Thomas R. Teehan
Senior Counsel

September 3, 2010

VIA HAND DELIVERY & ELECTRONIC MAIL

John Spirito, Esq.
Chief of Legal Services
Rhode Island Division of Public Utilities and Carriers
89 Jefferson Boulevard
Warwick, RI 02888

RE: Portsmouth Wind Generator Facility

Dear Mr. Spirito:

At the request of the Division of Public Utilities and Carriers (the "Division"), National Grid[1] is providing this response to a letter from Benjamin C. Riggs, Jr., questioning whether the Town of Portsmouth's wind generating plant conforms to the requirements of R.I.G.L. §39-26-2.

As background, the Town of Portsmouth applied to interconnect a 1.5 MW wind turbine in May 2008, which eventually came on line in March 2009. The initial layout called for the Town of Portsmouth to assume ownership of National Grid overhead and underground facilities at the school property line so that the wind turbine could be behind a new primary meter feeding two school accounts and a town account (tennis courts). Due to the fact that the process of selling Company-owned equipment can be quite burdensome and would have required the Town to maintain utility grade equipment, the Company agreed to connect the turbine directly to its distribution line. This arrangement reduced the amount of construction costs that would be borne by the town to interconnect the generator.

Net metering is understood in the industry as a means of allowing customers who have installed "behind-the-meter" generation to obtain credit for excess generation during those times that the production from the unit exceeds the on-site load. Where a generating facility is fashioned as a stand-alone facility, with no real associated distribution load, it may be more accurately viewed as a wholesale generator, which could trigger FERC jurisdiction under the Federal Power Act. In addition, if the unit is a "qualifying facility" under federal law, as smaller renewable electricity projects would typically be, recent decisions on this issue would indicate that the sale of power from such a facility should be governed by the federal requirement that the rate established for its output does not exceed the avoided cost of the purchasing utility. 16 U.S.C §824a-3; See In re California Public Utilities Commission, FERC Docket No. EL10-64-000 (attached).

Given the set of facts at the Portsmouth site, the Company made an accommodation to help the town avoid otherwise significant costs. The resulting configuration is not net metering as that term has traditionally been understood, but rather has been inadvertently labeled net metering as one of the multiple interpretations of state law in Rhode Island. Although the Company recommends that, given the

[1] The Narragansett Electric Company d/b/a National Grid ("National Grid" or the "Company").

circumstances of the Company's accommodation to the town, the Portsmouth project be grandfathered, the Company believes there is at present uncertainty around the interaction of federal and state statutes, and that additional consideration of these issues by the Division and the Commission is warranted.

After the Portsmouth facility came on line, additional amendments to R.I.G.L. §39-26-6 changed the way towns could apply excess renewable generation credits. In July of 2009, the statute was amended to allow, among other things, a city or town to be compensated for excess renewable generation credits by a check from the utility. Thus, the excess generation credits no longer have to be applied to another town account or rolled forward from month to month. In the Company's view, the evolution to paying excess credits by check highlights the fact that a stand-alone generating facility that is not used to supply an existing customer load at the location may instead fall under the "qualified facility" rules of the Public Utility Regulatory Policies Act, despite having some "station service" or parasitic load on site.

The Company would welcome the opportunity to work with the Division to develop new regulations that will help to clearly interpret R.I.G.L. §39-26-6 to ensure net metering in Rhode Island works to the benefit of all customers and in accordance with federal law. The Company suggests that the Division consider requesting that the Commission establish a moratorium on certifying facilities that are not behind the meter at a location with an expected associated customer load, such that the expected energy output of the facility is equal to or less than the expected customer usage, as eligible net metered energy systems until such regulations can be promulgated.

Thank you for your attention to this transmittal. If you have any questions, please feel free to contact me at (401) 784-7667.

Very truly yours,

Thomas R. Teehan

Enclosure

cc: Steve Scialabba, Division
Luly Massaro, Division Clerk

132 FERC ¶ 61,047
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
John R. Norris and Cheryl A. LaFleur.

California Public Utilities Commission	Docket No. EL10-64-000
Southern California Edison Company Pacific Gas and Electric Company San Diego Gas & Electric Company	Docket No. EL10-66-000

ORDER ON PETITIONS FOR DECLARATORY ORDER

(Issued July 15, 2010)

1. On May 4, 2010, in Docket No. EL10-64-000, the California Public Utilities Commission (CPUC) submitted a petition for declaratory order in which it requests that the Commission find that sections 205 and 206 of the Federal Power Act (FPA),[1] section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)[2] and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generating facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements. On May 11, 2010, in Docket No. EL10-66-000, Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) (collectively, Joint Utilities) filed a separate petition for declaratory order in which they argue that the CPUC's decision is preempted by the FPA insofar as it sets rates for electric energy that is sold at wholesale.

2. In this order, the Commission addresses these petitions. As discussed below, the Commission finds that the CPUC's decision is not preempted by the FPA, PURPA or Commission regulations, as long as the program meets certain requirements.

[1] 16 U.S.C. §§ 824d, 824e (2006).

[2] 16 U.S.C. § 824a-3 (2006); *see generally* 16 U.S.C. § 2601 *et seq*. (2006).

I. Background

3. Through the California "Waste Heat and Carbon Emissions Reduction Act," Assembly Bill (AB) 1613, the California legislature amended the California Public Utilities Code to require "electrical corporations" in California (i.e., investor-owned utilities (IOUs) regulated by the CPUC) to offer to purchase, at a price to be set by the CPUC, electricity that is generated by certain CHP generators and delivered to the grid.[3] In particular, CHP generators must have a generating capacity of not more than 20 MW and must meet certain efficiency and emissions standards. The legislation requires California electrical corporations to file standard ten-year purchase contracts (AB 1613 feed-in tariffs) with the CPUC that require them to offer to purchase at the CPUC-set price for electricity generated by CHP generators. The California Public Utilities Code, as amended, states that the tariff shall "provide for payment for every kilowatt hour delivered to the electrical grid by the combined heat and power system at a price determined by the commission."[4] In addition, AB 1613 requires that the CPUC set the rates at which the utilities must offer to purchase from CHP generators at a level that "ensure[s] that ratepayers not using [CHP] systems are held indifferent to the existence of [the AB 1613 feed-in] tariff."[5]

4. In the CPUC's decision implementing AB 1613 (AB 1613 Decision), which became effective on December 17, 2009, the CPUC stated that it is not setting a price for wholesale power sales, but is requiring California utilities under its jurisdiction to offer to purchase electricity at a CPUC-set price intended to encourage development of highly efficient CHP generators in order to reduce greenhouse gas emissions. The Joint Utilities and Southern California Gas Company[6] sought rehearing and stay of the CPUC's AB 1613 Decision, arguing that the CPUC exceeded its authority to set the wholesale price for electric energy in violation of the Supremacy Clause of the United States Constitution and the FPA. The CPUC granted extensions of time to June 21, 2010 for utilities to file AB 1613 feed-in tariffs. The CPUC, however, denied the Joint Utilities' request for rehearing (AB 1613 Rehearing Order) of the CPUC's AB 1613 Decision, asserting that, through the AB 1613 program, the CPUC is exercising its jurisdiction over the

[3] CPUC Petition at 2-3.

