegations constitute an "as applied" claim that must be heard in state court. (CPUC Mot. 8.) The PURPA rule they quote - 16 U.S.C. § 824a-3 - does not draw a distinction between an "implementation" claim and an "as applied" claim. The cited FERC decision - *Policy Statement Regarding the Commission's Enforcement Role under Section 210 of PURPA*, 23 F.E.R.C. ¶ 61,304, 1983 FERC LEXIS 2583, at **10-11 (May 31, 1983) - does draw a distinction between "implementation" claims and "as applied" claims, but the distinction there drawn is between claims **against the public utilities commission** (deemed to be "implementation" claims) and claims **against a utility** that fails to comply with the public utilities commission's regulations (deemed to be "as applied" claims). *Id*. In this action, SFUI claims that CPUC's policies - primarily the approval of Rule 21 and the CREST contract - violate PURPA. Under the FERC decision the CPUC Defendants cite, this would be an implementation claim properly in federal court.

The only authority the CPUC Defendants cite that supports the proposition that federal courts lack subject matter jurisdiction over claims that CPUC policies violate PURPA because they are "as applied" is *Mass. Inst. of Tech. v. Dep't of Pub. Utils.*, 941 F. Supp. 233, 236-38 (D. Mass. 1996). The Court is not bound by this decision from the District of Massachusetts and does not find the reasoning in that case to be persuasive. The more straightforward reading of PURPA's judicial review and enforcement provisions (16 U.S.C. §§ 824a-3(g)-(h)) is that claims against a public utilities commission for actions or omissions that violate PURPA may be brought in federal court provided the plaintiff first petitions FERC and FERC takes no enforcement action of its own within 60 days. 16 U.S.C. § 824a-3(h)(2)(B). Where the public utilities commission has complied with PURPA by promulgating regulations but a utility has refused to abide by those regulations, actions against the utility must be brought in state court. 16 U.S.C. § 824a-3(g).

Accordingly, the Court has subject matter jurisdiction over SFUI's claim for PURPA enforcement.

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3. Standing

The CPUC Defendants next argue that even if the Court has jurisdiction, SFUI lacks statutory standing to bring a claim for PURPA enforcement because SFUI is not a QF. The FAC is ambiguous on this issue, as discussed above. The FAC alleges that SFUI is a QF. (FAC ¶ 25.) However, the FAC does not indicate **when** SFUI was certified as a QF. And the main factual allegation in the FAC is that, due to SCE's misrepresentations, SFUI **did not seek certification as a QF**, even though it was eligible (FAC ¶ 26), but pursued a CREST contract instead (FAC ¶ 26.4).

In addition to the concrete factual allegations in the FAC (regarding SCE tricking SFUI into pursuing a CREST contract rather than a contract that would give SFUI PURPA rights), the FAC also alleges generically:

> SFUI made repeated and long-standing efforts to obtain contracts with SCE in accordance with PURPA and its implementing regulations . . . but has been unable to do so because of the refusal of SCE to abide with PURPA and its implementing regulations, and the refusal of CPUC to enforce PURPA and its implementing regulations, despite repeated efforts by Plaintiff SFUI to secure same.

(FAC ¶ 29.) Read in the light most favorable to SFUI, this allegation refers to other unsuccessful attempts SFUI made to obtain PURPA contracts besides the one attempt that FAC actually describes in detail. This allegation, combined with the allegation that SFUI is a QF, demonstrates that SFUI has standing to bring this claim. While the allegations are not sufficient to survive a motion to dismiss, as discussed in the next section, the allegations are sufficient to confer standing.

4. Failure to State a Claim

The fatal deficiency to SFUI's PURPA-enforcement claim is that it has failed to sufficiently allege that SFUI **attempted to get a PURPA-compliant contract and was unable to do so**. All the FAC alleges is that SFUI hoped to get a PURPA-compliant contract, SCE duped SFUI into pursuing a CREST contract instead, and then after waiting in the wrong queue, SFUI realized the inferiority of the CREST contract and regretted waiting in the wrong queue. If PURPA-compliant contracts are available to QFs in California but SFUI did not follow the proper procedures to get such a contract, it does not have a cause of action against the CPUC Defendants.

The parties all agree that Rule 21 and the CREST program were not promulgated to effectuate PURPA. None of the parties has pointed the Court to the particular CPUC regulations or decisions that **do** implement PURPA. However, the FAC does not allege a wholesale failure on the part of the CPUC Defendants to implement PURPA and the FERC regulations. (*See generally* FAC.) In the absence of evidence (or even allegations) to the contrary, the Court assumes that such

implementing regulations exist.[3] The FAC merely alleges that by authorizing SCE to offer SFUI (which met the eligibility requirements to be certified as a QF) the CREST contract instead of a PURPA-compliant contract, the CPUC Defendants violated PURPA and the FERC regulations.

Thus, the Court gleans the following allegation from the FAC: small power production facilities and nontraditional electricity generating facilities in California that meet the eligibility requirements to be certified as a QF have **two options**: (1) they can be certified as a QF and exercise their PURPA rights; **or** (2) they can choose not to exercise their PURPA rights and pursue a CREST contract instead. And according to SFUI, because the CREST contract does not comply with the terms PURPA mandates (including that the rate be the avoided cost), the CPUC Defendants' approval of the CREST contract violates PURPA.

This allegation concedes that SFUI was free, at the outset, to pursue **either** QF certification and a PURPA contract **or** the CREST contract. This is not a sufficient allegation of a PURPA violation. Perhaps SFUI regrets that it pursued the option that turned out, in hindsight, to be less attractive. Perhaps SFUI can state a claim against SCE for erroneously telling SFUI that the way to obtain its PURPA rights was by pursuing a CREST contract instead of seeking QF certification and pursuing a PURPA-compliant contract. But according to the allegations in the FAC, the option of pursuing QF certification and a PURPA-compliant contract was always available to SFUI: SFUI just never took that option.

The only way SFUI's allegations could amount to a PURPA violation is if PURPA mandates that **all contracts** between utility companies and small power production facilities and nontraditional electricity generating facilities **must comply** with PURPA's terms. In essence, this would be a preemption argument - an argument that for entities eligible to be QFs, PURPA-compliant contracts **and no others** may be used. Plaintiffs have not made this preemption argument, and the law does not support it. While utilities are required to **offer** QFs a contract that complies with PURPA and the FERC regulations (including a rate set at the full avoided cost), the Supreme Court has held that "a qualifying facility and a utility may negotiate a contract setting a price that is lower than the full-avoided-cost rate." *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 416 (1983). Accordingly, PURPA-compliant contracts are not the only allowable contracts between utilities and QFs. So long as utilities offer a PURPA-compliant contract, they may also offer non-PURPA-compliant contracts (such as the CREST contract) as an alternative.

The FAC does not allege that the CPUC Defendants have failed to implement PURPA. The FAC does not allege that SCE refuses to offer PURPA-compliant contracts to QFs. The FAC does not allege any specific attempt made by SFUI to obtain a PURPA-compliant contract that was

[3] While the CPUC Defendants do not point to the PURPA-implementing regulations it has promulgated, it does contend that "since the early 1980's, the CPUC has approved standard offer PURPA contracts which are currently in effect." (CPUC Mot

unsuccessful.[4] In the absence of these allegations, SFUI has failed to state a claim that the CPUC Defendants failed to implement or have violated PURPA.

SFUI's first cause of action is therefore dismissed with leave to amend.

B. Claim 2: SFUI's § 1983 Action

Claim 2 is brought by SFUI only against the individual former and current commissioners and SCE. It alleges that, under color of state law, these defendants deprived SFUI of its rights under PURPA and because the defendants' action deprived SFUI of its right to profit from its business, the actions also constituted an unconstitutional and unlawful taking. (FAC ¶¶ 44-61.)

1. Denial of PURPA Rights

Section 1983 cannot be used to create a remedy for violation of a federal statute that provides for its own remedies.

> [I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981) (citations omitted). As discussed above, PURPA provides a comprehensive remedial scheme, permitting aggrieved small power production facilities such as SFUI to sue for PURPA violations either against public utilities commissions (in federal court, after unsuccessfully petitioning FERC to bring an enforcement action) or against utilities (in state court only). In light of this comprehensive statutory scheme, SFUI may not sue under § 1983 for violations of its PURPA rights.

2. Taking Without Just Compensation

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[4] To plead sufficiently, a plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, __ U.S. __, 129 S. Ct. 1937, 1949 (2009). As explained above, the incident the FAC describes in detail was not an attempt to get a PURPA-compliant contract. It was an attempt to get a CREST contract followed by regret that a PURPA-compliant contract had not been pursued. The general, vague, conclusory allegation in paragraph 29 is insufficient to state a claim.

SFUI claims that it was "denied its right to reasonably profit from its business enterprises, thereby constituting an unlawful and unconstitutional taking without just compensation and/or due process of law." (FAC ¶ 44.b.) SFUI has made clear that the "taking" is based on the alleged PURPA violations. "[I]f there were no PURPA violations, then there was no taking from SFUI; and if there were, one consequence [of the PURPA violations] was the taking." (SCE Opp'n 12.)

The Court notes at the outset that SFUI has not alleged a taking of "property" in the traditional sense. SFUI has not alleged that the commissioners have taken (or restricted SFUI's use or enjoyment of) the physical land it owns, the machinery on the land, or the energy SFUI produces. The alleged actions do not force SFUI to use their assets or property in any particular manner, and they do not forbid SFUI from using their assets or property in any manner of its choosing. Rather, the allegation is that, by not implementing PURPA, SFUI was unable to access its statutory right to contract with a utility company and receive a certain rate for its energy, preventing SFUI from realizing the profits it expected to make from its business venture. The expectation of profits, however, is not a property interest protected by the Takings Clause. "Reduced profits are damages; they are not themselves a kind of 'property' that can be the subject of a Takings Clause claim." *Yee v. MobileHome Park Rental Review Bd.*, 62 Cal. App. 4th 1409, 1422 (1998.) Indeed, the government makes any number of regulations that affect the profitability of various business ventures. Even regulations that completely ban the trade of previously legal goods have been held not to constitute a taking. *See Andrus v. Allard*, 444 U.S. 51 (1979) (law banning the sale of any part of an eagle - even preexisting artifacts of eagles legally killed before the passage of the Eagle Protection Act - is not an unconstitutional taking).

Even if the commissioners egregiously violated PURPA and denied SFUI the rights to which it is statutorily entitled, this would not constitute an unconstitutional taking of profits. If the commissioners failed to implement PURPA or violated PURPA, the proper avenue for redress is an enforcement action under PURPA.[5] SFUI cannot turn its claim that it suffered damages in the form of lost profits because of a PURPA violation into a claim for an unconstitutional taking of those profits. Because even the most egregious violation of PURPA could not give rise to a claim under the Takings Clause, Claim 2 must be dismissed without leave to amend.

C. Claim 3: CARE's § 1983 Action

CARE's § 1983 action rests on three theories. The first two - that the individual commissioners denied CARE its PURPA rights and engaged in actions that amounted to an unlawful and unconstitutional taking - must be dismissed without leave to amend for the same reasons

[5] And if PURPA did not already provide an enforcement mechanism, the proper form of redress would be to bring a § 1983 action for violation of PURPA, not a § 1983 action for an unconstitutional taking.

discussed above. CARE also attempts to state a § 1983 claim based on the alleged violation of their First Amendment rights to free speech and right to petition the government.

CARE alleges that, in retaliation for its decision to petition FERC to bring an enforcement action against CPUC, the commissioners took two actions intended to chill CARE's First Amendment rights: (1) they attempted to have FERC ban CARE from petitioning FERC any further; and (2) they made fee determinations in a manner designed to chill CARE from exercising its First Amendment rights. (FAC ¶ 62.c.)

The first allegation cannot support a First Amendment claim. While parties have the right to bring their grievances to court, "baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 743 (1983.) Any attempt to have a party declared a vexatious litigant is, in some sense, "in retaliation" for the other party's decision to bring suit. Nevertheless, a government entity is entitled to seek to have an arbiter deem a party to be a vexatious litigant, with all the punitive consequences attendant to such a determination. *See, e.g.,* CAL. CODE CIV. PROC. §§ 391-391.7 (permitting defendants, including governmental defendants, to request that a court find party to be a vexatious litigant); *Wolfe v. George*, 486 F.3d 1120 (9th Cir. 2007) (holding California's vexatious litigant statute to be constitutional).

The second allegation - that the commissioners' fee determinations were set in such an manner and for the purpose of chilling CARE's right to petition - could support a First Amendment violation if adequately pled. However, the FAC is devoid of any concrete allegations to support the conclusory claim that fees were set in such a manner as to chill CARE's First Amendment rights. In the absence of any specific allegations (When did the commissioners set the fees? What were the fees for? Against whom were the fees levied? In what way did the fee determination affect CARE's First Amendment rights?), this cause of action must be dismissed.

In the absence of any concrete allegations, it is premature to determine whether the commissioners have a valid defense of absolute immunity or whether the Johnson Act, 28 U.S.C. § 1342, precludes the claims. It is unclear whether the fees that allegedly impacted CARE's First Amendment rights were levied against an entire class of QF-eligible power producers, in which case legislative immunity would likely preclude such a suit, or whether the fees were levied solely against CARE. Thus, CARE's § 1983 cause of action for violation of its First Amendment rights is dismissed with leave to amend.

D. Claim 4: Equitable, Injunctive, and Declaratory Relief

Because the Court has dismissed all of Plaintiffs' claims under PURPA and § 1983, the claims for equitable, injunctive, and declaratory relief must also be dismissed. All that remains is to determine whether the dismissal is without leave to amend.

The CPUC Defendants argue that the Eleventh Amendment bars the claim for equitable relief because the claim is based on violations of state law. (CPUC Mot. 19-20.) While the conduct complained of is conduct by state actors, Plaintiffs' claims are not for violations of state law. On the contrary, one of the only things that is clear in the FAC is that the claims are for violations of PURPA and the federal FERC regulations. Thus, the language the CPUC Defendants cite from *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984) - that "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law" - is of no moment. Plaintiffs do not want the Court to instruct the CPUC Defendants on how to conform their conduct to state law; they want the Court to instruct the CPUC Defendants on how to conform their conduct to federal laws and regulations. Claim 4 is dismissed with leave to amend. This claim is dismissed without leave to amend only to the extent that it concerns the CARE Plaintiffs' allegations of PURPA violations that were not properly petitioned to FERC prior to filing this action.