[4] Cal. Pub. Util. Code § 2841(b)(2) (2010). The term "the commission" in the code refers to the CPUC.

[5] *Id.* § 2841(b)(4).

[6] Southern California Gas Company does not join the Joint Utilities in their petition for declaratory order in Docket No. EL10-66-000.

procurement practices of the purchaser utilities, and that the program does not regulate the conduct of the seller/CHP generators.

II. Filings, Notices of Filings, and Responsive Pleadings

A. CPUC Petition, Docket No. EL10-64-000

5. The CPUC requests that the Commission find that the FPA, PURPA and Commission regulations do not preempt the CPUC's AB 1613 Decision to require California utilities to offer to purchase electricity at a CPUC-set price from CHP generators[7] of 20 MW or less that meet environmental compliance requirements. The CPUC argues that the purpose of its AB 1613 Decision and AB 1613 Rehearing Order (together, AB 1613 decisions) is environmental protection, particularly the reduction of greenhouse gas emissions. The CPUC states that its decision achieves this goal by requiring California utilities to offer ten-year standard contracts to eligible CHP generators that meet certain environmental requirements as specified in the statute. According to the CPUC, the rates that it requires the California utilities to offer to pay to such CHP generators reflect the additional costs necessary to meet all of the environmental requirements under AB 1613. In addition, the CPUC states that, for CHP generators located in congested areas, there is a ten percent bonus to reflect the avoided cost of the construction of additional distribution and transmission upgrades. The CPUC does not dispute that the Commission has exclusive authority over rates for wholesale sales under the FPA. Rather, the CPUC contends that it has only required that California electric utilities (the buyer) must offer to purchase under contracts with CPUC-set prices to encourage CHP generators to be constructed, but the CPUC does not require a CHP generator (the seller) to accept that offer. The CPUC also explains that, in its AB 1613 Rehearing Order, it recognized that most, if not all CHP generators, could obtain Qualifying Facility (QF) status at the Commission.[8]

6. The CPUC argues that its AB 1613 Decision should not be preempted by federal law due to the compelling nature and urgency of reducing greenhouse gas emissions. The CPUC relies on environmental data and Environmental Protection Agency reports on climate change to support its argument that climate change is being accelerated by greenhouse gas emissions, and that climate change is posing a threat to the state of California. The CPUC states that electric generation sources account for 25 percent of California's greenhouse gas emissions, and asserts that CHP generators are key elements

[7] CPUC Petition at 9. On rehearing of its AB 1613 decision, the CPUC stated that the price offered under the AB 1613 program should be based on the cost of operating and building a combined cycle gas turbine. AB 1613 Rehearing Order at 8-9.

[8] CPUC Petition at 9-10 (citing AB 1613 Rehearing Order at 6).

to achieving California's goal of cutting greenhouse gas emissions to 1990 levels by 2020. The CPUC also states that California policy makers have identified feed-in tariffs as an important mechanism for promoting efficient CHP systems of 20 MW or less, and that AB 1613 is a statutory directive to establish a feed-in tariff, which seeks to encourage a substantial increase in the use of CHP generators throughout the state. The CPUC asserts that, given the need for immediate action to reduce greenhouse gas emissions, the Joint Utilities' threat to delay the resolution of the dispute over AB 1613 through litigation is contrary to the public interest. The CPUC also asserts that the importance of the Commission's ruling on the CPUC's petition has much greater ramifications than just the dispute between it and the Joint Utilities.

7. The CPUC also argues that its AB 1613 Decision would not be preempted by federal law given the legal authority that states already have over the resource portfolios and procurement of utilities, and due to the different purposes of the environmental protection objectives of AB 1613, compared to the economic objectives of the FPA and PURPA. In addition, the CPUC contends that, based on principles of cooperative federalism, the Commission and state commissions should cooperate to reduce greenhouse gas emissions, and therefore the Commission should find that the CPUC's decisions are not preempted.[9]

8. The CPUC asserts that a preemption analysis (i.e., whether Congress intended to displace state law) would find the presumption is against the preemption of state environmental laws.[10] The CPUC also argues that the Joint Utilities have relied upon outdated Commission cases from the mid-1990s to claim that states are preempted from adopting feed-in tariffs because: (1) the mid-1990s Commission cases did not take into account the urgent need to combat climate change;[11] (2) the FPA and PURPA do not preempt state regulation of discretionary procurement decisions of utilities serving retail

[9] *Id*. at 24-26 (citing *Connecticut Light & Power Co. v. FPC*, 324 U.S. 515, 525-26 (1945)).

[10] *Id*. at 27 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

[11] *Id*. at 29 (citing *Midwest Power Systems, Inc.*, 78 FERC ¶ 61,067 (1997) (*Midwest Power Systems*); *Southern California Edison Co.*, 70 FERC ¶ 61,215, *reconsideration denied*, 71 FERC ¶ 61,269 (1995) (*Southern California Edison*); *Connecticut Light and Power Co.*, 70 FERC ¶ 61,012, *reconsideration denied*, 71 FERC ¶ 61,035 (1995), *appeal dismissed*, *Niagara Mohawk Power Corp. v. FERC*, 117 F.3d 1485 (1997) (*Connecticut*)).

markets;[12] (3) the Commission's recent precedent supports states' efforts to reduce greenhouse gas emissions consistent with the spirit of cooperative federalism underlying the FPA and PURPA;[13] and (4) the Joint Utilities have ignored that, in implementing section 1253(a) of the Energy Policy Act of 2005, the Commission clarified that QFs with 20 MW or less of capacity could still be regulated under state law.[14] Finally, the CPUC requests that, to the extent any relief that it seeks requires waiver of the Commission's regulations, the Commission "should waive any requirements in order to find that the CPUC's feed-in tariffs are not preempted."[15]

9. Notice of the CPUC's petition was published in the *Federal Register*, 75 Fed. Reg. 27,340 (2010), with interventions and protests due on or before June 3, 2010. Timely motions to intervene were filed by: Alliance for Retail Energy Markets, the California Cogeneration Council, the California Municipal Utilities Association, Calpine Corporation, the Cogeneration Association of California (Cogeneration Association), the Electric Power Supply Association (EPSA), Golden State Water Company, NRG Companies, Sacramento Municipal Utility District (SMUD),[16] the Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California (collectively, Six Cities), and the Vermont Department of Public Service. A late motion to intervene was filed by the City of Santa Clara, California (City of Santa Clara). Timely motions to intervene or notices of intervention and comments were filed by: the California Energy Commission, the Clean Energy Group, the Edison Electric Institute (EEI), the Feed-In Tariff Coalition, FuelCell Energy, Inc. (FuelCell), the People of the State of California, *ex rel*. Edmund G. Brown, Jr., Attorney General (California Attorney General), San Joaquin Refining Company, Inc. (San Joaquin Refining), and jointly by the Solar Alliance, the Interstate

[12] *Id*. at 33 (citing *New York v. FERC*, 535 U.S. 1, 20, 23, 28; *Connecticut Light and Power Co. v. FPC*, 324 U.S. at 523-531; *Ameren Energy Marketing Co.*, 96 FERC ¶ 61,306, at 62,189 & n.18 (2001)).