III. RULING

For the foregoing reasons, the Court **GRANTS** the CPUC Defendants' Motion to Dismiss and **GRANTS** SCE's Motion to Dismiss, disposing of the claims as follows:

(1) Claim 1 is **DISMISSED WITHOUT LEAVE TO AMEND** as to the CARE Plaintiffs for failure to exhaust administrative remedies;
(2) To the extent Claim 1 concerns SCE's alleged 2008 misrepresentations and encouragement that SFUI pursue a CREST contract, the Claim is **DISMISSED WITHOUT LEAVE TO AMEND**; to the extent Claim 1 concerns SFUI's other unsuccessful attempts to obtain PURPA rights, the Claim is **DISMISSED WITH LEAVE TO AMEND**;
(3) Claim 2 is **DISMISSED WITHOUT LEAVE TO AMEND**;
(4) To the extent Claim 3 concerns deprivation of PURPA rights, unconstitutional or unlawful takings, or attempts to bar the CARE Plaintiffs from petitioning FERC, Claim 3 is **DISMISSED WITHOUT LEAVE TO AMEND**; to the extent Claim 3 is based on retaliatory fee determinations, the Claim is **DISMISSED WITH LEAVE TO AMEND**;
(5) Claim 4 is **DISMISSED WITH LEAVE TO AMEND**; to the extent Claim 4 rests on the CARE Plaintiffs' allegations of PURPA violations, these Claims are **DISMISSED WITHOUT LEAVE TO AMEND** for failure to exhaust administrative remedies.

The Court previously gave Plaintiffs until January 9, 2012 to file their Second Amended Complaint. (*See* Dec. 13, 2012 Order, ECF No. 61.) Plaintiffs met this deadline and filed their Second Amended Complaint on January 9, 2012. This is now the operative complaint.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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JS-5/JS-6	___
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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** March 14, 2012

TITLE: Solutions for Utilities, Inc., et al. v. California Public Utilities Comm'n, et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

==========

PROCEEDINGS (in chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS [Docket No. 67]

This matter is before the Court on the motion filed by Defendants California Public Utilities Commission ("CPUC") and current and former commissioners Michael R. Peevey, Timothy Alan Simon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachel Chong, John A. Bohn, Dian M. Gruenich, and Nancy E. Ryan (collectively with CPUC, "CPUC Defendants") to dismiss the Second Amended Complaint ("Motion"). Plaintiffs Solutions for Utilities, Inc. ("SFUI"), CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd, and Robert Sarvey (collectively, "Plaintiffs") filed an Opposition ("Opposition"), to which the CPUC Defendants replied ("Reply").

The Court found this matter suitable for disposition without oral argument and vacated the hearing set for March 12, 2012. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court GRANTS IN PART and DENIES IN PART the Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed their First Amended Complaint ("FAC") on August 10, 2011. The FAC listed as Defendants the CPUC Defendants and Southern California Edison Co. ("SCE"). (*See generally* FAC, Aug. 10, 2011, ECF No. 20.) The CPUC Defendants and SCE filed motions to dismiss, which the Court granted on December 2, 2011.[1]

[1] On February 13, 2012, the Court re-issued the December 2, 2011 Order with minor alterations in response to Plaintiffs' Motion for Reconsideration. The only differences between the February 13, 2012 version and the December 2, 2011 version of the Order are: (1) the Court removed its analysis of whether to dismiss the fifth cause of action, as the parties pointed out to the Court that they had already stipulated to the dismissal of that claim; and (2) the Court changed the phrasing of the dismissals from "with prejudice" or

In the Order dismissing the FAC, the Court explained in depth the statutory and regulatory background that is relevant to this case. (Dec. 2, 2011 Order 1-4; Feb. 13, 2012 Order 1-4.) The Court will not endeavor to repeat that statutory and regulatory background here.

The Order dismissing the FAC explained which causes of action were dismissed with leave to amend and which dismissals did not have leave to amend. (Dec. 2, 2011 Order 15; Feb. 13, 2012 Order 15.) Plaintiffs filed their Second Amended Complaint ("SAC") on January 9, 2012. The caption page of the SAC still lists SCE as a Defendant, but none of the causes of action actually state claims against SCE. (*See generally* SAC, Jan. 9, 2012, ECF No. 64.) Accordingly, the CPUC Defendants are the only defendants remaining in the case. The CPUC Defendants filed the instant Motion to Dismiss the SAC on January 23, 2012.

II. DISCUSSION

A. Legal Standard

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-1200 (9th Cir. 2003). In evaluating a motion to dismiss, a court accepts the plaintiff's material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). Dismissal is proper if the complaint lacks a "cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *see Ileto*, 349 F.3d at 1200. "While legal conclusions can provide the complaint's framework, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). To plead sufficiently, a plaintiff must proffer "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949.

B. First Cause of Action - Claim for Enforcement of PURPA

The first cause of action is brought only by Plaintiff SFUI. (SAC 11.) The parties agree that under the Public Utility Regulatory Policies Act ("PURPA") and the Federal Energy Regulatory

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"without prejudice" to "without leave to amend" and "with leave to amend," respectively. (*Compare* Dec. 2, 2011 Order, ECF No. 59 *with* Feb. 13, 2012 Order, ECF No. 77.)

Commission ("FERC") regulations, the CPUC Defendants are charged with providing an avenue for small power production facilities to sell electric energy to public utilities at a rate equal to avoided cost. The parties also agree that the California Renewable Energy Small Tariff ("CREST") contract was not intended to (and indeed, does not) satisfy this requirement. Simply put, the CREST contract is not a PURPA-compliant contract.

The FAC contained allegations regarding SFUI's attempts to obtain its PURPA rights by pursuing the CREST contract and allegations regarding SFUI's dismay when it found out that a CREST contract was not the proper vehicle through which to obtain PURPA rights (such as a rate for electric energy equal to avoided cost). In the Order dismissing the FAC, the Court held that so long as the CPUC Defendants offered **some avenue** for qualifying facilities to obtain their PURPA rights, it was not unlawful for the CPUC Defendants to **also** approve and offer the CREST contract, which contained different (non-PURPA-compliant) terms. The Court held that to the extent the PURPA-enforcement cause of action was based on the CREST allegations, the claim was dismissed without leave to amend. (Dec. 2, 2011 Order 15; Feb. 13, 2012 Order 15.)

The SAC repeats the allegations from FAC regarding SFUI's attempts to obtain a CREST contract, which SFUI hoped and believed was the avenue whereby it could obtain its PURPA rights to interconnectivity and a rate for energy equal to avoided cost. (*See generally* SAC.) However, SFUI explains that the CREST-related allegations are included not because those events, standing alone, lead to liability; rather, the CREST-related allegations are included in the SAC to provide context. (SAC 8 n.1.) SFUI's new theory is that the CPUC Defendants have **completely failed to implement PURPA**. For instance, SFUI alleges that the CPUC Defendants have "failed to adopt any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to interconnectivity, pricing and contract terms as mandated by PURPA and its FERC implementing regulations." (SAC ¶ 40.)

The CREST allegations are included to support SFUI's theory that the CPUC Defendants have approved the CREST contract **instead of** PURPA-compliant contracts, rather than **in addition to** PURPA-compliant contracts. According to the allegations of the SAC, "[T]here is no available PURPA compliant option within California for small power producing facilities to freely interconnect and remain interconnected with SCE or other utilities at avoided cost pricing, as mandated by PURPA and its FERC implementing regulations." (SAC ¶ 42.)

The CPUC Defendants present three arguments for why the first cause of action should be dismissed. First, they argue that there **are** PURPA-compliant options available, essentially attempting to disprove the allegations in the SAC by seeking to have the Court take judicial notice of FERC decisions that have approved allegedly PURPA-compliant contracts. (Mot. 5-8.) Second, they argue that the allegations in the SAC are vague and conclusory and do not satisfy the pleading standard. (Mot. 10-12.) Third, they imply (without arguing outright) that SFUI lacks standing because it was not certified as a Qualifying Facility ("QF") during most of the relevant time period of this lawsuit. (*See* Mot. 11-12.)

1. Argument One: PURPA-Compliant Options Exist

In the instant Motion, the CPUC Defendants point to those contracts that they argue **are** PURPA-compliant. (*See* Mot. 5-8.)[2] SFUI responds that none of the contracts identified by the CPUC Defendants permits QFs to interconnect with utilities and obtain a rate for their electric energy equal to avoided cost. (Opp'n 11.) The Court cannot determine at this juncture whether the contracts identified by the CPUC Defendants actually comply with PURPA. To make this determination, the Court would need to engage in a fact-intensive inquiry of the factors the CPUC Defendants considered in setting the avoided cost rate. Such a factual inquiry is inappropriate on a motion to dismiss. The CPUC Defendants are free to argue in a summary judgment motion that there are PURPA-compliant programs in California. The motion will be granted if the CPUC Defendants can show, on the basis of evidence that is not reasonably subject to dispute, that the programs they identify comply with PURPA.

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[2] The CPUC Defendants also seek judicial notice of FERC decisions approving the allegedly PURPA-compliant contracts. (Req. for Judicial Notice in Supp. of Mot. ("RJN"), ECF No. 67.) SFUI, however, argues that judicial notice of the FERC decisions is not appropriate because the holdings are disputed. (Opp'n 11-13.) SFUI, for its part, seeks judicial notice of other FERC rulings that it argues show that the CPUC Defendants have not complied with PURPA (or, at the very least, that determining whether the CPUC Defendants have complied with PURPA is a fact-intensive inquiry). (Opp'n 11-13.)

The Court does not believe that judicial notice of any of the FERC rulings is appropriate. The Court is only permitted to take judicial notice of facts that are not subject to reasonable dispute because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The Court would be willing to take judicial notice of **the fact** that FERC ruled a particular way on a particular issue, without commenting on whether or not that decision was correct. This is not what either party asks the Court to do. Instead, both sides seek to have the Court essentially ratify FERC's decisions by taking judicial notice of the content of those decisions. This is inappropriate. A decision handed down by an adjudicative body such as FERC is only binding in a subsequent proceeding if collateral estoppel or *res judicata* applies. No party has argued that the FERC decisions should be accorded claim-preclusive or issue-preclusive effect. If one of the parties hopes that the Court will reach the same conclusion as FERC regarding the PURPA compliance of various contracts, that party may cite those rulings for their persuasive value, although the decisions are not controlling authority. Judicial notice is not necessary to cite to a FERC decision as arguably persuasive.

2. Argument Two: SFUI's Allegations Are Vague and Conclusory

The CPUC Defendants next argue that the SAC is just as vague and conclusory as the FAC. (Mot. 11.) However, the SAC contains critical allegations that were lacking from the FAC. The SAC alleges that there is no PURPA-compliant program in California, and that all of the programs the CPUC Defendants identify as supposedly being PURPA-compliant fail to allow QFs to interconnect and receive payment for energy at an avoided cost rate. (SAC ¶¶ 40-42.) The FAC focused on the allegations that the CREST contract did not comply with PURPA. (*See generally* FAC.) The SAC alleges that the CREST contract does not comply with PURPA and no other program implemented by the CPUC Defendants complies with PURPA either. (*See generally* SAC.) As explained above, the CPUC Defendants can attempt to disprove this allegation on summary judgment, but they cannot do so on a motion to dismiss.

3. Argument Three: SFUI Lacks Standing

Finally, the CPUC Defendants insinuate that SFUI lacks standing because it was not certified as a QF until February of 2011. (Mot. 11-12.) However, SFUI has alleged that, although it was not certified as a QF until February of 2011, "at all relevant times, [SFUI has] been an electric power producing facility [that] is within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by PURPA and its FERC promulgated regulations." (SAC ¶ 43.) The statute that authorizes suit states:

> **Any electric utility, qualifying cogenerator, or qualifying small power producer** may petition [FERC] to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court to require such State regulatory authority or nonregulated electric utility to comply with such requirements, and such court may issue such injunctive or other relief as may be appropriate.

16 U.S.C. § 824a-3(h)(2)(B) (emphasis added). The statute does not require that the qualifying small power producer be **certified**. Thus, SFUI's allegation that it met the criteria set out in PURPA and the FERC regulations to qualify as a small power production company during the relevant times of this lawsuit is sufficient for prudential standing purposes, even if it was not certified as a QF until February 2011.

SFUI has alleged that there does not exist a program in California that implements PURPA and allows QFs to interconnect with utility grids and sell their power at a rate equal to avoided cost. Accepting all the allegations in the SAC as true, which the Court must at this stage, SFUI has

stated a claim for enforcement of PURPA. There are no judicially-noticeable facts that would allow the Court to determine that the allegations in the SAC are false. Thus, the Motion is DENIED with respect to the first cause of action.

C. Second Cause of Action - Claim for Violations of 42 U.S.C. § 1983

The FAC attempted to state two cases of action under § 1983. The first was brought by SFUI, and it alleged that under color of law, the individual current and former CPUC commissioners and SCE deprived SFUI of its PURPA rights and effected an unconstitutional taking without just compensation. (FAC ¶¶ 44-61.) The Court dismissed this cause of action without leave to amend. (Dec. 2, 2011 Order 15; Feb. 13, 2012 Order 15.)

The second § 1983 cause of action in the FAC was brought by CARE, alleging that under color of law, the individual current and former CPUC commissioners and SCE deprived CARE of its PURPA rights, effected an unconstitutional taking without just compensation, and violated CARE's First Amendment rights to free speech and freedom to petition the government. (FAC ¶¶ 61.1-73). CARE alleged that the CPUC commissioners took two actions designed to chill CARE's First Amendment rights: (1) they attempted to have FERC ban CARE from petitioning FERC any further; and (2) they made fee determinations in a manner designed to chill CARE's exercise of its First Amendment rights. (FAC ¶ 62.c.) The Court dismissed this cause of action without leave to amend as to all of the allegations other than the retaliatory fee determinations. (Dec. 2, 2011 Order 15; Feb. 13, 2012 Order 15.) As to the retaliatory fee determinations, the Court dismissed the cause of action with leave to amend. (Dec. 2, 2011 Order 15; Feb. 13, 2012 Order 15.)

The SAC alleges that under color of law, the individual CPUC commissioners deprived CARE of its First Amendment rights to free speech and freedom to petition the government. (SAC ¶¶ 64-92.) Once again, CARE alleges that its rights were violated in two ways: (1) the defendants attempted to have FERC ban CARE from petitioning FERC any further; and (2) the defendants made fee determinations in a manner designed to chill CARE's exercise of its First Amendment rights. (SAC ¶ 65.) The Court already rejected the first theory and dismissed those allegations without leave to amend. The Court will now consider whether the second allegation: that the CPUC commissioners made fee determinations in such a manner as to chill CARE's First Amendment rights.

The SAC clarifies the nature of the allegations regarding the retaliatory fee determinations. To encourage the "effective and efficient participation of all groups that have a stake in the public utility regulation process," Cal. Pub. Utils. Code § 1801.3(b), California law allows the CPUC to "provide compensation for reasonable advocate's fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the [C]ommission," Cal. Pub. Utils. Code § 1801. The law states that intervenors in commissioner proceedings will be compensated if the Commission determines that their contribution was "substantial." Cal. Pub. Utils. Code § 1801.3(d). A "substantial contribution" means that "in the

judgment of the commission, the customer's presentation has substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer." Cal. Pub. Utils. Code § 1802(i).

CARE alleges that it has intervened in certain rulemaking proceedings and that it has made contributions to those proceedings that it believes were substantial. (SAC ¶ 81.) CARE has petitioned to have its expenses for those contributions reimbursed, which is permitted under law if the Commission finds the contributions were substantial. However, the CPUC commissioners have denied the requests for reimbursement or have paid the reimbursement only in minor portion. (SAC ¶ 81.)

CARE has petitioned FERC five times alleging that CPUC has engaged in unlawful acts and misconduct. (SAC ¶¶ 75-78.) CARE alleges that the commissioners' decision not to reimburse CARE for its contributions to the rulemaking proceedings (or to provide only partial reimbursement) was made to punish CARE for repeatedly petitioning FERC and making allegations against CPUC. (SAC ¶¶ 75-81.) Making these fee determinations to retaliate against CARE for exercising its right to petition FERC is, according to CARE, a violation of the First Amendment.

The commissioners argue that the Johnson Act bars the Court's jurisdiction over this cause of action. (Mot. 12-14.) The Johnson Act provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
> (2) The order does not interfere with interstate commerce; and,
> (3) The order has been made after reasonable notice and hearing; and,
> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

28 U.S.C. § 1342. The threshold inquiry to determine if the Johnson Act even applies to this case is whether the allegations in the second cause of action of the SAC challenge orders "affecting rates chargeable by a public utility." *Id.* The second cause of action challenges the commissioners' decision regarding whether to reimburse CARE for its contributions to rulemaking proceedings. Thus, the decisions challenged are not decisions **directly** aimed at setting rates, but rather are aimed at compensating intervenors for participating in rulemaking hearings. However, California law also provides that:

> any award paid by a public utility pursuant to this article shall be allowed by the commission as an expense for the purpose of establishing rates of the public utility by way of a dollar-for-dollar adjustment to rates imposed by the commission immediately on the determination of the amount of the award, so that the amount of the award shall be fully recovered within one year from the date of the award.

Cal. Pub. Utils. Code § 1807. Thus, under California law, intervenor fees are passed through such that the decision to award such fees has a direct dollar-for-dollar impact on rates chargeable by a utility. Thus, the threshold question of the Johnson Act's applicability is satisfied, and the Johnson Act will bar this Court from exercising jurisdiction if the four prongs listed in the statute are satisfied.[3]

The first prong is easily satisfied. The only reason the Court would have jurisdiction over the SAC's second cause of action is because CARE alleges that the commissioners have violated its rights under the First Amendment of the United States Constitution; or, to parallel the phrasing of the Johnson Act, the commissioners' decision not to award CARE its full intervenor fees is allegedly repugnant to the Federal Constitution.

Under the second prong of the Johnson Act, the Court is precluded from exercising jurisdiction over the case only if the challenged order does not interfere with interstate commerce. 28 U.S.C. § 1342(2). Courts have explained that **interfering** with interstate commerce is more significant than merely **affecting** interstate commerce. *U.S. West v. Nelson*, 146 F.3d 718, 724 (9th Cir. 1998). Indeed, all ratemaking affects interstate commerce, *id.*, so to hold that a mere affect on interstate commerce triggers the exception in the second prong of the Johnson Act would nullify the Act. It is Plaintiffs' burden to explain how the CPUC's decisions to award (or withhold) intervenor fees, and the subsequent pass-through to ratemaking determinations, interfere with interstate commerce. *Id.* Plaintiffs would have to explain how the CPUC's actions are "directly burdensome or otherwise discriminatory of interstate traffic." *Id.* (citation omitted). Plaintiffs have not done so in either the SAC or the Opposition.

The third and fourth prongs of the Johnson Act require that the action challenged in the lawsuit be made only after reasonable notice and a hearing, and that there be sufficient avenues to challenge the decision in the state system. 28 U.S.C. § 1342(3)-(4). Notice and a hearing procedures on the CPUC's hearings, investigations, and proceedings are extensively provided for

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[3] This threshold question - whether the decision to award intervenor fees affects rates chargeable by a public utility - is the only issue Plaintiffs disputed regarding the Johnson Act in their Opposition. (Opp'n 15.) Plaintiffs did not allege that any of the four prongs of the Johnson Act were not satisfied. (*See generally* Opp'n.) Nevertheless, the Court will satisfy itself that the four requirements of the Johnson Act have been met before declining jurisdiction on that ground.

in California law. Cal. Pub. Utils. Code §§ 1701-1736. The law also provides for review of the CPUC's decisions in California Courts of Appeal and the California Supreme Court. Cal. Pub. Utils. Code §§ 1756-1758. There are also procedures for intervenors who seek to have their expenses reimbursed to request compensation for their contribution and to obtain a decision from an administrative law judge regarding that compensation. Cal. Pub. Utils. Code §§ 1801-1812. Accordingly, there are adequate notice, hearing, and review procedures in place in California that the third and fourth prongs of the Johnson Act have been satisfied.

Because all of the prongs of the Johnson Act have been satisfied and the orders challenged in the second cause of action affect rates chargeable by a public utility, the Court lacks jurisdiction to hear this claim and dismisses the claim without leave to amend pursuant to Federal Rule of Civil Procedure 12(b)(1).

D. Third Cause of Action - Claim for Injunctive and Declaratory Relief

The third cause of action, for injunctive and declaratory relief, is based on the same theories of liability as the first two causes of action. (SAC ¶¶ 93-97.) Because the Court has held that it has no jurisdiction to hear Plaintiffs' § 1983 claim, it must dismiss the third cause of action without leave to amend insofar as it seeks relief based on the alleged § 1983 violations. Because the first cause of action, for PURPA enforcement, survives the instant motion to dismiss, the third cause of action also survives to the extent it seeks injunctive and declaratory relief related to the alleged failure to implement PURPA.

III. RULING

For the foregoing reasons, the Court **GRANTS IN PART** and **DENIES IN PART** the CPUC Defendants' Motion to Dismiss, disposing of the claims as follows:

(1) The Motion is **DENIED** with respect to Claim No. 1;
(2) The Motion is **GRANTED** with respect to Claim No. 2; the Court Dismisses Claim No. 2 without leave to amend;
(3) To the extent Claim No. 3 seeks relief related to the alleged violations of § 1983, the Motion is **GRANTED** and the claim is dismissed without leave to amend; to the extent Claim No. 3 seeks relief related to the alleged failure to implement PURPA, the Motion is **DENIED**.

IT IS SO ORDERED.

FILED

MAR 06 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOLUTIONS FOR UTILITIES, INC., a California Corporation,

Plaintiff,

and

CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation; MICHAEL E. BOYD; ROBERT SARVEY,

Plaintiffs - Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; MICHAEL R. PEEVEY; TIMOTHY ALAN SIMON; MICHAEL R. FLORIO; CATHERINE J.K. SANDOVAL; MARK J. FERRON, in their official and individual capacities as current Public Utilities Commission of California Members,

Defendants - Appellees,

No. 13-55206

D.C. No. 2:11-cv-04975-SJO-JCG

MEMORANDUM*

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

and

SOUTHERN CALIFORNIA EDISON CO., a California Corporation; RACHEL CHONG; JOHN A. BOHN; DIAN M. GRUENICH; NANCY E. RYAN, in their individual capacities as former Public Utilities Commission of California Members,

Defendants.

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted February 10, 2015
Pasadena, California

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,** District Judge.

Plaintiffs Californians for Renewable Energy, Inc., a California-based non-profit energy company, and its members Michael Boyd and Robert Sarvey (collectively "CARE") appeal the dismissal of their claims against defendants California Public Utilities Commission, the state agency responsible for California energy policymaking, and its past and present commissioners in both their official

** The Honorable James C. Mahan, District Judge for the U.S. District Court for the District of Nevada, sitting by designation.

and individual capacities (collectively "CPUC").[1] We review de novo a district court's grant of a motion to dismiss. Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); Vestron, Inc. v. Home Box Office Inc., 839 F.2d 1380, 1381 (9th Cir. 1988). We review the denial of leave to amend for abuse of discretion. Gompper, 298 F.3d at 898. We reverse and remand on claim one but affirm the dismissal of all other claims.

1. We need not decide whether the administrative exhaustion requirement under the Public Utility Regulatory Policies Act of 1978 ("PURPA") is jurisdictional. CARE fulfilled the requirement to exhaust administrative remedies. It petitioned for enforcement, and the Federal Energy Regulatory Commission did not initiate an enforcement action within 60 days. The statute does not forbid "activating" a premature complaint when there is a proper petition and no action within 60 days. See 16 U.S.C. § 824a-3(h)(2)(B). Therefore, the district court erred. This claim is remanded for further proceedings.

2. The district court correctly dismissed CARE's 42 U.S.C. § 1983 claim for First Amendment violations. CARE did not sufficiently plead that CPUC had a retaliatory motive that was the but-for cause of seeking to have CARE declared a

[1]The underlying complaint also included as parties co-plaintiff Solutions for Utilities, Inc., and co-defendant Southern California Edison Co. Neither is a party to this appeal.

vexatious litigant. See Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1231-32 (9th Cir. 2006). Though the district court's rationale for dismissal was arguably different, "we may affirm based on any ground supported by the record." Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121 (9th Cir. 2008).

3. The district court correctly dismissed CARE's claim for intervenor fees. The Johnson Act applies because the award of intervenor fees has a dollar-for-dollar effect on utility rates. See Cal. Pub. Util. Code § 1807(a). All four prongs of the Johnson Act were satisfied. See US West, Inc. v. Nelson, 146 F.3d 718, 722 (9th Cir. 1998). First, jurisdiction over the claim rests on the alleged First Amendment violation. Second, CARE did not satisfy its burden to explain how CPUC's actions were directly burdensome to or discriminatory against interstate commerce. See id. at 724. Third, there are extensive notice, hearing, and review procedures in place for CPUC proceedings. See Cal. Pub. Util. Code §§ 1701-1736, 1756-1758. Finally, procedures in place allow intervenors to have an administrative law judge address their request for compensation for their contributions in CPUC proceedings. See Cal. Pub. Util. Code § 1804. Because the Johnson Act withdraws state utility rate cases from federal jurisdiction when all four prongs of the Act are satisfied, we affirm the district court's dismissal of CARE's intervenor fees claim for lack of jurisdiction.

4. The district court correctly dismissed CARE's § 1983 claim for PURPA violations. PURPA provides a mechanism for parties to seek an administrative or judicial remedy. See 16 U.S.C. § 824a-3(h)(2)(B). That PURPA provides fewer remedies than § 1983 is evidence that Congress did not intend to permit a PURPA claim to be brought under § 1983. See City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005). Because PURPA has a comprehensive remedial scheme, CARE is precluded from alleging a PURPA violation through § 1983.

5. The district court properly dismissed CARE's takings claim. Under California law, CARE has no protected property interest in the profits that it anticipated earning with a PURPA-compliant contract. See Yee v. Mobilehome Park Rental Review Bd., 73 Cal. Rptr. 2d 227, 235 (Ct. App. 1998). Though CARE tries to recharacterize its claim as one for complete loss of the use of its property, CARE's claim does not amount to the forfeiture of all economically beneficial uses. See id. at 1421-22; cf. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

AFFIRMED in part, REVERSED in part, and REMANDED. Parties to bear their own costs.

FILED

APR 30 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOLUTIONS FOR UTILITIES, INC., a California Corporation,

Plaintiff,

and

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

Plaintiffs - Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, a Independent California State Agency; et al.,

Defendants - Appellees,

and

SOUTHERN CALIFORNIA EDISON, CO., a California Corporation; et al.,

Defendants.

No. 13-55206

D.C. No. 2:11-cv-04975-SJO-JCG
Central District of California,
Los Angeles

ORDER

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,* District Judge.

The panel has voted to deny Appellants' petition for panel rehearing. Judges Graber and Wradlaw have voted to deny Appellants' petition for rehearing en banc, and Judge Mahan has so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellants' petition for panel rehearing and petition for rehearing en banc are DENIED.

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* The Honorable James C. Mahan, United States District Judge for the District of Nevada, sitting by designation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** March 16, 2016

TITLE: Solutions for Utilities, Inc. et al. v. California Public Utilities Commission et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz	Not Present
Courtroom Clerk	Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER DENYING WITHOUT PREJUDICE MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT AND FIRST SUPPLEMENTAL COMPLAINT [Docket No. 178]

This matters is before the Court on Plaintiffs CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd ("Boyd"), and Robert Sarvey's ("Sarvey") (together, "CARE Plaintiffs") Motion for Leave to File Fourth Amended Complaint and First Supplemental Complaint ("Motion"), filed March 8, 2016. Commissioners of Defendant California Public Utilities Commission ("CPUC") opposed the Motion ("Opposition") on March 21, 2016,[1] and CARE Plaintiffs replied ("Reply") on March 28, 2016. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for April 11, 2016. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **DENIES** the Motion **WITHOUT PREJUDICE**.

I. FACTUAL AND PROCEDURAL BACKGROUND

This litigation, which commenced almost six years ago, centers on allegations that CPUC, its then-existing Commissioners, and Southern California Edison Company ("SCE") (together, "Defendants") failed to perform certain duties with respect to both CARE Plaintiffs and co-plaintiff Solutions for Utilities, Inc. ("SFUI"), California-based small-scale energy companies, that are required under the Public Utility Regulatory Policies Act ("PURPA"), 16 U.S.C. § 824a-3(h), as prescribed by the Federal Energy Regulatory Commission ("FERC"). The following facts are not in genuine dispute.

SFUI is and at all relevant times was within the class of small power production facilities and nontraditional electricity generating facilities contemplated by PURPA and the FERC regulations. (Second Am. Compl. ("SAC") ¶ 44, ECF No. 64.) SFUI filed a self-certification for two facilities at

[1] CPUC filed a Notice of Errata on March 22, 2016, which the Court deems timely filed. (*See* Notice of Errata to Correct Formatting Deficiencies in Opp'n, ECF No. 181.)

its home office in San Diego, California on February 27, 2011. (Statement of Uncontroverted Facts ("UF") ¶¶ 2, 4, ECF No. 113-3.) As explained below, none of SFUI's facilities were qualified as a qualifying facility ("QF") within the meaning of PURPA for most if not all of the time period during which the events allegedly leading to Defendants' liability occurred.

SCE is the owner of the power grid in the region where SFUI hoped to build and connect a solar farm in San Bernardino County, consisting of two separate 1.5 megawatt facilities, during the period April 2008 through May 2010. (UF ¶ 6.) During this time, SFUI did not attempt to obtain certification as a QF under PURPA; instead, it did so under a separate state program that provides California Renewable Energy Small Tariff ("CREST") contracts to certain facilities under certain circumstances. (SAC ¶ 44.) Upon reaching the first position in the queue for the sate program, SFUI sought out a more favorable connection, under PURPA protections, simultaneously requesting that SCE grant it a position early in the PURPA interconnection queue to avoid lost time. (SAC ¶ 16.) SFUI's two existing facilities in San Diego are not within SCE's service territory. (UF ¶ 3.)