[13] *Id*. at 34- 37 (citing *Southern California Edison*, 70 FERC ¶ 61,215 at 61,675-76; *American Ref-Fuel Co.* 107 FERC ¶ 61,016, at P 2-3 (2004) (*American Ref-Fuel*); *Wheelabrator Lisbon v. Connecticut Dept. of Pub. Util. Control*, 531 F.3d 183, 189 (2d Cir. 2008)).

[14] *Id*. at 40-41 (citing *Revised Regulations Governing Small Power Production and Cogeneration Facilities*, Order No. 671, FERC Stats. & Regs. ¶ 31,203, at P 99, *order on reh'g*, Order No. 671-A, FERC Stats. & Regs. ¶ 31,219, at P 17 (2006)).

[15] *Id*. at 41.

[16] On June 10, 2010, SMUD filed an amendment to its motion to intervene that includes comments on the CPUC's petition.

Renewable Energy Council, the Solar Energy Industries Association, the California Solar Energy Industries Association, and the Vote Solar Initiative (together, Solar Energy Parties). A late motion to intervene and comments were filed by the Energy Producers and Users Coalition (Energy Producers and Users).[17] In addition, a timely motion to intervene, protest and answer was filed by the Joint Utilities.

10. On June 18, 2010, San Joaquin Refining filed an answer to the protest and answer filed by the Joint Utilities and to the comments filed by EEI. On June 23, 2010, the Joint Utilities filed an answer to the comments, protests and motions to intervene of various intervenors in both Docket Nos. EL10-64-000 and EL10-66-000.

11. In its petition, the CPUC requests that, pursuant to Rules 207 and 108 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.207(c) and 18 C.F.R. § 381.108(a) (2010), the Commission grant it an exemption from paying any filing fees for its petition for declaratory order because it is a state agency established under the laws of the state of California.

12. The CPUC submitted a request for official notice concurrently with its petition for declaratory order. In its request, the CPUC asks that the Commission, pursuant to Rules 212 and 508(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 and 18 C.F.R. § 385.508 (2010), take official notice of the documents and statements attached to its petition as Exhibits PUC-1 through PUC-19, which include documents from the CPUC and California Energy Commission's AB 1613 implementation proceedings, including the CPUC's AB 1613 decisions, various federal and state agency reports concerning climate change, and comments filed by SCE and PG&E in the CPUC's separate rulemaking proceeding in R.06-04-009. In support of its request for official notice, the CPUC argues that Rule 508 of the Commission's Rules of Practice and Procedure allows the Commission to "'take official notice of any matter that may be judicially noticed by the courts of the United States, or of any matter about which the Commission, by reasons of its functions, is expert.'"[18] The CPUC filed the same request for official notice in Docket No. EL10-66-000.

13. The California Energy Commission also requests that the Commission take official notice of documents filed with its comments as Exhibits CEC-1 through CEC-4, pursuant to Rule 508 of the Commission's Rules of Practice and Procedure.

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[17] The Energy Producers and Users state that they timely filed this motion to intervene but misstated the Docket Number as ER10-64-000, and mistakenly filed the motion in that proceeding on June 3, 2010.

[18] CPUC Request for Official Notice at 4 (quoting 18 C.F.R. § 385.508(d) (2010)).

14. On May 18, 2010, the CPUC submitted, in both Docket Nos. EL10-64-000 and EL10-66-000, a motion to consolidate the proceeding on its petition and the proceeding on the Joint Utilities' petition on the grounds that both proceedings are petitions for declaratory order involving the same issues of law and fact, the same parties, and the same CPUC orders. The CPUC states that Commission precedent supports consolidating proceedings when similar issues are present in order to ensure administrative efficiency and uniform results.[19] In its comments, the California Energy Commission joins the CPUC's motion to consolidate Docket Nos. EL10-64-000 and EL10-66-000. The Joint Utilities, EEI, and the Feed-In Tariff Coalition support consolidation of Docket Nos. EL10-64-000 and EL10-66-000.

15. On June 14, 2010, in both Docket Nos. EL10-64-000 and EL10-66-000, Solutions For Utilities, Inc. (Solutions for Utilities) filed an email that it sent to President Obama and to the Secretary of Energy that discusses the CPUC's feed-in tariff programs.

B. Joint Utilities' Petition, Docket No. EL10-66-000

16. In their separate petition for declaratory order, the Joint Utilities argue that the CPUC's petition "fails to directly present the clear and precise legal issue before this Commission," namely, "[c]an a state, in furtherance of its own policy interests, demand that wholesale power be purchased from public utilities at a price set by the state, or does the FPA preempt such action?"[20] The Joint Utilities claim that, contrary to the CPUC's argument, the central issue raised by the CPUC's AB 1613 Decision is not a question of fact, policy, or environmental concern, but rather is a question of law.

17. The Joint Utilities contend that the CPUC's implementation of AB 1613 is preempted by the FPA. Specifically, they argue that the Commission's jurisdiction over wholesale power sales by public utilities is exclusive because Congress has preempted the field, and they argue that the CPUC requirement that California utilities purchase wholesale power at state-set prices is preempted by the FPA, and is not "regulation of procurement." The Joint Utilities further argue that the Commission directly addressed this issue in *Midwest Power Systems*, where it found that the Iowa Utilities Board lacked authority to set the rate for wholesale sales of electricity. The Joint Utilities also argue that the CPUC's efforts in its AB 1613 Rehearing Order to re-characterize its decision as merely establishing an "offering price" by the purchaser of power are unavailing because an order requiring a utility to "offer" to buy wholesale power at a CPUC-set price is an

[19] CPUC Motion for Consolidation at 4 (citing *Columbia Gas Transmission, LLC*, 130 FERC ¶ 61,265, at P 29 (2010); *Unocal Pipeline Co.*, 129 FERC ¶ 61,275, at P 13 (2009); *Pacific Gas and Electric Co.*, 83 FERC ¶ 61,212, at 61,938 (1998)).

[20] Joint Utilities' Petition at 2.

order to actually buy wholesale power at a CPUC-set price, insofar as the Joint Utilities have no flexibility to "offer" a different price.[21] The Joint Utilities contend that because the mandatory offer cannot be withdrawn without CPUC direction, the "offer" is a requirement to purchase at the price established by the CPUC.[22] The Joint Utilities also argue that the CPUC is not regulating retail sales service because it is regulating the price of wholesale energy sold by CHP generators. In addition, the Joint Utilities state that other statutes, which have not yet been implemented, such as Senate Bill 32 and AB 920, will require the CPUC to set the price for wholesale power.

18. In addition, the Joint Utilities argue that the Commission's PURPA precedent supports a finding that the states have no authority outside of PURPA to set the price at which wholesale energy must be purchased.[23] The Joint Utilities assert that, although PURPA allows the CPUC to require the Joint Utilities to purchase from QFs at no more than the utility's avoided cost, the pricing structure adopted in the CPUC's AB 1613 Decision results in a price above avoided cost.[24] According to the Joint Utilities, allowing states to set wholesale power prices will start the Commission down a slippery slope, because, if the Commission were to abandon the mandates of the FPA and *Midwest Power Systems*, and to agree that the CPUC's action falls within a state's jurisdiction over procurement, retail sales, energy efficiency, the environment, or any combination of the above, the Commission would open a door to state regulation of wholesale electric energy sales that could not be closed again. The Joint Utilities also request expedited action on their petition.[25]

19. Notice of the Joint Utilities' petition was published in the *Federal Register*, 75 Fed. Reg. 28,604 (2010), with interventions and protests due on or before June 10, 2010. Timely motions to intervene were filed by: the Alliance for Retail Energy Markets, the California Cogeneration Council, Calpine Corporation, the City of Santa Clara, EPSA, Golden State Water Company, the Northern California Power Agency, Six Cities, Southern Company Services, Inc., and the Vermont Department of Public Service. A notice of intervention was filed by the CPUC.