When SCE denied this request, SFUI filed a complaint on January 5, 2010 with CPUC, alleging that SCE unlawfully denied its request for connection to the electricity grid. (UF ¶ 7.) This dispute was settled on March 2, 2010, with an agreement guaranteeing SFUI a CREST contract, but not a PURPA-compliant contract. (UF ¶ 8.) SFUI does not believe that Defendants CPUC and current and former commissioners Michael R. Peevey, Timothy Alan SImon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachel Chong, John A. Bohn, Dian M. Gurenich, and Nancy E. Ryan (together with CPUC, "Defendants") have honored the terms of the contract, however, and claims that, because its issues were not resolved in the settlement agreement, it has been prevented from being able to operate at a profit, (SAC ¶¶ 37-38), and in Octoboer 2010, SFUI sold the real property on which its proposed solar farm would have been built, (UF ¶ 11).

On March 11, 2011, SFUI petitioned FERC to bring an enforcement action against CPUC and SCE, but on May 19, 2011, FERC declined to do so. (*See* First Am. Compl. ("FAC") ¶ 30, ECF No. 20.) SFUI and the CARE Plaintiffs ("Plaintiffs") filed the present action on June 10, 2011 against Defendants as well as SCE. (*See generally* Compl., ECF No. 1.) Plaintiffs filed their First Amended Complaint on August 10, 2011. (*See* FAC, ECF No. 20.) In the FAC, Plaintiffs asserted the following five causes of action: (1) enforcement of PURPA claim by SFUI and CARE Plaintiffs against CPUC and current Commissioners for failing to substantially comply with FERC obligations passed pursuant to PURPA; (2) § 1983 claim by SFUI against CPUC Commissioners and SCE for attempting to suppress SFUI's freedom to petition the government; and (3) § 1983 claim by CARE against CPUC Commissioners for denying CARE the right to reasonably and economically operate its nonprofit business enterprises and retaliating against CARE for exercising its free speech rights; (4) equitable, injunctive, and declaratory relief by SFUI and CARE against CPUC pursuant to PURPA and § 1983; and (5) equitable and declaratory relief by SFUI against SCE pursuant to § 1983. (*See generally* FAC.) On February 13, 2012, the Court issued an amended order granting Defendants' motions to dismiss, dismissing in relevant part (1) the first claim as to

CARE Plaintiffs because they failed to exhaust their administrative remedies; and (2) the fourth claim without leave to amend "only to the extent that it concerns the CARE Plaintiffs' allegations of PURPA violations that were not properly petitioned to FERC prior to filing this action." (*See generally* Amended Orders Granting Def.'s Mots. To Dismiss, ECF No. 77 ("First Dismissal Order").)

Plaintiffs filed their Second Amended Complaint on January 9, 2012, reducing the number of asserted claims from five to the following three: (1) PURPA enforcement claim by SPUC; (2) § 1983 claim by CARE; and (3) injunctive and declaratory relief by SFUI pursuant to the first two claims. (*See generally* SAC.) Defendants and SCE thereafter filed motions to dismiss, which the Court granted in part and denied in part on March 14, 2012. (Order Granting in Part and Den. in Part Defs.' Mots. to Dismiss SAC ("Second Dismissal Order") 9, ECF No. 82.) Under that ruling, the Court dismissed all of CARE Plaintiffs' claims and SFUI's § 1983 claims, leaving only SFUI's first claim related to Defendants' alleged failure to comply with FERC obligations under PURPA. (*See* Second Dismissal Order.) Defendants thereafter moved for summary judgment on the issue of whether SFUI had standing to assert its remaining PURPA claim, which the Court granted on January 3, 2013 and consequently entered judgment in favor of Defendants. (Order Granting Mot. for Summ. Judgment ("Summary Judgment Order"), ECF No. 147; Judgment, ECF No. 148.)

CARE Plaintiffs appealed the Judgment and attendant orders to the United States Court of Appeals for the Ninth Circuit, which affirmed the Court's dismissal of CARE Plaintiffs' § 1983 claims, claim for intervenor fees, and takings claim, but reversed the Court's dismissal of CARE Plaintiffs' PURPA claim. (Notice of Appeal, ECF No. 161; Mem., ECF No. 173.) The case was remanded on May 11, 2015, and on March 8, 2016, CARE Plaintiffs filed the instant Motion. (Mandate, ECF No. 177; Mot., ECF No. 178.)

II. DISCUSSION

In the Motion, CARE Plaintiffs request leave to file both a Fourth Amended Complaint ("4AC") and First Supplemental Complaint ("FSC"), both attached to the Motion as Exhibit B, pursuant to Federal Rules of Civil Procedure 15(a) and (d). (*See generally* Mot.) CARE Plaintiffs contend such relief is proper because (1) the membership of Defendant CPUC has changed in the time since the SAC was filed and judgment was entered, and their pleading should be modified to encompass these changes; and (2) the Ninth Circuit's mandate applies to CARE Plaintiffs' PURPA claims as stated in the FAC, but defects in this claim were "cured" by the SAC, and therefore CARE Plaintiffs should be permitted to "merge" these claims. (*See* Mot. 6-8.)

Although CPUC agrees that new Commissioners can be substituted in their official capacity for former Commissioners who have completed their term of service pursuant to Federal Rule of Civil

Procedure 25(d) ("Rule 25(d)"),[2] CPUC contends that other alterations in the 4AC largely not discussed by CARE Plaintiffs—most notably "CARE's most significant proposed amendment" seeking "remedial equitable [make whole] money damages from Defendants for Plaintiffs' economic injuries caused by Defendants' violatiosn of said federal laws and regulations"—would be contrary to the Ninth Circuit's mandate, violate the law of the case in this proceeding, and be barred by absolute legislative immunity and Eleventh Amendment sovereign immunity protection. (*See generally* Opp'n, ECF No. 180.)

A. Legal Standards

1. Amendment Pursuant to Rule 15

Rule 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave," which should be "freely give[n] . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 15(d), in turn, provides that "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d).

"Although amendment of pleadings following remand may be permitted, such amendment cannot be inconsistent with the appellate court's mandate." *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984). "On remand, a trial court cannot consider 'issues decided explicitly or by necessary implication.'" *Id.* (quoting *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982)). This is because "[t]he law of the case doctrine states that the decision of an appellate court on a legal issue must be followed in all subsequent proceedings in the same case[,]" and "controls unless the first decision is clearly erroneous and would result in manifest injustice, there has been an intervening change in the law, or the evidence on remand is substantially different." *Waggoner v. Dallaire*, 767 F.2d 589, 593 (9th Cir. 1985) (internal quotation marks and citations omitted).

B. Whether Leave to Amend Should Be Granted

CARE Plaintiffs submit in the Motion that the Ninth Circuit in its mandate "reinstat[ed] the Second and Fifth Claims of the First Amended Complaint, under [PURPA] and seeking all forms of equitable relief . . ." (Decl. Meir J. Westreich in Supp. Mot. ("Westreich Decl.") ¶ 2.) In the 4AC, CARE Plaintiffs expressly seek, in addition to injunctive, equitable, and declaratory relief compelling CPUC and its members to perform federally mandated duties, "remedial equitable

[2] References to particular Federal Rules of Civil Procedure are hereinafter cited as "Rule [X]," where [X] denotes the number of the referenced rule.

[make whole] money damages from Defendants for Plaintiffs' economic injuries caused by Defendants' violations of [PURPA]." (Mot., Ex. B ("4AC") at p.2.) CARE Plaintiffs later "elaborate" on this request, requesting (1) "damages . . . tailored to reflect the sovereign immunity of CPUC;" (2) "[c]ompensatory damages, according to proof;" (3) "[s]pecial consequential and equitable [make whole] damages, including but not limited to economic damages, financial losses, damages to business and economic opportunities, attorneys' fees, legal costs, and other as yet undetermined damages, according to proof;" and (4) "[r]easonable attorneys' fees and costs of suit as private attorneys general[.]" (4AC ¶ 57 & p.19.)

As a preliminary matter, the Court interprets CARE Plaintiffs' averment that the Ninth Circuit reinstated the **second** and **fifth** claims asserted in the FAC as instead referring to the **first** and **fourth** asserted claims, respectively. Both the second and fifth claims were brought pursuant to § 1983, and CARE Plaintiffs acknowledge that the Ninth Circuit affirmed this Court's dismissal of those claims. (*See* Mot. 2; Mem. 3-5, ECF No. 173.) The first and fourth claims, however, involve PURPA and are therefore implicated by the Ninth Circuit's Opinion.

1. Allegedly Inconsistent Pleadings and Failure to Comply With Court's Order

In its Opposition, CPUC contends that two allegations in the 4AC are "contradictory" to allegations contained in the SAC. (*See* Opp'n 9-11.) First, CPUC argues that although CARE Plaintiffs alleged in the SAC that Plaintiffs Boyd and Sarvey have interconnected facilities, CARE Plaintiffs allege in the 4AC that CPUC and the electric utilities have failed to adopt or implement PURPA-compliant interconnection. (Opp'n 10.) The Court rejects this argument, for it is entirely possible for Boyd and Sarvey to have facilities connected to the grid and have CPUC mandate a price formula that "render[s] completely unprofitable the vast majority of small and/or non-fossil fuel power production facilities . . ." (4AC ¶ 19.)

CPUC's second argument is similarly misplaced. Pacific Gas and Electric Company ("PGAE") neither has been nor currently is a defendant in this action, and in both the SAC and 4AC venue within this District is alleged to exist, at least in part, because many of the acts complained of took part in this District and most witnesses reside in this District. (*See* SAC 3; 4AC 3.) That SFUI, the party residing in this District, is no longer a party to this litigation does not necessarily render venue improper.

Nevertheless, the Court agrees with CPUC that the 4AC, SAC, and FAC each contain highly confusing allegations. For example, none of these pleadings clearly or consistent allege, *inter alia*:

(1) the precise conduct of PG&E and its relevance to CARE Plaintiffs' cause of action against CPUC and the Commissioners;
(2) the specific allegations of wrongdoing by CPUC and its Commissioners, including details regarding:

(A) with whom and under what terms CARE Plaintiffs initiated "repeated and long-standing efforts to obtain contracts;"
(B) CARE's "participat[ion] in relevant CPUC proceedings;" and
(C) how CPUC refused to enforce PURPA and its implementing regulations;

(3) what efforts were made by CARE to obtain contracts with such local power grid providers;

(4) the complete membership of CARE;

(5) proof that Plaintiffs Boyd and Sarvey are members of CARE and are QFs.

As noted by CPUC, several of these shortcomings were expressly noted in the Court's First Dismissal Order. (*See* First Dismissal Order.)

2. Remedies Available Under PURPA

In its Opinion, the Ninth Circuit reversed the Court's dismissal of the first claim asserted in the FAC for PURPA enforcement on exhaustion grounds, concluding that CARE fulfilled the requirement to exhaust administrative remedies by petitioning FERC for enforcement, and FERC did not initiate an enforcement action within 60 days. (Mem. 3.) The Ninth Circuit also concluded, however, that this Court correctly dismissed the remainder of Plaintiffs' claims, including CARE's § 1983 claim for First Amendment and PURPA violations, CARE's claim for intervenor fees, and CARE's takings claim. (*See* Mem. 3-5.)

Critically, although the Ninth Circuit did not expressly decide in its Opinion whether or to what extent an entity's failure to implement PURPA or a violation of PURPA could entitle an aggrieved party to monetary, equitable, or declaratory relief, the court of appeal also did not disturb this Court's earlier conclusion that "[i]f the [CPUC] commissioners failed to implement PURPA or violated PURPA, the proper avenue for redress [would be] an enforcement action under PURPA." (First Dismissal Order 13; *see also* Mem.) Rather, the Ninth Circuit noted that "PURPA provides a mechanism for parties to seek an administrative or judicial remedy," and held that "[b]ecause PURPA has a comprehensive remedial scheme, CARE is precluded from alleging a PURPA violation through § 1983." (Mem. 5.)

PURPA's "remedial scheme" begins with Section 210(h)(2)(B), which provides that:

> Any electric utility, qualifying cogenerator, or qualifying small power producer may petition the Commission to enforce the requirements of subsection (f) of this section as provided in subparagraph (A) of this paragraph. If the Commission does not initiate an enforcement action under subparagraph (A) against a State regulatory authority or nonregulated electric utility within 60 days following the date on which a petition is filed under this subparagraph with respect to such authority, the petitioner may bring an action in the appropriate United States district court **to**

> **require such State regulatory authority or nonregulated electric utility to comply with such requirements**, and **such court may issue such injunctive or other relief as may be appropriate**. The Commission may intervene as a matter of right in any such action.

16 U.S.C. § 824a-3(h)(2)(B) (emphasis added); *see also Niagara Mohawk Power Corp. v. Federal Energy Regulatory Comm'n*, 306 F.3d 1264, 1268 (2d Cir. 2002) (holding that "[t]he only private right of action under PURPA arises from § 210(h)(2)(B) of that statute"); *Industrial Cogenerators v. F.E.R.C.*, 47 F.3d 1231, 1232 (1995) (holding that "PURPA does not provide any other means by which the FERC or a petitioner can force a state regulatory authority or a nonregulated utility to comply with § 210 of the Act" other than through Section 210(h)(2)(B)).

The question the Court must answer, therefore, is whether the various forms of relief requested in the 4AC—including compensatory damages, "[s]pecial consequential and equitable [make whole] damages," and "[r]easonable attorneys' fees and costs of suit as private attorneys general"—can be provided under Section 210(h)(2)(B). The Court concludes that they cannot for the reasons that follow.

a. Availability of Compensatory and "Equitable [Make Whole] Damages"

In their Motion, CARE Plaintiffs completely neglect to discuss the propriety of either the 4AC's second cause of action for equitable, injunctive, and declaratory relief, which in the final paragraph includes a request for "equitable [make whole] damages . . . sought by means tailored to reflect the sovereign immunity of CPUC[,]" or their request for compensatory damages in the prayer for relief. (*See generally* Mot; 4AC ¶ 57 & p.19.) Curiously, the term "damages" does not appear once in the Motion.

Accordingly, the Court need not consider whether compensatory damages or "equitable [make whole] damages" are available under PURPA, for CARE Plaintiffs have not demonstrated that "justice . . . requires" the inclusion of this obfuscated request for relief. Fed. R. Civ. P. 15(a)(2); *see also* Fed. R. Civ. P. 7(b)(1)(B) (requiring that a party's motion must "state with particularity the grounds for seeking the order"). Even if CARE Plaintiffs had made some argument regarding the availability of monetary damages under Section 210(h)(2)(B), the Court would likely conclude that PURPA does not provide for such relief. First, Section 210 contains no express mention of monetary relief. *See generally* 16 U.S.C. § 824a-3. Second, a FERC Policy Statement indicates that the judicial review and enforcement provisions of Section 210 are generally "available to ensure that State regulatory automobiles and nonregulated electric utilities undertake **implementation** of the Commission regulations." 48 Fed. Reg. 29475-01 (emphasis added). Moreover, the Court has been unable to locate any case in which monetary damages were awarded under PURPA, and the scant authority the Court could locate indicating that monetary damages **might** be available have noted that a state-run utility and its commissioners "are likely

immune from damages for regulatory activities." *Adrian Energy Assocs., LLC v. Michigan Pub. Serv. Comm'n*, No. 5:05-CV-60, 2005 WL 2571881, at *2 n.3 (W.D. Mich. Oct. 12, 2005).

With respect to claims against current Commissioners in their **official** capacity, the Court follows the many courts that have ruled on this issue, and similarly concludes that the Eleventh Amendment exception to *Ex Parte Young* applies, permitting "prospective injunctive relief to enjoin ongoing violations by state officials of federal law." *Niagara Mohawk Power Corp. v. F.E.R.C.*, 162 F. Supp. 2d 107, 143-44 (N.D.N.Y. 2001) (citations omitted). Moreover, because Rule 25(d) provides that "when a public officer who is a party in an official capacity dies, resigns, or otherwise ceases to hold office while the action is pending . . . [t]he officer's successor is automatically substituted as a party," CARE Plaintiffs' arguments regarding the need to file the 4AC to update the membership of the Commissioners is unavailing. Fed. R. Civ. P. 25(d).

In addition, claims against prior Commissioners in their **individual** capacity are barred by "the principle that [local] legislators are absolutely immune from liability for their legislative activities . . ." *Bogan v. Scott-Harris*, 523 U.S. 44, 48 (1998). CPUC has broad powers, including the legislative power to set rates. *People v. W. Air Lines, Inc.*, 42 Cal. 2d 621, 630 (1954). As the implementation of PURPA is a ratemaking function, *see FERC v. Mississippi*, 456 U.S. 742, 759, 769 (1982), former Commissioners are immune from damages for activities undertaken in setting rates.

Accordingly, although CARE Plaintiffs can pursue their PURPA enforcement claim against CPUC and the Commissioners in their official capacity, the only forms of relief CARE Plaintiffs will be entitled to would be of the injunctive or declaratory variety. Indeed, CARE Plaintiffs themselves acknowledge that it has "been firmly established that traditional general and compensatory damages remedies, as well as attorneys' fees, are not provided in the text of PURPA, and Plaintiffs' invocation of 42 U.S.C. sec. 1983 was rejected to fill that gap." (Reply 3, ECF No. 183.) CARE Plaintiffs' citation to *Albemarle v. Moody*, 422 U.S. 405 (1975), a class action case involving Title VII of the Civil Rights Act of 1964, for the proposition that the United States Supreme Court has generally "inferred a right to recover equitable damages, for the period of culpability to the date of injunctive corrections," misses the mark. In *Albermarle*, the Court held that backpay, a remedy "bestowed by Congress" and thus expressly contemplated in Title VII, *see* 42 U.S.C. § 2000e-5(g), could be awarded in the absence of a finding of bad faith, *Albemarle*, 422 U.S. at 415-16. PURPA contains no similar provision, and the Court does not read *Albemarle* so broadly as to permit the award of "equitable [make whole] damages."

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b. Attorneys' Fees

Notably absent from Section 210 is a fee-shifting provision. Accordingly, the Court concludes that CARE Plaintiffs would not be entitled to an award of attorneys' fees were they to prevail on their PURPA enforcement claim. *See City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 122-24 (2005) (concluding that attorneys' fees were not available under the [TCA] where the statute did not include such an award and further contained "no such indication" that the statute was meant to complement, rather than supplant, § 1983); *see also Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 95 (2d Cir. 2015) ("Additionally, because no § 1983 claim is available to enforce PURPA, Allco also cannot bring a § 1988 claim for attorneys' fees predicated on the Commissioner's failure to comply with PURPA."); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 263-64 (1975) (holding that, absent statutory authorization or contractual agreement between the parties, the prevailing "American rule" is that each party in federal litigation bears its own attorneys' fees). Accordingly, CARE Plaintiffs cannot obtain attorneys' fees under their PURPA enforcement claim.

3. Conclusion

The Court finds that CARE Plaintiffs' proposed 4AC contains several critical deficiencies such that leave to amend to file this particular pleading should not be granted. In particular, the 4AC fails to address a number of deficiencies set forth in the Court's First Dismissal Order, *see* Section II(B)(1), *supra*, and requests forms of relief, including compensatory, "equitable [make whole] damages," and attorneys' fees, that are not permitted under PURPA. Nevertheless, the Court agrees with CARE Plaintiffs' position that an amended pleading should be filed to clarify CARE Plaintiffs' sole remaining claim for enforcement of PURPA. Accordingly, the Court **DENIES** CARE Plaintiffs' Motion **WITHOUT PREJUDICE**, but will afford CARE Plaintiffs fourteen (14) days from the issuance of this Order to file a proposed Fourth Amended Complaint that (1) addresses the Court's concerns set forth in Section II(B)(1), *supra*; and (2) requests only appropriate declaratory and injunctive relief.

III. RULING

For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE** CARE Plaintiffs' Motion. Should CARE Plaintiffs choose to further amend their pleading, they may do so by filing a Fourth Amended Complaint for enforcement of PURPA pursuant to 16 U.S.C. § 824a-3 that is consistent with both this Order and the Court's prior Orders. Such a pleading must be filed within fourteen (14) days of the issuance of this Order. Defendants have fourteen (14) days thereafter to respond.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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CASE NO.: CV 11-04975 SJO (JCGx) **DATE:** December 28, 2016

TITLE: Solutions for Utilities, Inc. et al. v. California Public Utilities Commission et al.

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PRESENT: THE HONORABLE S. JAMES OTERO, UNITED STATES DISTRICT JUDGE

Victor Paul Cruz Courtroom Clerk	Not Present Court Reporter
COUNSEL PRESENT FOR PLAINTIFFS:	**COUNSEL PRESENT FOR DEFENDANTS:**
Not Present	Not Present

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PROCEEDINGS (in chambers): ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Docket No. 206]

This matter is before the Court on Defendants the California Public Utilities Commission ("the CPUC") and its current Commissioners' (together, "Defendants") Motion for Summary Judgment, filed October 27, 2016. Plaintiffs CAlifornians for Renewable Energy, Inc. ("CARE"), Michael E. Boyd ("Boyd"), and Robert Sarvey ("Sarvey") (together, "CARE Plaintiffs") opposed the Motion ("Opposition") on November 17, 2016 and Defendants replied ("Reply") on November 23, 2016. The Court found this matter suitable for disposition without oral argument and vacated the hearing set for December 5, 2016. *See* Fed. R. Civ. P. 78(b). For the following reasons, the Court **GRANTS** Defendants' Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Introduction

This litigation, which commenced more than five years ago, centers on allegations that Boyd and Sarvey—both of whom are members of the 358-member CARE organization comprising small power production facility operators—have been frustrated in their efforts to enter the California energy market by the CPUC, its Commissioners, and a host of other players in the energy sector. (*See* Fifth Am. & First Supp'l Compl. for Equitable Relief ("FAC") ¶¶ 10, 27, 41-42, 44, 46(a), ECF No. 185.) In particular, CARE Plaintiffs allege they were improperly denied contracts by non-party Pacific Gas and Electric Company ("PG&E") that was obligated by federal law to provide them the ability both (1) to "rapidly and expeditiously **interconnect** with existing power grids;" and (2) to **sell** surplus energy they generate to utilities that operate the power grids for the "legally mandated" market-based price known as the "**avoided cost**." (FAC ¶¶ 10, 25, 27, 41-42, 46(a).) According to CARE Plaintiffs, PG&E's denial was facilitated by Defendants' adoption of a pricing program that "renders economically unfeasible the operation of [CARE] Plaintiffs . . . [and] enables major energy sellers . . . to favor contracts with larger power production facilities as a means of manipulating the

energy market to ensure a lack of economic viability of small power production facilities and nontraditional electricity generating facilities." (FAC ¶¶ 19, 47(c).)

CARE Plaintiffs twice petitioned the Federal Energy Regulatory Commission ("FERC") to enforce provisions of the Public Utility Regulatory Policies Act ("PURPA") and its implementing regulations and to enforce compliance thereby by the CPUC and local power grid providers, but were twice rebuffed. (FAC ¶ 43.) CARE Plaintiffs now accuse Defendants of failing to enforce PURPA, believing "there is no available PURPA compliant option within California for small power producing facilities to freely interconnect . . . with utilities at avoided cost pricing, as mandated by PURPA and its FERC implementing regulations." (FAC ¶ 50.) As will be seen, resolution of this action requires a thorough understanding of both PURPA and its implementing regulations and the interconnection and pricing options made available to small power production facilities by the CPUC.

B. Procedural History

On March 11, 2011, Solutions for Utilities Inc. ("SFUI") petitioned FERC to bring an enforcement action against the CPUC and Southern California Edison Company ("SCE").[1] (*See* First Am. Compl. ¶ 30, ECF No. 20.) FERC declined to do so on May 19, 2011. (*See* First Am. Compl. ¶ 30.) Shortly after this denial, SFUI and CARE Plaintiffs filed the present action against Defendants and SCE, and filed their First Amended Complaint on August 10, 2011, asserting the following five causes of action: (1) enforcement of PURPA claim by SFUI and CARE Plaintiffs against Defendants for failing to substantially comply with FERC obligations passed pursuant to PURPA; (2) Section 1983 claim by SFUI against the Commissioners and SCE for attempting to suppress SFUI's freedom to petition the government; (3) Section 1983 claim by CARE against the Commissioners for denying CARE the right to reasonably and economically operate its nonprofit business enterprises and retaliating against CARE for exercising its free speech rights; (4) equitable, injunctive, and declaratory relief by SFUI and CARE against CPUC pursuant to PURPA and Section 1983; and (5) equitable, injunctive, and declaratory relief by SFUI against SCE pursuant to Section 1983. (*See generally* First Am. Compl.; *see also* Compl., ECF No. 1.) After SFUI and SCE stipulated to dismissal of the fifth cause of action without prejudice, (*see* Sept. 8, 2011 Order, ECF No. 35), the Court on February 13, 2012 issued an order dismissing each of the remaining four causes of action, but permitting SFUI and CARE Plaintiffs leave to amend certain portions of the first, third, and fourth causes of action. (*See generally* Amended Orders Granting Mots. to Dismiss, ECF No. 77 ("First Dismissal Order").)

SFUI and CARE Plaintiffs filed their Second Amended Complaint on January 9, 2012, reducing the number of asserted causes of action from five to the following three: (1) PURPA enforcement claim by SFUI against Defendants; (2) Section 1983 claim by CARE Plaintiffs against the

[1] Both SFUI and SCE have since been dismissed as parties to this action.

Commissioners; and (3) injunctive and declaratory relief by SFUI against Defendants. (*See generally* Second Am. Compl. ("SAC"), ECF No. 64.) Defendants and SCE thereafter filed motions to dismiss, which the Court granted in part and denied in part on March 14, 2012. (Order Granting in Part and Den. in Part Defs.' Mots. to Dismiss SAC ("Second Dismissal Order") 9, ECF No. 82.) Under that ruling, the Court dismissed all of CARE Plaintiffs' claims and SFUI's Section 1983 claims, leaving only SFUI's first claim related to Defendants' alleged failure to comply with FERC obligations under PURPA. (*See* Second Dismissal Order.) Defendants thereafter moved for summary judgment on the issue of whether SFUI had standing to assert its remaining PURPA claim, which the Court granted on January 3, 2013 and consequently entered judgment in favor of Defendants. (Order Granting Mot. for Summ. Judgment ("Summary Judgment Order"), ECF No. 147; Judgment, ECF No. 148.)

CARE Plaintiffs appealed the Judgment and attendant orders to the United States Court of Appeals for the Ninth Circuit, which affirmed the Court's dismissal of CARE Plaintiffs' Section 1983 claims, claim for intervenor fees, and takings claim, but reversed the Court's dismissal of CARE Plaintiffs' PURPA claim, finding CARE Plaintiffs had fulfilled PURPA's requirement to exhaust administrative remedies. (Notice of Appeal, ECF No. 161; Mem., ECF No. 173.) The case was remanded on May 11, 2015 solely on CARE Plaintiffs' PURPA enforcement claim against Defendants. (Mandate, ECF No. 177.)

CARE Plaintiffs filed their FAC on April 14, 2016, asserting two causes of action: (1) enforcement of PURPA pursuant to 16 U.S.C. § 824a-3; and (2) equitable, injunctive, and declaratory relief. (*See* FAC.) After a limited reopening of discovery, Defendants filed the instant Motion. (*See* Minutes of Scheduling Conference, ECF No. 202)

C. Regulatory Overview

1. PURPA

In 1978, Congress enacted the PURPA "to encourage the development of cogeneration and small power production facilities, and thus to reduce American dependence on fossil fuels by promoting increased energy efficiency." *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Utils. Comm'n* ("*IEP*"), 36 F.3d 848, 850 (9th Cir. 1994). "To achieve this objective, Congress sought to eliminate two significant barriers to the development of alternative energy sources: (1) the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional facilities[;] and (2) the financial burdens imposed upon alternative energy sources by state and federal utility authorities." *Id.* (citing *Fed. Energy Reg. Comm'n v. Mississippi*, 456 U.S. 742, 750-51 (1982)).

Section 201 of PURPA ("Section 201") designates a group of facilities as Qualifying Facilities ("QFs"), which includes small power production and cogeneration facilities meeting requirements

set by the Federal Energy Regulatory Commission ("FERC"). 16 U.S.C. § 796(18)(B). QFs are granted particular privileges under PURPA, as delineated below.

Section 210 of PURPA ("Section 210") creates a market for energy produced by QFs by requiring FERC to establish regulations that obligate public utilities to sell electric energy to and purchase electric energy from QFs. 16 U.S.C. § 824a-3(a). The binding force of this provision has been reduced over time, in part because of PURPA's recognized success in normalizing access for QFs. In 2005, Congress passed the Energy Policy Act of 2005 ("EPAA"), which offers FERC the opportunity to remove the obligation on an individual utility to enter into new contracts with any QFs that have "nondiscriminatory access to" the relevant energy markets. 16 U.S.C. § 824a-3(m). FERC is empowered to make such determinations on a regional level. *Id.*

Section 210 further requires FERC to promulgate regulations to ensure that the electricity rates—the price paid for electrical energy—for these purchases "shall be just and reasonable to the electric consumers of the electric utility and in the public interest, and shall not discriminate against qualifying cogenerators or qualifying small power producers." 16 U.S.C. § 824a-3(b). However, in order to ensure that the general public, as both consumers and ratepayers, is not forced to subsidize QFs, the rates set by FERC cannot exceed the incremental cost to the electric utility of alternative electric energy. *Id.* PURPA defines this incremental cost as the "cost to the electric utility of the electric energy which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d). In other words, a public utility cannot be forced to pay a QF a price for energy that is higher than the amount of money it would take the utility to obtain the electric energy through other means, either by generating such energy itself or by purchasing it from other sources.