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[21] *Id*. at 16-17.

[22] *Id*. at 17 (citing *Consolidated Edison Co. of New York v. Pub. Serv. Commission of State of New York*, 472 N.E. 2d 981 (N.Y. Ct. App. 1984), *appeal dismissed*, 470 U.S. 1075 (1985) (*Consolidated Edison*)).

[23] *Id*. at 20-21 (citing *Connecticut*, 71 FERC ¶ 61,035 at 61,151).

[24] *Id*. at 7.

[25] EEI supports the Joint Utilities' request for expedited action on their petition.

20. Timely motions to intervene or notices of intervention and comments were filed by the California Municipal Utilities Association, California Energy Commission,[26] the Clean Energy Group, EEI, the Feed-In Tariff Coalition, FuelCell, and SMUD.

21. In addition, timely motions to intervene and protests were filed by the California Attorney General, the Cogeneration Association, Energy Producers and Users, San Joaquin Refining, and the Solar Energy Parties. The CPUC filed a notice of intervention and a protest to the Joint Utilities' petition. On June 25, 2010, San Joaquin Refining filed an answer to the comments submitted by EEI. On July 2, 2010, in both Docket Nos. EL10-64-000 and EL10-66-000, the CPUC filed an answer to the Joint Utilities' answer and a request for official notice in which it asks that the Commission take official notice of the documents and statements attached to its July 2 answer as Exhibits PUC-20 and PUC-21.

III. Protests and Comments

A. Joint Utilities' Protest and Answer to CPUC Petition

22. In their protest and answer to the CPUC's petition, the Joint Utilities argue the FPA does not allow state regulation of wholesale sales to achieve state environmental goals, and that federal preemption cannot be avoided based on the purpose of the preempted state regulation. The Joint Utilities also argue that, although they fully support the environmental goals of the state of California, the CPUC's discussion of environmental issues is irrelevant to the legal issues presented by the CPUC's AB 1613 Decisions. They also state that the proceedings implementing AB 1613 contain none of the record on global warming that is discussed in the CPUC's petition.

23. The Joint Utilities further argue that, because the Commission has exclusive jurisdiction to regulate the price of wholesale energy sales by public utilities, there can be no exception for CHP generators of 20 MW or less.[27] The Joint Utilities argue that, because Congress has not amended the FPA to enable states to address climate change by regulating interstate wholesale energy rates, the Commission's order in *Midwest Power Systems* is still controlling precedent. The Joint Utilities assert that the CPUC's citations to principles of cooperative federalism and to the enactment of PURPA as an example of such cooperation do not support the CPUC's desired expansion of state authority in the

[26] The California Energy Commission filed the same timely motion to intervene and comments in both Docket Nos. EL10-64-000 and EL10-66-000.

[27] Joint Utilities' Protest at 12-13 (citing *FPC v. Southern California Edison Co.*, 376 U.S. 205, 215-16 (1964); *Public Util. Dist. No. 1 of Grays Harbor County Washington v. IDACORP, Inc.*, 379 F.3d 641, 646-47 (9th Cir. 2004)).

field of wholesale energy regulation, because the Commission cannot delegate its ratemaking authority to the states.

24. In addition, the Joint Utilities argue that the CPUC cannot justify its AB 1613 Decisions under PURPA, and that section 210(m) of PURPA and Order No. 671 are inapplicable because the CPUC's AB 1613 Decisions held that CHP generators do not need to be QFs, and adopted a price that is not related to avoided cost rates currently in effect. The Joint Utilities state that the CPUC's petition cannot substitute its AB 1613 pricing scheme as an alternative method for determining the long-term avoided cost for affected CHP generators because the CPUC had not previously provided notice that it would adopt a price intended to be a "substitution of alternative method" under section 292.302(d) of the Commission's regulations or an avoided cost price pursuant to section 292.304(e) of the Commission's regulations. The Joint Utilities argue that, contrary to the CPUC's interpretation, section 292.302(d) does not establish an alternative method for setting the avoided cost.

25. Further, the Joint Utilities assert that, even if the Commission reviewed the CPUC's rate for CHP generators for consistency with PURPA, the CPUC has not met the standard for "real environmental costs" set forth in *Southern California Edison*.[28] The Joint Utilities conclude that "the CPUC 'may not set avoided cost rates … by imposing environmental adders or subtractors that are not based on real costs' because it 'would result in rates which exceed the incremental cost to the electric utility and are prohibited by PURPA.'"[29] They also contend that state authority to set a price for environmental benefits separate from the rate for electricity does not support the CPUC's action here because the CPUC is pricing electricity only.[30] They also contend that the Commission has chosen not to regulate small QFs, and that "it has affirmatively indicated that the states may only regulate them pursuant to the PURPA avoided cost scheme."[31]

26. In their answer to the comments and protests on the two petitions, the Joint Utilities argue that the CPUC never intended to adopt an avoided cost rate pursuant to PURPA, and that the CPUC did not undertake any analysis of the facts necessary to determine the actual costs a state utility would avoid through its purchase of AB 1613 power. The Joint Utilities also argue that simply calling the AB 1613 mandatory purchase price a long-term avoided cost does not change the fact that the price adopted in

[28] *Id*. at 19 (citing 71 FERC ¶ 61,269 at 62,080).

[29] *Id*.

[30] *Id*. at 20 (citing *American Ref-Fuel*, 107 FERC ¶ 61,016).

[31] *Id*. at 21 (citing 18 C.F.R. § 292.602(c)(1) (2010)).

the CPUC's AB 1613 Decisions is not the same as the currently effective avoided-cost rate for purchases from QFs, either short-run or long-run.[32] In addition, the Joint Utilities state that the energy and capacity payment formulas are different under the CPUC AB 1613 Rehearing Order and the CPUC's QF pricing decision.[33]

27. The Joint Utilities argue that the Commission should not waive any requirements implicated by the CPUC's actions to implement AB 1613 because the CPUC does not identify which requirements it wants waived, as required by Commission regulations.[34] Finally, the Joint Utilities argue that the CPUC's assertion that the Joint Utilities have threatened to slow down California's progress through prolonged litigation should be disregarded.

B. CPUC Protest to the Joint Utilities' Petition

28. In its protest to the Joint Utilities' petition, the CPUC disagrees with the Joint Utilities' assertion that the CPUC failed to present the legal issue, and the CPUC argues that it relied on the following three distinct legal arguments: (1) the CPUC's regulation of what the utility must offer in a contract to a CHP generator does not constitute regulation of the seller in the wholesale market; (2) the FPA and PURPA do not occupy the field of environmental regulation; and/or alternatively (3) to the extent that PURPA is implicated, the modifications in the AB 1613 Rehearing Order clarify that the CPUC's feed-in tariff does not exceed the Joint Utilities' long-term avoided costs.

29. The CPUC argues that the Joint Utilities mischaracterize the CPUC's AB 1613 Decision and AB 1613 Rehearing Order, and states that the Joint Utilities are mistaken in their assumption that the regulation of wholesale rates is so broad that it extends to either: (1) the state's regulation of the retail utility's procurement activities; or (2) state efforts to promote its citizens' health and welfare by reducing greenhouse gas emissions that result from consumption of fossil fuels and the consumption of electricity. The CPUC argues that, where the presumption of state police powers is at issue, the Supreme Court has concluded that the scope of preemption should be narrowly construed.[35] The CPUC argues that the FPA did not occupy the field of all utility regulation affecting wholesale

[32] Joint Utilities Answer, Docket Nos. EL10-64-000 and EL10-66-000, at 26 (filed June 23, 2010).

[33] *Id*. (citing CPUC Rulemaking 04-040003/04-04-025, Opinion on Future Policy and Pricing for Qualifying Facilities, CPUC Decision 07-09-040 (Sept. 20, 2007)).

[34] Joint Utilities Protest at 21 (citing 18 C.F.R. § 35.13(a) (2010)).

[35] CPUC Protest at 6 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

transactions, but rather preserved the states' authority to regulate retail sales, procurement, and the resource portfolios of the retail utilities.[36] The CPUC contends that its AB 1613 feed-in tariff simply requires that utilities offer to buy power at a price sufficient to encourage the development of highly efficient CHP. The CPUC also contends that the cases cited in the Joint Utilities' petition do not support the Joint Utilities' expansive reading of field preemption.[37]

30. The CPUC argues that the Commission's ratemaking authority under sections 205 and 206 of the FPA does not provide the Commission with authority to decide environmental matters.[38] The CPUC also asserts that the Joint Utilities fail to address *American Ref-Fuel*, where the Commission found that state law controlled the disposition of renewable energy credits (RECs), and that PURPA's avoided cost provisions did not contemplate the inclusion of environmental attributes, and therefore that state law controls. According to the CPUC, a premium paid though a feed-in tariff is indistinguishable from a premium paid for a REC in a state-mandated renewable portfolio standards (RPS) program.[39] In addition, the CPUC argues that the Joint Utilities should be estopped from arguing that the FPA's preemption of the regulation of wholesale transactions extends to state regulations with an environmental purpose, because their position in this case conflicts with the position they took in the CPUC's AB 32 implementation proceeding.

31. The CPUC argues that, in its AB 1613 Rehearing Order, it clarified that the AB 1613 feed-in tariff does not exceed the Joint Utilities' long-term avoided cost. The CPUC explains that its AB 1613 Rehearing Order corrected numerous findings distinguishing between short-run avoided costs and the utilities' environmental

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[36] *Id*. at 8-12 (citing *Connecticut Light and Power Co. v. FPC*, 324 U.S. at 525-26 (1945); *New York v. FERC*, 535 U.S. at 24; *Consolidated Edison Co. of N.Y. v. Pub. Serv. Comm'n of State of N.Y.*, 472 N.E.2d 981 (N.Y. Ct. App. 1984); *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493 (1989); *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84 (1963); *Ameren Energy Marketing*, 96 FERC ¶ 61,306, at 62,189 n.18 (2001); *Central Vermont Pub. Serv. Corp.*, 84 FERC ¶ 61,194, at 61,975 (1998)).

[37] *Id*. at 6 (citing *PG&E v. State Energy Resources and Conservation and Development Commission*, 461 U.S. 190, 212-13 (1983)).

[38] *Id*. at 13 (citing *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 956-57 (D.C. Cir. 2000); *Monongahela Power Co.*, 39 FERC ¶ 61,350, at 62,097 (1987); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960)).

[39] *Id*. at 16.

compliance requirements, and that references to "avoided costs" in the AB 1613 Decision "should have been to 'short-term avoided costs' and, therefore, the short-term avoided cost determination [set by the CPUC in a different proceeding] should not set the limit on the price that the utilities must offer for CHP systems under AB 1613."[40] The CPUC states that, in making this clarification, it was not conceding that it was setting prices above avoided costs, but rather was distinguishing between its previous determination of "short-run" avoided costs and "long-term" avoided costs.[41] The CPUC also asserts that its AB 1613 Rehearing Order noted that the Joint Utilities' long-term procurement costs would include environmental compliance costs, and that such environmental costs could be considered avoided costs by the CPUC's AB 1613 feed-in tariff.

32. Finally, the CPUC argues that the Joint Utilities contradict the main purpose of PURPA by claiming that the CPUC's decisions, which try to encourage CHP generators, are preempted by PURPA. In this regard, the CPUC argues that the main reason that section 210 of PURPA was enacted was to encourage cogeneration and other small power production facilities. The CPUC also points out that the Joint Utilities' petition does not address the exemption under Order No. 671 of small QFs of 20 MW or less from FPA sections 205 and 206.[42] The CPUC disagrees with the Joint Utilities' argument that the Commission only allows state commissions to set wholesale rates if they exercise their authority under PURPA to set avoided cost prices for small QFs, citing the Commission's statement in Order No. 671-A "that having QF sales regulated at the state level is sufficient, and will allow us to close the regulatory gap while not dramatically or inappropriately increasing the regulatory burden on QFs…."[43] The CPUC also asserts that in Order No. 688 the Commission, in relieving utilities of the obligation to enter into contracts with QFs if it finds that the QFs have nondiscriminatory access to the specified markets, created a rebuttable presumption that utilities should be required to enter into contracts with QFs with 20 MW or less of capacity.[44]

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[40] *Id*. at 19.

[41] The CPUC also adds that to the extent that the Commission deemed it necessary, "pursuant to 18 C.F.R. § 292.302(d)(2), more than 30 days ago the CPUC provided notice to the [Commission] of this substitution of an alternative method for long-term avoided costs for CHP facilities of 20 MW or less." *Id*. at 21.

[42] *Id*. at 22 (citing Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 99).

[43] *Id*. at 23 (citing Order No. 671-A, FERC Stats. & Regs. ¶ 31,219 at P 17-18).

[44] *Id*. at 24 (citing *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities,* Order No. 688, FERC Stats. & Regs. ¶ 31,233, at P 6, 76-78 (2006)).

C. Other Comments and Protests

33. The California Attorney General, the California Energy Commission,[45] the Clean Energy Group,[46] the Cogeneration Association, the Energy Producers and Users, the Feed-In Tariff Coalition,[47] FuelCell, San Joaquin Refining, and the Solar Energy Parties support the CPUC's petition, and argue that the Commission should find that the CPUC's AB 1613 feed-in tariff for CHP generators is *not* preempted by federal law, and that the Joint Utilities' petition should be denied.

34. The Joint Utilities and EEI oppose the CPUC's petition, and argue that the Commission should reject the request made by the CPUC, and find that the CPUC's AB 1613 program is preempted by the FPA.

35. The California Municipal Utilities Association, SMUD and Solutions For Utilities filed comments on issues that they contend are raised by the two petitions.