Finally, PURPA establishes an enforcement scheme for violations of PURPA and its implementing regulations. *See Conn. Valley Elec. Co., Inc. v. FERC*, 208 F.3d 1037, 1043 (D.C. Cir. 2000). If a state regulatory authority (such as the CPUC) fails to properly implement FERC's regulations, FERC can bring an enforcement action against the state regulatory agency in federal court. 16 U.S.C. § 824a-3(h)(2). If FERC does not bring such an action on its own, any person who sells electric energy may petition FERC to initiate an enforcement action against the state regulatory authority. *Id.* If FERC does not initiate an enforcement action within 60 days, that party may then sue the state regulatory agency in federal district court to implement FERC's rules. *Id.* If the public utility commission does implement FERC's regulations, but a utility violates the public utility commission's requirements, an aggrieved party can sue for damages based on that violation in state court only. 16 U.S.C. §§ 824a-3(g)(2), 2633.

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2. FERC Regulations Implementing PURPA

FERC has promulgated numerous regulations pursuant to its mandate under PURPA. For example, PURPA has implemented Section 201 by setting forth the criteria that cogeneration and small power production facilities must meet to be certified as a QF, including operating and efficiency standards. 18 C.F.R. §§ 292.201-.211.

FERC has implemented Section 210 through regulations requiring public utilities to purchase energy from QFs. 18 C.F.R. § 292.303. However, pursuant to the EPAA, FERC has also determined that all QFs in California with a total electrical capacity **greater than 20 megawatts** ("MW") have access to nondiscriminatory transmission and interconnection services, as well as to competitive wholesale markets. 18 C.F.R. § 292.309(g). As a result, FERC has terminated CPUC's purchase obligation with respect to QFs with a capacity greater than 20 MWs.

In implementing Section 210, FERC also requires public utilities to purchase electric energy from and sell electric energy to QFs at the utility's full "avoided cost" rate. 18 C.F.R. § 292.304(d). "'Avoided costs' are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source." *IEP*, 36 F.3d at 851 (citing 18 C.F.R. § 292.101(b)(6)). The "avoided cost" is essentially the same as the "incremental cost" as defined in PURPA. Because PURPA mandates that the electricity rate cannot be higher than the incremental cost and the FERC regulations state that the rate cannot be less than the avoided cost, PURPA and the FERC regulations, read in conjunction, require the price paid by utilities to be exactly the avoided cost. While rates may not exceed avoided costs, rates will satisfy the "just and reasonable" and non-discrimination requirements of 18 C.F.R. § 292.304(a) "if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section." 18 C.F.R. § 292.304(b)(2). Paragraph (e) provides a list of factors to be taken into account in determining avoided costs, "to the extent practicable." 18 C.F.R. § 292.304(e).

Other regulations "provide that each QF has the option to sell energy on an 'as available' basis or pursuant to a contract enforceable over a specified term." *IEP*, 36 F.3d at 851 (citing 18 C.F.R. § 292.304(d)(1) & (2)). "If electric energy is purchased pursuant to a contract, the rate for such purchases is based on either the avoided cost as calculated at the time of delivery, or the avoided cost as calculated at the time the obligation is incurred." *Id.* at 851-52 (citing 18 C.F.R. § 292.304(d)(2)).

3. CPUC Implementation of FERC Regulations

PURPA places the states in charge of implementing FERC's regulations pertaining to determining avoided costs and to setting rates paid to QFs. 16 U.S.C. § 824a-3(f). In doing so, the states are given broad latitude: "PURPA delegates to the states broad authority to implement section 210

. . . . Thus, the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities. . . ." *IEP*, 36 F.3d at 856 (9th Cir. 1994). The CPUC is a state agency of constitutional origin that is authorized to fix retail rates and establish rules for California utilities. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Util. Code § 701. In California, the CPUC is the entity responsible for implementing FERC's regulations.

a. History of CPUC Regulation of Utilities and QFs

"Pursuant to this statutory and regulatory command, the CPUC initiated a process in the early 1980s to develop contracts under which QFs could sell electric energy to and purchase electric energy from utilities." *IEP*, 36 F.3d at 852. For example, "[i]n 1982, the CPUC adopted 'standard offer' contracts, which contain standardized contract terms and establish the prices to be paid QFs for electric energy." *Id.* (citing Dec. 82-01-103, OIR 2 ,8 CPUC 2d 20 (1982)). "The four contracts differ primarily in the length of the contract, the availability of capacity and energy from a QF, and the avoided cost rate payments corresponding to such availability." *Id.* "The CPUC required that utilities offer these contracts to any QF desiring one." *Id.*

According to the CPUC, although the standard offers were highly successful in terms of the amount of QF capacity developed in California, they were significantly less successful in accurately reflecting the avoided cost of investor-owned utilities ("IOUs") as California's electricity market evolved and large numbers of QFs came on line. *See* Interim Opinion, *Re Pac. Gas & Elec Co.*, D.85-07-021, 18 CPUC2d 315, 1985 WL 1204866 (July 10, 1985); Interim Opinion on Suspension of Standard Offer 2 and on Approval of Final Long-Run Standard Offers (Phase II), *Re Pac. Gas & Elec. Co.*, D.86-05-024, 21 CPUC2d 124, 1986 WL 1300368 (May 7, 1986). As a result, in the mid-1980s, the CPUC suspended all of its fixed forecast standard offers due to QF oversubscription. *See id.*

The CPUC thereafter envisioned a "major shift" in the mechanisms it could use to price and acquire QF-generated power. *See* Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation, D.95-12-063, 64 CPUC2d 1, 1995 WL 792086 (Dec. 20, 1995), *as modified by* D.96-01-069. Consistent with this new direction, utilities were no longer obligated to enter into the remaining standard offers with QFs. "In September 1996, as part of the legislation for restructuring California's electric industry, the Legislature enacted Pub. Util. Code § 390," which "sets forth certain elements to be included in setting [short-term avoided cost ('SRAC')], pending a shift to the use of California Power Exchange (PX) prices to establish SRAC." Opinion on Future Policy and Pricing for Qualifying Facilities, *In re Order Instituting Rulemaking to Promote Policy, Program Coordination and Integration in Electric Utility Resource Planning*, 2007 WL 2872674, at *9 (Cal. P.U.C. Sept. 20, 2007). "Section 390(b) requires [the CPUC] to calculate SRAC energy prices using a formula that links SRAC energy prices to California border natural gas prices." *Id.* In response to the energy crisis of 2000 and 2001, the associated rise in natural gas prices, and

other changes, the CPUC revised certain of SCE's Transition Formulae, but did not make any changes for the factors used to calculate SRAC for PG&E or San Diego Gas and Electric Company ("SDG&E"). *See* D.02-02-028.

As noted above, Congress in 2005 passed the EPAA, which offers FERC the opportunity to remove the obligation on an individual utility to enter into new contracts with any QFs that have "nondiscriminatory access to" the relevant energy markets. 16 U.S.C. § 824a-3(m). On January 19, 2006, FERC issued a Notice of Proposed Rulemaking ("NOPR" or "Obligation NOPR") regarding Section 210(m), which proposed a framework for FERC's determination of whether electric utilities will be exempt from PURPA's mandatory purchase obligation as otherwise provided in Section 210. *See* 71 Fed. Reg. 4532-01, 2006 WL 189929 (Jan. 27, 2006). In response to Obligation NOPR, California IOUs argued that the potential end of PURPA's mandatory purchase obligation under the EPAA should cause the CPUC to limit any new contracts to short durations. (*See* Defs.' Mot. Summ. J. as to Second Am. Compl. ("First MSJ"), Ex. V at 19, ECF No. 113-28.) QFs, by contrast, suggested the opposite, noting that the only jurisdiction that the CPUC has to set wholesale power prices is that which it derives from PURPA. (First MSJ, Ex. V at 19.)

On October 20, 2006, FERC issued *New PURPA Section 210(m) Regulations Available to Small Power Production and Cogeneration Facilities* ("Order 668") to amend its regulations governing small power production and cogeneration in response to Section 210(m) and Section 1253 of the EPAA. *See* 18 C.F.R. § 292, 71 Fed. Reg. 64342-01, 2006 WL 3076405 (Nov. 1, 2006). With respect to the California market, FERC determined it would be premature to find that the California Independent System Operator Corporation ("CAISO") had met the criteria of Section 210(m)(1)(A) once its ongoing market redesign becomes effective. Order 668, 71 Fed. Reg. 64363. Order 668 further establishes a "rebuttable presumption that the requirement that an electric utility enter into new contracts or obligations to purchase from a QF remains in effect, **in all markets**, for QFs sized 20 MW net capacity or smaller. *Id.* (emphasis in original). This presumption, however, could be rebutted upon demonstration by the electric utility "with regard to each small QF that it, in fact, has nondiscriminatory access to the market." *Id.*

Since the issuance of Order 668, the CPUC has implemented four programs that Defendants claim provide PURPA-compliant avenues for QFs, such as those operated by Boyd and Sarvey, to obtain preferential interconnection and electricity provision contracts. These programs, which generally apply for QFs with different energy capacities, are described below.

b. QF Settlement

In 2010, the CPUC approved the "Qualifying Facility ('QF') and Combined Heat and Power ('CHP') Program Settlement" among QFs, public utilities, and ratepayer representatives (the "QF Settlement"), which resolved certain disputes regarding contract terms, pricing, capacity

payments, contract extensions and terminations, and the formation of new contracts. *See generally* Decision Adopting Proposed Settlement, No. D.10-12-035 (Cal. Pub. Util. Comm'n Dec. 16, 2010).[2] The QF Settlement provides a variety of QF contract options for large and small QFs, including a *pro forma* power purchase agreement ("PPA"). That said, the QF Settlement did not resolve disputes regarding (1) retrospective adjustments to SRAC pricing; (2) disputes over pricing and ability to execute PPA extensions; (3) motions for prospective QF PPA options; (4) SRAC disputes dating back to the 2000-2001 energy crisis; (5) disputes concerning administrative heat rates used to calculate SRAC; and (6) applications for rehearing and petitions for modification fo numerous QF decisions. (QF Settlement pp. 5-6.)

Relevant to this action, the QF Settlement adopted "a new, competitive procurement process . . . in lieu of the Commission-ordered contracts" that would "allow the IOUs to run competitive, transparent [Requests for Offers ('RFOs')] for CHP resources." (QF Settlement pp. 40.) This competitive procurement process would exist alongside "other processes such as bilateral contracting, AB 1613 feed-in tariffs, a PURPA Program for QFs under 20 MW, utility-ownership, and other procurement options," several of which are discussed below. (QF Settlement p. 40.) The QF Settlement further "establishes SRAC prices for . . . QF contracts that are still available under PURPA for facilities less than 20 MW," with SRAC prices "based on the current Commission-approved SRAC pricing formula" set forth in D.07-09-040, Resolution E-4246 (July 10, 2009), adopting the "Market Index Formula" ("MIF"). (QF Settlement p. 41.) Specific pricing methodologies and formulae are provided in Section 10.2 of the QF Settlement. (*See* QF Settlement, Ex. A ¶ 10.2.) Finally, the QF Settlement set forth four *pro forma* PPAs developed for specific circumstances, including one that "offers QFs of 20 MW or less, including small power producers and renewable energy resources, the option to make firm or as-available sales to the IOUs." (QF Settlement p. 44.)

c. CHP Program

California Assembly Bill 1613 ("AB 1613"), which became effective on January 1, 2008, created the Combined Heat and Power Facilities ("CHP") Program, which established a separate program under PURPA for CHP facilities with capacities less than 20 MW. *See* Cal. Pub. Util. Code §§ 2840-2845. Based on this law, CPUC established a separate program setting prices and other rules for such facilities. *See generally* Order Granting Limited Rehearing of Decision (D.)

[2] A copy of this voluminous decision is attached to Defendants' first motion for summary judgment as Exhibit G. (*See* First MSJ, Ex. G, ECF Nos. 113-6 through 113-15.) The Court refers to this document using the notation ("QF Settlement p. [X]"). The Court notes that CARE opposed the QF Settlement on the grounds that it is preempted by both federal law and FERC orders, but that its arguments were rejected by the CPUC. (QF Settlement pp. 11, 53-55.)

10-12-055 on the Issue of GHG Compliance Costs, Modifying Decision, 2011 WL 1589687 (Apr. 14, 2011). The CHP Program bases the price for energy to be paid to such facilities on the Market Price Referent ("MPR"), which is defined as the cost to design, build, and operate a 500 MW Combined cycle natural gas turbine generator ("CCGT"). *Id.* at 11-13.

d. Net Energy Metering ("NEM") Program

On October 11, 2009, Assembly Bill 920 ("AB 920") amended California Public Utility Code § 2827, obligating the CPUC to establish a program to compensate net energy metering ("NEM") customers for electricity produced in excess of on-site load at the end of a 12-month true up period. The bill required the CPUC to adopt, by January 1, 2011, a net surplus electricity compensation valuation to compensate net surplus customer-generators, who cannot have a total electricity capacity of more than 1 MW. *See* Cal. Pub. Util. Code § 2827(b)(4)(A).

Under the NEM program, utilities are required to pay eligible facilities "a per kilowatthour rate . . . for net surplus electricity that is set" by "measuring the difference between the electricity supplied to the eligible customer-generator and the electricity generated by the eligible customer-generator and fed back to the electrical grid over a 12-month period." *Id.* §§ 2827(b)(9), (h). "[T]he net surplus compensation rate [is] calculated using an avoided cost derived from an hourly day-ahead electricity market price known as the 'default load aggregation point' (DLAP) price." Decision Adopting Net Surplus Compensation Rate Pursuant to Assembly Bill 920 and the Public Utility Regulatory Policies Act of 1978, D 11-06-016, slip op. at 2 (June 9, 2011). "A utility's DLAP price reflects the costs the utility avoids in procuring power during the time period net surplus generators are likely to produce their excess power." *Id.* Put differently, when a facility provides electricity to a utility pursuant to the NEM program, the utility must reimburse the facility at the rate the utility is paying one day out in the marketplace.

e. FiT/Re-MAT Program

Finally, CPUC has established a Feed-in Tariff ("FiT") program, sometimes referred to as the Renewable Market Adjusting Tariff ("Re-MAT") program, for renewable generators with electricity capacities of 3 MW or less. *See* Cal. Pub. Util. Code § 399.20, *amended by* 2016 Cal. Legis. Serv. Ch. 663 (A.B. 1923); *see also* Re Implementation and Administration of California Renewables Portfolio Standard Program, D. 12-05-035, 2012 WL 2049420 (May 24, 2012). This program is based on California law requiring CPUC to approve tariff rates for electricity, specifically from eligible renewable energy producers. *See* Cal. Pub. Util. Code § 399.20. Under the FiT program, IOUs must make tariffs available to the owners of eligible facilities "upon request, on a first-come-first-served basis, until the [IOU] meets its proportionate share of a statewide cap of 750 [MWs] cumulative rated generation capacity . . . ." *Id.* § 399.20(f).

The price of the tariff under the Re-MAT program is based on (1) a starting price based on the weighted average contract price of PG&E, SCE, and SDG&E's highest priced executed contract resulting from the CPUC's auction held in November 2011 for three different product types; and (2) a two-month price adjustment "based on the market response." (First MSJ, Ex. M at 2-3.) Each accepted project will be paid a "time-of-delivery adjustment" based on the generator's actual energy delivery profile and the individual utility's time-of-delivery factors. (First MSJ, Ex. M at 3.)

D. Other Undisputed Facts

Boyd and Sarvey operate facilities that are interconnected with PG&E and participate in PG&E's NEM program. (*See* Pl.'s Statement of Genuine Issues of Material Fact ("Pl.'s Facts") ¶¶ 1, 3.) Their facilities are QFs within the meaning of Subpart B of 18 C.F.R. §§ 292.101(b)(1) and 292.203 with production capacities below 20 megawatts ("MWs").

II. DISCUSSION

As far as the Court can ascertain from CARE Plaintiffs' pleadings and papers, their core allegation is that none of the programs CPUC has authorized require PG&E or its fellow IOUs to purchase electric energy from small power production facilities—such as those operated by Boyd and Sarvey—at the IOUs' "full avoided cost," as the term is defined under federal law. (*See* FAC ¶¶ 19-20, 24, 42(a), 46(c); Opp'n 1, ECF No. 210.) In particular, CARE Plaintiffs allege (1) the price formula under the QF Settlement—SRAC adjusted by the Market Index Formula ("MIF")—"is a *de facto* means of permitting payment to QFs at variable unpredictable rates less than avoided cost[;] (2) payment rates under the CPUC-approved Solar Photovoltaic Program ("SPVP") for small power production facilities less than 10 MW is "based on competitive least cost bids—*i.e.* below avoided cost—and further reducing that rate by mandating transfer from the small power facility to the utility of the former's Renewable Energy Credits ('RECs')[;]" and (3) the CHP Program's reliance on the MPR, defined as the cost to design, build, and operate a 500 MW CCGT, although offering higher prices than those available under QF Settlement, are nevertheless "still below PURPA / FERC mandated avoided cost." (FAC ¶¶ 19-20, 24.) In their opposition papers, CARE Plaintiffs for the first time argue that the CPUC-approved NEM net surplus compensation rate ("NSCR") violates PURPA because it (1) does not provide for a separate "capacity payment;" (2) does not reflect long-run avoided costs ("LRAC"); and (3) is not based only on renewable generators. (*See* Opp'n 14-16, 18-19.)

For the reasons set forth below, the Court concludes that CARE Plaintiffs have failed to meet their summary judgment burden of identifying violations of PURPA or its implementing regulations by the CPUC, and therefore enters summary judgment in favor of Defendants as to both remaining causes of action.

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A. Legal Standards

Federal Rule of Civil Procedure 56(a) mandates that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party does not need to produce any evidence or prove the absence of a genuine issue of material fact. *See Celotex*, 477 U.S. at 325. Rather, the moving party's initial burden "may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* "Summary judgment for a defendant is appropriate when the plaintiff 'fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial.'" *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 805-06 (1999) (quoting *Celotex*, 477 U.S. at 322).

Once the moving party meets its initial burden, the "party asserting that a fact cannot be or is genuinely disputed must support the assertion." Fed. R. Civ. P. 56(c)(1). "The mere existence of a scintilla of evidence in support of the [nonmoving party]'s position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986); *accord Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) ("[O]pponent must do more than simply show that there is some metaphysical doubt as to the material facts."). Further, "[o]nly disputes over facts that might affect the outcome of the suit . . . will properly preclude the entry of summary judgment . . . . [f]actual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. At the summary judgment stage, a court does not make credibility determinations or weigh conflicting evidence. *See id.* at 249. A court is required to draw all inferences in a light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587.

Finally, courts "review the [public utilities commission's] implementation of PURPA and the FERC Regulation[s] with deference because 'a state has broad authority to implement PURPA with respect to the approval of purchase contracts between utilities and [Qualifying Facilities].'" *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 394 (5th Cir. 2014) (quoting *Power Resource Grp., Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 236 (5th Cir. 2005)). Such deference is appropriate with respect to ratemaking because ratemaking is a legislative, not judicial, function, "a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation." *See United States v. Morgan*, 313 U.S. 409, 417 (1941).

B. Analysis

1. CARE Plaintiffs Have Failed to Demonstrate that the Options the CPUC Offers Small QFs, Such as Those Operated by Boyd and Sarvey, Violate PURPA or Its Implementing Regulations

FERC regulations require that "[i]n determining avoided costs," certain factors "shall, to the extent practicable, be taken into account." 18 C.F.R. § 292.304(e) (2010). These factors can be summarized as follows:

(1) the utility's system cost data;
(2) the terms of any contract including the duration of the obligation;
(3) the availability of capacity or energy from a QF during the system daily and seasonal peak periods;
(4) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and
(5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.

Cal. Pub. Utils. Comm'n ("*CPUC*"), 133 FERC ¶ 61,059, 2010 WL 4144227, at ¶ 23 (Oct. 21, 2010) (citing 18 C.F.R. § 292.304(e) (2010)). As FERC has recognized, "there is no obligation under PURPA for a utility to enter contracts to make purchases which would result in rates which are not 'just and reasonable to electric consumers of the electric utility and in the public interest' or which exceed 'the incremental cost to the electric utility of alternative electric energy.'" *City of Ketchikan*, 94 FERC ¶ 61,293, 2001 WL 275023, at *5 (Mar. 15, 2001).

Moreover, FERC has explained that "states are allowed a **wide degree of latitude** in establishing an implementation plan for [S]ection 210 of PURPA, as long as such plans are consistent with our regulations." *Am. REF-FUEL Co. of Hempstead*, 47 FERC ¶ 61161, 61,533, 1989 WL 261302 (Apr. 28, 1989) (emphasis added); *see also LG&E Westmoreland Hopewell*, 62 FERC ¶ 61098, 61712, 1993 WL 20530 (Feb. 2, 1993). Thus, "with regard to review and enforcement of avoided cost determinations under such implementation plans, [FERC's] role is generally limited to ensuring that the plans are consistent with [S]ection 210 of PURPA. . . ." *Am. REF-FUEL Co.*, 47 FERC at ¶ 61533. "In this regard, the determinations that a state commission makes to implement **the rate provisions** of [S]ection 210 of PURPA are **by their nature fact-specific and include consideration of many factors**, and [FERC is] **reluctant to second guess** the state commission's determinations; [FERC's] regulations thus provide state commissions with guidelines on factors to be taken into account, 'to the extent practicable,' in determining a utility's avoided cost of acquiring the next unit of generation." *CPUC*, 133 FERC at ¶ 24 (emphasis added) (citing 18 C.F.R. § 292.304(e) (2010)).

At a more granular level, PURPA and its implementing regulations mandate that calculation of a utility's "avoided cost" requires consideration of **all supply alternatives available** to the utility. Indeed, as early as 1995, FERC clarified that

> Avoided costs are determined, in the first instance, by all alternatives available to the purchasing utility. Those alternatives, as we have explained in a number of recent orders, include **all** supply alternatives. Here, the City's supply alternatives included the power sale agreement offered by Arkansas Power. If the QF proposed by Petitioners could not match the rate offered by a competing supplier of power to the City, regardless of whether the competitor was or was not a QF, then the QF demonstrably was not offering a rate at the City's avoided cost —and the City had no obligation under PURPA to purchase power offered at a higher price than the lowest bid.

N. Little Rock Cogeneration, L.P. and Power Sys., Ltd. v. Entergy Servs., Inc., 72 FERC ¶ 61263, ¶ 62173, 1995 WL 556544 (Sept. 19, 1995) (emphasis in original). Following this guidance, the CPUC in 2007 found "that a combination of market-based offers along with the ability to compete for longer-term contracts best reflects the utilities' avoided cost and meets California's goals for acquiring and retaining cost-effective, environmentally sound generation." *Opinion on Future Policy and Pricing for Qualifying Facilities*, D.07-09-040, at 125 (Sept. 25, 2007).[3] For the reasons explained below, CARE Plaintiffs' core allegations fail in light of these principles.

a. QF Settlement

First, FERC has expressly found the portions of the QF Settlement at issue in this case to be PURPA-compliant. FERC recently determined that "[i]n California, QFs 20 MW and smaller . . . may sell their net capacity to their host utility under a long-term PURPA contract **at an avoided cost rate**, containing both an energy and capacity component, pursuant to California's Standard Contract for QFs 20 MW or Under." *Winding Creek Solar LLC*, 151 FERC ¶ 61103, at ¶ 6, 2015 WL 2151303 (May 8, 2015) (emphasis added). Because (1) courts defer to an agency's reasonable policy choices in "technical and complex arena[s]" unless contrary to the history and purpose of the statute, *see Chevron, U.S.A., Inc. v. Natural Resource Defense Council*, 467 U.S. 837, 845 ,863 (1984); and (2) FERC's declaratory orders are generally entitled to precedential effect, *see CPUC*, 134 FERC at ¶ 28 n. 50, 2011 WL 182464 (Jan. 20, 2011), FERC's finding regarding compliance with its own regulations is entitled to *Chevron* deference, *see Perfectly Fresh Farms, Inc. v. U.S. Dep't of Agric.*, 692 F.3d 960, 966-67 (9th Cir. 2012). CARE Plaintiffs,

[3] This decision, attached as Exhibit V to Defendants' first motion for summary judgment, is hereinafter referred to as "D.07-09-040."

who chose not to cite to *Winding Creek* once in their Opposition, fail to explain why FERC's finding is not subject to such deference.

Even if the Court were to disregard both *Winding Creek* and FERC's express finding that the QF Settlement includes the provision of long-term contracts at avoided cost rates for QFs with capacities less than 20 MW, it would nevertheless conclude that CARE Plaintiffs have failed to meet their summary judgment burden of demonstrating the contract provisions available to small QFs do not comply with PURPA. In D.07-09-040, the CPUC, *inter alia*, "adopt[ed] contract provisions for 'small' QFs under 20 MW" that it deemed to be "necessary because a small QF is unable to bid in a utility RFO, generally does not have the resources or expertise required to negotiate and enter into a bilateral contract with a utility, and is prohibited by current rules from selling surplus generation directly to the CAISO." D.07-09-040 at 121-122. Notwithstanding its adoption of these contract provisions, the CPUC noted that "nothing in this Decision bars QFs desiring longer-term contracts or more flexible contract options, from participating in utility resource solicitations or bilateral negotiations." *Id.* at 122. Indeed, the CPUC neither "expect[s] [n]or desire[s] all QFs to continue on SRAC-based pricing," as "[t]he prices paid to winning bidders in competitive solicitations **can best reflect the utility's long-run avoided cost** for the specific type of product needed and provided." *Id.* (emphasis added). The CPUC reiterated its earlier finding that "[n]o preference for QF power justifies payment above levels arrived at by all source bidding, as such above market prices would violate PURPA's standard of ratepayer indifference." *Id.* at 122-123 (quoting *Appl. of San Diego & Elec. Co.*, D.96-10-036 at § 3.2.2, 1996 WL 651138 (Oct. 9, 1996)). Thus, the CPUC determined that "[c]ontrary to the QF representatives claims, we are under no PURPA obligation to require long-term standard offers, and we find no mandated minimum term for PURPA required purchases. Looking to FERC regulations, we similarly find no mandated minimum term." *Id.* at 123.

The only two arguments the Court can find in CARE Plaintiffs' Opposition arguably relating to whether the QF Settlement complies with PURPA and its implementing regulations are (1) their submission that California requires utilities to purchase a fixed portion of its fuel supplies from renewable sources, and thus "'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;" (2) their submission that none of the market-based rates contemplated in the CPUC's current offerings take into account "capacity costs" or PG&E's "actual capacity costs;" and (3) their contention that the QF Settlement does not apply to QFs less than 20 MW. (*See* Opp'n 12-16.) None of these arguments can withstand scrutiny.

With respect to the first argument, that a state might require IOUs to purchase a fixed portion of their fuel supplies from renewable sources does not mean that renewable energy would constitute the only "alternative[ ] available to the purchasing utility" within that state, and CARE Plaintiffs point to no authority indicating otherwise. *N. Little Rock Cogeneration*, 72 FERC at ¶ 62173; *cf. CPUC*, 133 FERC at ¶ 26 (noting that "in determining the avoided cost rate, just as a state may

take into account the cost of the next marginal unit of generation, so as well the state **may** take into account obligations imposed by the state that, for example, utilities purchase energy from particular sources of energy or for a long duration"). A state can mandate that IOUs purchase, for example, 10% of their electric energy from renewable sources but still consider the price of electric energy obtained from non-renewable sources to be part of the "incremental costs to an electrical utility of electrical energy or capacity or both which, but for the purchase from the qualifying facility or facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6).

CARE Plaintiffs' second argument fares no better. California courts have upheld the use of SRAC pricing to reflect the utilities' avoided cost, finding that challengers had failed to demonstrate that the SRAC was below the utilities' avoided costs. For example, in *Southern California Edison Co. v. Public Utilities Commission of State*, a California court of appeal found that the County of Los Angeles "failed to demonstrate that the SRAC was below Edison's avoided costs . . ." 101 Cal. App. 4th 982, 996, 125 Cal. Rptr. 2d 211 (2002). Three years later, a California court of appeal noted that "[i]n D.04-04-037, the [CPUC] specifically noted that it considered the evidence regarding SRAC pricing presented by the parties and concluded that 'the evidence in this proceeding has not demonstrated that SRAC prices are in violation of the PURPA avoided cost standard.'" *S. Cal. Edison Co. v. Pub. Utils. Comm'n of State of Cal*, 128 Cal. App. 4th 1, 7, 26 Cal. Rptr. 3d 700 (2005). 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). Here, as in *Southern California Edison*, CARE Plaintiffs have failed to demonstrate the SRAC-based rate contemplated in the *pro forma* contracts available under the QF Settlement are below PG&E's avoided costs.

Finally, CARE Plaintiffs' contention that the QF settlement "only applies to 20MW and larger suppliers, not those less than 20MW" lacks evidentiary support and is belied by the terms of the QF Settlement itself. (*See* QF Settlement at 5-6, 14-15, 19-21, 25, 39-42, 44, Ex. A at § 4.5 [describing terms of the "PURPA Program for QFs 20 MW or Less (QF PPAs)"], Ex. D.)