1. Comments Supporting CPUC Petition and Opposing Joint Utilities' Petition

36. The California Attorney General, the California Energy Commission and the Clean Energy Group argue that the CPUC's feed-in tariff does not set a wholesale rate for generators, but rather creates an offer to buy as part of utility procurement designed to promote energy efficiency and reduction of greenhouse gas emissions.[48] The California

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[45] The California Energy Commission states that it is the primary energy policy and planning agency of the state of California, and has a statutory obligation to support the development of CHP generators. It states that it "has a 'vested interest' in seeing that the role of the CPUC under AB 1613 is allowed to be performed as intended by the legislature…." California Energy Commission, Comments, Docket Nos. EL10-64-000 and EL10-66-000, at 2, 9 (filed June 3, 2010). The California Energy Commission also states that its role is to ensure that eligible CHP generators meet rigorous environmental standards primarily concerning efficiency and greenhouse gas emissions reductions. *Id*. at 10-11.

[46] The Clean Energy Group states that it is a non-profit organization that works with states on development of renewable energy policy.

[47] The Feed-In Tariff Coalition is a California-based entity that advocates for feed-in tariffs, wholesale distributed generation and other renewable energy policy solutions.

[48] The California Attorney General submitted a protest to the Joint Utilities' petition that is substantially the same pleading as its comments filed in support of the

(continued…)

Attorney General asserts that under the CPUC's feed-in tariff program, the CHP generator retains the authority to sell at any rate its sees fit and to any buyer, while benefiting from the option to sell to the utilities at the feed-in tariff rate, and the Commission retains its authority to review the contract, including the feed-in rate, once entered.[49] The Solar Energy Parties similarly argue that because the CPUC's AB 1613 program is a must-offer program, not a must-buy program, it does not establish rates for the sale of power at wholesale by public utilities.[50]

37. The California Attorney General argues that by setting an offer for purchase, the CPUC's feed-in tariff is part of its management of utility procurement, which is an essential element of the state's traditional authority and function, and does not constitute a wholesale rate.[51] The California Attorney General argues that there is a presumption against preemption of the CPUC's AB 1613 Decision because the CPUC's implementation of AB 1613 relates to state health and safety, and therefore falls within one of the traditional police powers of the state of California.[52]

38. The California Energy Commission agrees with the CPUC that AB 1613 is an environmental protection law, and that the Commission should consider the CPUC AB 1613 decisions in light of recent efforts by the state of California to combat climate change and as a part of California's greenhouse gas emissions reduction plan. In addition, the California Energy Commission argues that the Commission should find that the CPUC AB 1613 feed-in tariff is not a sale subject to the Commission's FPA jurisdiction because AB 1613 states that the legislature's intent was not to permit eligible generators to operate as *de facto* wholesale generators with guaranteed purchasers for their electricity.[53]

CPUC's petition. The California Energy Commission also submitted the same pleading and exhibits in both Docket Nos. EL10-64-000 and EL10-66-000.

[49] California Attorney General, Comments, Docket No. EL10-64-000, at 8 (filed June 2, 2010).

[50] Solar Energy Parties, Comments, Docket No. EL10-66-000, at 11 (filed June 10, 2010).

[51] California Attorney General, Comments, Docket No. EL10-64-000, at 9 (filed June 2, 2010) (citing *Southern California Edison*, 71 FERC ¶ 61,269 (1995)).

[52] *Id*. at 5 (citations omitted).

[53] California Energy Commission, Comments, Docket Nos. EL10-64-000 and EL10-66-000, at 14 (filed June 3, 2010) (citing Cal. Pub. Util. Code § 2843, subd. (b);

(continued…)

39. The California Attorney General also contends that *Midwest Power Systems* and *Connecticut* both concerned state-created obligations for power purchase and contracts for sale, not a requirement simply for the utility to provide an offer to purchase. The Solar Energy Parties argue that *Midwest Power Systems* and *Connecticut* are not controlling on state programs that establish prices that utilities must offer to pay, so long as contracts entered into are subject to the Commission's approval under the FPA. The California Energy Commission argues that because these cases precede California's environmental laws by about a decade, the Commission should consider the CPUC AB 1613 decisions in a different light from that of these mid-1990's Commission orders.[54] The California Energy Commission also argues that the Commission should establish precedent in response to the CPUC and Joint Utilities' petitions "that state commissions may compel utilities to offer feed-in tariffs, under contract prices set by the state…."[55] The Clean Energy Group similarly argues that the Commission should reexamine decade old precedent in *Midwest Power Systems* and *Connecticut* that suggests that states are bound by PURPA's avoided cost caps even where they act under state law to set rates for offers to purchase that apply to entities with QF status.[56] The Feed-In Tariff Coalition states that the Commission should distinguish *Midwest Power Systems* because the AB 1613 feed-in tariff is not an above avoided cost rate.

40. The California Attorney General and the Solar Energy Parties also argue that because the Commission has exempted QFs under 20 MW from sections 205 and 206 of the FPA, and because the CPUC's feed-in tariff for excess power from CHP generators applies only to generators that are 20 MW or smaller, the CPUC has authority to set feed-in tariff rates. However, the Solar Energy Parties state that non-QF CHP generators that sell power at wholesale will be subject to the Commission's rate regulation under FPA sections 205 and 206.

41. The California Attorney General argues that, to the extent the Commission's decisions in *Midwest Power Systems* and *Connecticut* can be read to require state-set

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Renewable Energy Prices in State-Level Feed-in Tariffs: Federal Law Constraints and Possible Solutions, Technical Report, NREL/TP-6A2-47408 (NREL January 2010) pp. 23-26, available at *www.nrel.gov/docs/fy10osti/47408.pdf*) (NREL Feed-In Tariff Report).

[54] *Id*. at 12.

[55] *Id*. at 14.

[56] Clean Energy Group, Comments, Docket No. EL10-64-000, at 9 (filed June 3, 2010); Clean Energy Group, Comments, Docket No. EL10-66-000, at 16 (filed June 10, 2010).

rates to comply with PURPA avoided cost requirements, even if the sellers are not certified as QFs, that issue does not arise with respect to the CPUC feed-in tariff. According to the California Attorney General, under the California law, the CPUC must set the offer to purchase at rates that "'ensure that the ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff,'" and that this, by definition, is an avoided cost rate.[57] The Solar Energy Parties argue that the CPUC's implementation of AB 1613 is consistent with the FPA, PURPA and Commission regulations because the CPUC is limited in its rate setting ability by the statutory caveat that it ensure that ratepayers are held indifferent to the feed-in tariff.[58] The Solar Energy Parties assert that by statutorily overlaying the customer indifference standard on the rate to be set, the California legislature ensured that the CPUC would not exceed its ratemaking authority under PURPA. They also argue that the CPUC's pricing mechanism for CHP generators reflects utilities' avoided cost, because the CHP contracts will typically be 10-year contracts, and because the utilities will be avoiding a significant amount of environmental compliance costs, as well as the avoided cost associated with distribution and transmission upgrades when the CHP systems are located in congested transmission areas and load pockets.

42. The California Attorney General also argues that if the Commission determines that the CPUC feed-in tariff constitutes a wholesale rate, the CPUC nonetheless retains authority to set such a rate because under PURPA, states have the authority to set avoided cost rates for QFs, and the Commission provides to the state great deference for rate setting and "'wide latitude in implementing PURPA.'"[59] The Energy Producers and Users similarly argue that the feed-in tariff pricing adopted by the CPUC is simply another formulation of PURPA avoided cost pricing. FuelCell also argues that the CPUC's AB 1613 program is consistent with the CPUC's authority under PURPA, and asserts that given the parameters of the AB 1613 program, the fact that the pricing mechanism reflects the avoided cost and attributes of a clean marginal resource, and the significant discretion afforded the states in establishing avoided cost prices under

[57] California Attorney General, Comments, Docket No. EL10-64-000, at 13 (filed June 2, 2010).

[58] Solar Energy Parties Comments, Docket No. EL10-64-000, at 8 (filed June 3, 2010) (quoting California Public Utilities Code Section 2841(b)(4) (2010)).

[59] California Attorney General, Comments, Docket No. EL10-64-000, at 11 (filed June 2, 2010) (quoting *Southern California Edison*, 70 FERC ¶ 61,215, at 61,675 & n.17; citing *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Indep. Energy Producers and Users Ass'n v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 856 (9th Cir. 1994); *Metro Edison Co. and Pa. Elec. Co.*, 72 FERC ¶ 61,015, at 61,051-52, *reconsideration denied*, 72 FERC ¶ 61,224 (1995)).

PURPA, the Commission should find that the CPUC's AB 1613 program is consistent with PURPA requirements.[60] Further, FuelCell argues that there is nothing in PURPA or the PURPA regulations suggesting that the CPUC cannot establish a statutory CHP program that is open to both QFs and non-QFs, as long as the CPUC is properly exercising its authority under PURPA with respect to QF transactions.[61]

43. The Clean Energy Group argues that the Commission should conclude that the CPUC's AB 1613 feed-in tariff does not violate federal law so long as: (1) the CPUC maintains its feed-in tariff as a mandate to utilities to offer to purchase from CHP generators, not a wholesale transaction; and (2) the feed-in tariff applies to QF certified CHP generators of 20 MW or less, which the Clean Energy Group argues are exempt from the rate filings of FPA sections 205 and 206.[62] The Clean Energy Group contends that the FPA does not preempt states from setting prices for utility offers to purchase that a seller is free to reject, and argues that the feed-in tariff serves as a tool by which states can guide a utility's purchasing decision.[63]

44. The Clean Energy Group also argues that the Commission should provide guidance for future cases so that states have a clear path to move forward if they choose to implement feed-in tariffs, arguing that the Commission should clarify that states retain authority under state law (and independent of PURPA) to compel utilities to offer to purchase power at state-set rates, and to clarify whether QF status caps the utility's purchase obligation at the avoided cost when the purchase obligation is a state law obligation rather than a PURPA obligation.[64] The Clean Energy Group contends that the

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[60] FuelCell Comments, Docket No. EL10-64-000, at 8 (filed June 3, 2010).

[61] FuelCell Comments, Docket No. EL10-66-000, at 4 (filed June 10, 2010).

[62] Clean Energy Group, Comments, Docket No. EL10-64-000, at 8-9 (filed June 3, 2010); Clean Energy Group, Comments, Docket No. EL10-66-000, at 5 (filed June 10, 2010).

[63] Clean Energy Group, Comments, Docket No. EL10-66-000, at 12 (filed June 10, 2010) (citing *Central Vermont Public Serv. Corp.*, 84 FERC ¶ 61,194 (1998); *Philadelphia Elec. Co.*, 15 FERC ¶ 61,264 (1981); *Southern Company Services, Inc.*, 26 FERC ¶ 61,360 (1984); *Southern California Edison*, 71 FERC ¶ 61,269).

[64] In this regard, the Clean Energy Group argues that a finding of no cap, in the context of a state law mandate, would be logical because it would put the QF in the same position as non-QFs in terms of ability to sell outside of PURPA (i.e., being free from the avoided cost constraint). Clean Energy Group, Comments, Docket No. EL10-66-000, at 15-16 (filed June 10, 2010).

Commission should create safe harbor price caps to eliminate the need for a case-by-case review of feed-in tariff based contracts by the Commission in situations where a contract results from a seller's acceptance of a feed-in rate offer and requires approval under the FPA because the seller is a non-QF or is a QF larger than 20 MW.[65]

45. The Clean Energy Group argues that the Commission should revisit its determinations in *Southern California Edison* in order to supplement its explanation in that case on ways that states can reflect the added costs of environmental compliance in avoided cost rates without running afoul of PURPA. It also argues that the Commission should clarify that a state may always rely on its PURPA mandate to implement feed-in tariff rates, and that a state that chooses to do so may also supplement avoided cost payments by assigning renewable energy credits, making cash grants or additional payments to renewables through a systems benefits charge, or establishing a price that exceeds avoided cost but granting the purchasing utility a tax credit equal to the excess.[66]

46. The Cogeneration Association argues that the Commission can resolve the issues raised in the two petitions without reaching the question of federal preemption related to wholesale rates, and should allow the CPUC's AB 1613 program to move forward because the intent of the CPUC's AB 1613 program is to encourage CHP resources consistent with PURPA's express goals.[67] Both the Cogeneration Association and the Energy Producers and Users assert that if the Commission determines that the CPUC's feed-in tariff is preempted by federal law, it could create a broader program under which state-created mechanisms like the CPUC's feed-in tariff could be approved; and that program criteria to qualify for such a waiver of federal preemption could include requirements that the feed-in tariff be explicitly sanctioned by state law and earmarked to achieve greenhouse gas reductions. Both also argue that feed-in tariffs are "vital

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[65] The Clean Energy Group incorporates the suggestions from the January 2010 NREL Feed-In Tariff Report for structuring such a safe harbor. Clean Energy Group, Comments, Docket No. EL10-66-000, at 17-18 (filed June 10, 2010) (citing NREL Feed-In Tariff Report at 23-25).

[66] *Id*. at 18-19 (citing *Southern California Edison*, 71 FERC ¶ 61,269; *American Ref- Fuel Co.*, 105 FERC ¶ 61,004, at P 23 (2003); *CGE Fulton*, 70 FERC ¶ 61,290, *reconsideration denied*, 71 FERC ¶ 61,232 (1995)).

[67] The Cogeneration Association represents CHP interests of a number of cogeneration companies. The Energy Producers and Users is an association representing the large industrial and commercial consumer and CHP interests of its members. The Energy Producers and Users agree with and endorse the protest filed by the Cogeneration Association in Docket No. EL10-66-000. Energy Producers and Users, Protest, Docket No. EL10-66-000, at 3 (filed June 10, 2010).

weapons" in California's fight against climate change that the Commission should support, and contend that if the Commission smothers California's efforts on a feed-in tariff, it will establish precedent that could block renewable energy feed-in tariffs nationwide.