"Given the availability of California's Standard Contract for QFs 20 MW or Under, [CARE Plaintiffs] ha[ve] not demonstrated that the [CPUC's] implementation of PURPA [through other programs such as Re-MAT or the NEM program] is inconsistent with PURPA and [FERC's] regulations." *Winding Creek*, 151 FERC at ¶ 7. The Court therefore **GRANTS** partial summary judgment in favor of Defendants as to this issue.

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b. NEM Program

Despite being presently interconnected with PG&E through its NEM program, and despite the program's noted success in interconnecting customer-sited solar generators with IOUs, (*see* Decl. Harvey Y. Morris in Supp. Mot. ("Morris Decl."), Ex. 8 at 12-21), CARE Plaintiffs challenge the bill credits and rates paid through the NEM program as failing to take into account the IOUs' "full avoided cost." (*See generally* Opp'n.) CARE Plaintiffs also argue that certain aspects of the NEM program violate regulations obligating IOUs to permit QFs to interconnect. (Opp'n 13-14, 18.)

Even if it were true that CARE Plaintiffs were not legally permitted to enter into long-term contracts with PG&E pursuant to the QF Settlement—either by accepting a *pro forma* contract or by entering into a bilateral contract with PG&E—the Court would nevertheless conclude that CARE Plaintiffs have failed to meet their summary judgment burden with respect to whether the NEM program complies with PURPA's pricing and interconnection requirements.

i. CARE Plaintiffs Have Failed to Genuinely Dispute Whether the NEM Program Prices Electric Energy at IOUs' Avoided Cost

Although Boyd decries being "involuntarily inserted, by PG&E, into their CPUC approved [NEM] Program whereby over a 12 month period PG&E 'nets' the power [he] suppl[ies] and receive[s] — i.e. they pay [him] in energy units from cheaper, inter alia fossil fuel sources; and then either pays or charges [him] for the net surplus or deficit, at PG&E's then prevailing market retail rate for customers in [his] area who purchase power from PG&E[,]" (Decl. Michael Boyd #2 in Supp. Opp'n ¶ 7), CARE Plaintiffs fail to adequately explain **why** the price PG&E pays Boyd and others under the NEM program is anything other than PG&E's legally mandated avoided cost. As stated above, "[a]voided costs are determined, in the first instance, by all alternatives available to the purchasing utility," which "include[s] **all** supply alternatives," including fossil fuel sources. *N. Little Rock Cogeneration*, 72 FERC at ¶ 62173 (emphasis in original). Thus, the Court again rejects CARE Plaintiffs' argument regarding noncompliance with PURPA to the extent such an argument is predicated on an alleged "mixing" of different forms of energy.

The Court next considers CARE Plaintiffs' argument that "[f]ull avoided cost includes both SRAC [energy cost] and **capacity** costs," the latter of which are allegedly not taken into account in the NEM program's day-ahead market pricing scheme. (Opp'n 12-13.) In support of this contention, CARE Plaintiffs cite to three pieces of evidence. (*See* Opp'n 12.) Two of these documents reveal that PG&E has several Utility Owned Generation ("UOG") facilities with capital costs for construction that generated energy in their first year. (*See* Opp'n, Ex. 233 at 12; Ex. 234 at 1.) The third document states that the rate paid to NEM customers "will be in accordance with the eligible customer-generator's PG&E otherwise-applicable metered rate schedule (OAS)." (Opp'n, Ex. 236 at 5.) This evidence is insufficient to create a genuine dispute as to whether the prices provided through the NEM program are at a rate other than PG&E's avoided cost.

Defendants have submitted undisputed evidence that customers in the NEM program, at the end of a twelve-month period, receive (1) a **bill credit** equal to the customer's retail rate that includes generation, transmission, and distribution components, as well as non-bypassable charges, for generation offset by the customer's own generation; and (2) a **rate** from the IOU equivalent to the **DLAP** for net surplus generation. (*See* Opp'n, Ex. 240 at 445:5-20; Reply, Ex. 111 at 467:24-468:8, 469:10-470:1.)[4] There is no genuine dispute that the bill credit takes into account capacity costs. (*See* Morris Decl., Ex. 8 at 20-21 [explaining that "[u]nder NEM, customers receive a bill credit (in dollars) based on the full retail rate (including generation, transmission, and distribution rate components) for any excess generation (in kWh) that is exported back to the grid"]; Reply, Ex. 111 at 469:15-18 ["The retail rate includes all of the costs the utilities spend on capacity."].)

Moreover, the CPUC previously determined that the use of "DLAP prices is the **most reasonable and efficient source for an avoided cost** electricity to include in [its] adopted NSC rate" for a number of reasons, including that "DLAP prices represent the price that a utility pays for a quantity of energy sufficient to meet its day-ahead load and are the costs the utility avoids when NEM customers export excess energy between 7 a.m. and 5 p.m." *See Decision Adopting Net Surplus Compensation Rate Pursuant to Assembly Bill 920 and [PURPA]*, D.11-06-016 at 27 (June 20, 2011) (emphasis added).[5] This ratemaking determination, which followed a notice-and-comment period, is entitled to some deference, as FERC has "afford[ed] the states . . . a great deal of flexibility both in the manner in which avoided costs are estimated and in the nature of the contractual relationship between utility and QF." *IEP*, 36 F.3d at 856; *see also Colo. Interstate Gas Co. v. Fed. Power Comm'n*, 324 U.S. 581, 589 (1945) (holding "review is limited to keeping the commission within the bounds which Congress has created," since "[r]ate-making is essentially a legislative function"); *Wood v. Pub. Utils. Comm'n*, 4 Cal.3d 288, 292 (1971) ("In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions which require a public hearing for affected rate-payers."). Finally, CARE Plaintiffs fail to consider the CPUC's finding that "[n]et surplus generation by NEM customers **has no capacity value** because an individual NEM customer has no obligation to provide energy to the utility." (Opp'n, Ex. 235 at 60 ¶ 15 [emphasis added].) Indeed, in *City of Ketchikan, Alaska*, FERC held that "an avoided cost rate need not include capacity unless the QF purchase will permit the

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[4] Although it is typically not appropriate to consider documents submitted in connection with a party's reply papers, this document is of "certain pages [of a witness's deposition transcript] additional to [CARE Plaintiffs'] Exhibit 240," the entirety of which was not submitted by CARE Plaintiffs. (*See* Decl. Sara Kamins in Supp. Reply ¶ 6.)

[5] A copy of this decision is attached as Exhibit K to Defendants' first summary judgment motion.

purchasing utility to avoid building or buying future capacity." 94 FERC ¶ 61293, 62062, 2001 WL 275023. CARE Plaintiffs fail to cite to *Ketchikan*, much less distinguish it.

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. Rather, FERC has expressly upheld the use of **both** market-based rates and short-run avoided cost rates to determine an IOU's avoided cost. *See Revised Regulations Governing Small Power Production & Cogeneration Facilities*, 114 FERC ¶ 61102, 2006 WL 250518, at *24 (2006) (stating that "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"); *Winding Creek Solar*, 151 FERC ¶ 61103 at ¶¶ 6-7, n. 9 (upholding SRAC as a valid measure of avoided cost rates under PURPA). Indeed, at least one other court has expressly found that a state utility commission did not act unreasonably in "us[ing] the competitive bidding measure in determining avoided costs." *State ex rel. Utilities Comm'n v. North Carolina Power*, 338 N.C. 412, 420-21, 450 S.E.2d 896 (1994).

The Court also rejects CARE Plaintiffs' argument that credits and rates owed to QFs under the NEM program fail to take into account "interconnection costs" as part of the calculation of the IOUs' avoided cost. (*See* Opp'n 13.) To the extent that QFs are obligated to pay such costs pursuant to 18 C.F.R. § 292.306(a), CARE Plaintiffs have not shown how these costs **placed on QFs** affect the **IOUs**' "incremental costs for electric energy or capacity which, but for the purchase from the QF, the [IOUs] would generate itself or purchase from another source." *IEP*, 36 F.3d at 851 (citing 18 C.F.R. § 292.101(b)(6)). In any event, the Court notes that for NEM 1.0 customers such as Boyd and Sarvey, California state law prohibits the imposition of interconnection fees. *See* Cal. Pub. Util. Code § 2827(g).

CARE Plaintiffs additionally submit that in *CPUC*, 133 FERC ¶ 61059, "FERC found that CPUC's MIF and MPR pricing indexed to the variable cost of a CCGT did not comply with PURPA's requirements for a single source renewable type QF based on a 'multi-tiered avoided cost rate structure.'" (Opp'n 14.) Contrary to CARE Plaintiffs' suggestion, no such holding can be found in *CPUC*; rather, FERC found "that the concept of a multi-tiered avoided cost rate structure **is consistent with the avoided cost requirements** set forth in section 210 of PURPA and in the Commission's regulations." 133 FERC at ¶ 20 (emphasis added).

Finally, the Court discounts CARE Plaintiffs' factually and legally unsupported argument regarding "the risk of a low price dumping strategy." (Opp'n 15.) Other mechanisms, such as antitrust and unfair competition law and state court actions against IOUs authorized under PURPA, exist to ensure that such strategies are unavailable to putative monopolists.

For the reasons stated above, the Court concludes that CARE Plaintiffs have failed to meet their summary judgment burden of demonstrating why the CPUC-approved NEM program violates PURPA or its implementing regulations relating to avoided cost calculations. The Court accordingly **GRANTS** partial summary judgment in favor of Defendants on these issues.

ii. Whether Provisions of the NEM Program Violate FERC's Interconnection Requirements

CARE Plaintiffs raise two arguments why they believe the NEM program violates 18 C.F.R. § 292.303(c), which provides that, subject to certain exceptions not applicable here, "any electric utility shall make such interconnection with any [QF] as may be necessary to accomplish purchases or sales under this subpart," and that "[t]he obligation to pay for any interconnection costs shall be determined in accordance with § 292.306." 18 C.F.R. § 292.303(c). First, they contend that because entry into the NEM program "is imposed unilaterally . . . on PG&E's terms and conditions," then "[i]f the compensation conditions are unlawful as above discussed, then the availability of NEM inter-connection violates the mandatory inter-connection and purchase requirements." (Opp'n 18.) Because the Court determined in Sections II(B)(1)(a) and II(B)(1)(b)(i), *supra*, that the CPUC has not violated PURPA's "avoided cost" requirements, this generalized argument fails.

CARE Plaintiffs additionally argue that the "Smart-Meter™ Opt-Out" associated with the NEM program violates 18 C.F.R. § 292.303(c). (Opp'n 14.) Although the rationale underlying this argument is not clear from CARE Plaintiffs' brief, it likely centers on a theory that this charge "mak[es] their projects economically unviable." (Opp'n 14.) Federal regulations expressly provide that "[e]ach [QF] shall be obligated to pay any interconnection costs which the State regulatory authority . . . may assess against the [QF] on a nondiscriminatory basis with respect to other customers with similar load characteristics." 18 C.F.R. § 292.306(a). Moreover, the "Smart-Meter™ Opt-Out" is a voluntary option that QFs can exercise as a term and condition of the broader Smart Meter program applicable to both NEM and non-NEM customers, rather than an interconnectivity requirement under the NEM program. *See generally Decision Regarding Smartmeter Opt-Out Provisions*, D.14-12-078 (Dec. 18, 2014). CARE Plaintiffs have therefore failed to meet their summary judgment burden of demonstrating how the CPUC's utilization of the Smart-Meter™ Opt-Out charge violates PURPA's interconnection requirements.

2. To the Extent CARE Plaintiffs Argue Boyd or Sarvey Have Been Improperly Denied Contracts or Interconnection by PG&E, Such an Argument Is Not Properly Before this Court

PURPA's statutory scheme "is one that differentiates between 'implementation' claims and 'as-applied' claims." *Allco Renewable Energy Ltd. v. Mass Elec. Co.*, — F. Supp. 3d —, 2016 WL 5346937, at *5 (D. Mass. Sept. 23, 2016) (citing *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380, 388

(5th Cir. 2014). "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." *Id.* (citing *Power Res. Grp., Inc. v. Pub. Util. Comm'n of Tex.*, 422 F.3d 231, 235 (5th Cir. 2005)). "Such claims are brought in federal court by FERC or a private party against the state agency under section 210(h)(2)." *Id.* (citation omitted). "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." *Id.* (citation omitted).

Thus, to the extent CARE Plaintiffs claim (1) that PG&E offered them rates for electricity below PG&E's avoided cost, separate and apart from regulations implemented by the CPUC; (2) that PG&E improperly denied them *pro forma* PPAs; or (3) they were otherwise harmed by PG&E's conduct, separate and apart from actions taken by the CPUC, such claims cannot be adjudicated in this Court. The Court **GRANTS** partial summary judgment in favor of Defendants to the extent CARE Plaintiffs' claims are premised on such allegations.

3. Conclusion

Because the Court concludes that CARE Plaintiffs have failed to allege a violation of PURPA or its implementing regulations, the Court **GRANTS** summary judgment in favor of Defendants as to CARE Plaintiffs' remaining two causes of action. In light of this conclusion, the Court need not address Defendants' additional arguments regarding standing.

III. RULING

For the foregoing reasons, the Court **GRANTS** Defendants the California Public Utilities Commission and its current Commissioners' Motion for Summary Judgment.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 11-04975 SJO (JCGx)	Date	February 15, 2017
Title	Solutions for Utilities Inc et al v. California Public Utilities Commission et al		

Present: The Honorable	JAMES OTERO, Judge presiding	
Victor Cruz	Not Present	
Deputy Clerk	Court Reporter	Tape No.

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:

Proceedings: IN CHAMBERS

This matter is before the court on Plaintiffs' Motion to Amend or Alter Judgment ("Motion"), filed January 25, 2017. Plaintiffs ask the Court to amend the judgment entered on December 28, 2016 in order to modify or delete certain text and to address whether and to what extent the Court adopted Defendants' Proposed Statement of Uncontroverted Material Facts and Conclusions of Law. (See generally Mot., ECF No. 219.) As a preliminary matter, the Court agrees with Defendants that Plaintiffs misunderstand that under Rule 58(a) of the Federal Rules of Civil Procedure, the Court's judgment must be filed as a separate document from its order and need not address facts, conclusions of law, or reasoning. Fed. R. Civ. P. 58(a); see also In Re Cedant Corp. Sec. Litig., 454 F.3d 235, 245 (3d Cir. 2006). The Court also agrees that Plaintiffs' first and second requests are immaterial and these "errors" would not result in manifest injustice. Finally, the Court notes that examined in great detail whether a genuine dispute of material fact could preclude the entry of summary judgment in its associated order, also entered on December 28, 2016, (see ECF No. 218), and therefore need not address this point in the separately filed judgment. The Court accordingly DENIES Plaintiffs' Motion.

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