47. Similarly, the Feed-In Tariff Coalition urges the Commission to clarify that the CPUC is within its authority in setting the AB 1613 feed-in tariff rates and to encourage state utility commissions and legislatures to quickly bring robust feed-in tariffs online, and argues that feed-in tariffs are a proven policy tool for rapid acceleration of renewable energy deployment. The Feed-In Tariff Coalition also argues that the Commission should expand the question presented to feed-in tariff rate setting authority more generally, and find in favor of state authority for 20 MW and below CHP generators that are QFs.[68] The Feed-In Tariff Coalition also contends that California's existing renewable portfolio standard system and feed-in tariff program already set above avoided cost prices and the utilities have not previously objected.[69]

48. FuelCell argues that the CPUC's implementation of AB 1613 is consistent with the Commission's approach to regulating non-QF sellers because the CPUC-approved tariff and standardized contract prescribe terms and conditions that conform to state statutory requirements. FuelCell asserts that to the extent a jurisdictional non-QF seller participates in the AB 1613 program, it would remain subject to any applicable obligations under the FPA. In addition, FuelCell argues that the CPUC's AB 1613 program is consistent with section 201(b) of the FPA, and that the Commission should confirm that as long as a jurisdictional seller has complied with any applicable Commission requirements that it self-certify as a QF or comply with market-based rate seller filing and reporting requirements, it should be allowed to participate in the AB 1613 program.[70]

49. San Joaquin Refining states that its planned CHP project is the type of project that the California legislature intended to encourage in enacting AB 1613, but states that if its project is to succeed, it must obtain a contract for the sale of excess power produced by the project under reasonable terms and at reasonable prices. San Joaquin Refining also

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[68] Feed-In Tariff Coalition, Comments, Docket No. EL10-64-000, at 11 (filed June 3, 2010); Feed-In Tariff Coalition, Comments, Docket No. EL10-66-000, at 11 (filed June 10, 2010) (citing Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 50-51; Order No. 671-A, FERC Stats. & Regs. ¶ 31,219).

[69] Feed-In Tariff Coalition, Comments, Docket No. EL10-64-000, at 13-14 (filed June 3, 2010).

[70] FuelCell, Comments, Docket No. EL10-66-000, at 7 (filed June 10, 2010).

argues that PURPA provides the Commission with a means to support the CPUC's rulings because under PURPA, the CPUC has authority to regulate the avoided cost rates paid to QFs, and that Commission regulations exempt sales of energy or capacity made by QFs 20 MW or smaller from FPA sections 205 and 206.[71] In addition, San Joaquin Refining argues that the Commission may clarify that the CPUC's AB 1613 decisions are consistent with PURPA regardless of whether the CPUC made any such finding.[72] San Joaquin Refining argues that the record in the CPUC proceeding supports a finding that the AB 1613 adopted pricing option is a measure of the avoided cost of the California utilities insofar as the AB 1613 rate is based on the CPUC's market price referent (MPR), which is the key pricing benchmark used in California's Renewables Portfolio Standard (RPS) program. San Joaquin Refining concludes that because the CPUC has already adopted the use of the MPR as a key measure of the costs that the utilities avoid through their purchase of power from QFs, there is legal authority to support a finding that the MPR is a measure of long-term avoided cost.[73]

2. Comments Opposing CPUC Petition and Supporting Joint Utilities' Petition

50. EEI argues that the CPUC's AB 1613 program is preempted by the FPA because the CPUC is mandating the purchase price of wholesale electric energy from CHP generators. EEI asserts that the contracts the utilities would be required to enter into as a result of the CPUC AB 1613 Decision would be contracts for the wholesale sale of electricity, which are subject to the exclusive jurisdiction of the Commission under section 205 of the FPA.[74] EEI also argues that if states require wholesale power purchases from QFs, such purchases are subject to the Commission's PURPA regulations, and must be at avoided cost.[75] EEI asserts that the CPUC seeks to bypass PURPA's avoided cost limit, and makes no attempt to justify its pricing methodology as avoided cost. EEI argues that the Commission should reject the CPUC's reliance on

[71] San Joaquin Refining, Comments, EL10-64-000, at 6 (filed June 3, 2010); San Joaquin Refining, Protest, Docket No. EL10-66-000, at 6 (filed June 10, 2010) (citing 18 C.F.R. § 292.601(c)(1) (2010)).

[72] San Joaquin Refining, Answer, Docket No. EL10-64-000, at 3-4 (filed June 18, 2010).

[73] *Id*. at 7.

[74] EEI, Comments, Docket No. EL10-64-000, at 4-5 (filed June 3, 2010) (citing *Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246).

[75] *Id*. at 9 (citing *Southern California Edison*, 70 FERC ¶ 61,215 at 61,676).

section 292.302(d)(2) of the Commission's regulations as an alternative method for establishing the long-term avoided cost of CHP generators of 20 MW or less. According to EEI, the CPUC's attempt to impose a ten percent surcharge on avoided cost does not meet the requirements of an alternative methodology because it constitutes a different rate design methodology in contravention of section 292.302(d)(2).

51. In addition, EEI takes issue with the CPUC's argument that the FPA and PURPA, as economic statutes, should not prevent the CPUC from implementing its AB 1613 program, because the CPUC is seeking to use economic regulation to promote its environmental agenda. EEI also argues that *American Ref-Fuel* is inapposite because the Commission, in that case, narrowly held that the ownership of RECs is not an issue controlled by PURPA, and "reaffirmed that 'PURPA does determine the rate which electric utilities must offer to purchase electric energy from QFs.'"[76]

52. In its comments in response to the Joint Utilities' petition, EEI reiterates the arguments it made in its comments on the CPUC's petition and agrees with the Joint Utilities that there is no legal basis for the CPUC to set wholesale power rates. EEI argues that the CPUC cannot, under the guise of environmental regulation, adopt an economic regulation that requires purchases of electricity at a wholesale price outside the framework of the FPA and PURPA, or if acting under PURPA, at a price that exceeds avoided cost. EEI also agrees with the Joint Utilities that the price that the CPUC's AB 1613 Decisions would impose exceeds avoided cost and applies broadly to CHP facilities, whether or not they are QFs, and notes that the CPUC admits that it is purposefully adopting a price above the utilities' short run avoided cost to compensate for "'societal benefits.'"[77] Further, EEI argues that *Midwest Power Systems* clearly and correctly determines that if a state exercises its authority to set rates for purchases from QFs, such action must be taken under PURPA, and the rates cannot exceed avoided cost.

53. The California Municipal Utilities Association states that its members "are not subject to the Commission's rate jurisdiction or the CPUC's jurisdiction" and therefore "there are no 'mandates' to buy in their programs because [California Municipal Utilities Association] members are both regulators and purchasers."[78] The California Municipal Utilities Association does not oppose arguments that characterize AB 1613 as an environmental statute; however, it argues that this characterization does not "validate

[76] *Id*. (quoting 107 FERC ¶ 61,016 at P 1).

[77] EEI, Comments, Docket No. EL10-66-000, at 7 (filed June 10, 2010) (quoting CPUC AB 1613 Decision at 16-17).

[78] It is not clear who would be subject to such "mandates" or what programs the California Municipal Utilities Association is referring to in its comments.

otherwise-preempted state wholesale ratesetting."[79] The California Municipal Utilities Association asserts that a state cannot nullify a question of preemption by declaring legislative intent that falls within state authority, and argues that if price setting by the CPUC under the guise of AB 1613 was justified by the characterization of AB 1613 as an environmental law, this precedent would fundamentally alter the regulatory framework for wholesale markets in California. The California Municipal Utilities Association urges the Commission to focus narrowly on the specifics of the CPUC AB 1613 Decision so as to avoid unnecessarily disrupting net metering and small distributed-generation programs, which are regulated by locally-elected boards. Further, the California Municipal Utilities Association agrees with the Joint Utilities that there are a myriad of state initiatives to stimulate renewable development through standard offers.

3. Other Comments

54. The Clean Energy Group argues that the Commission should initiate a rulemaking, notice of inquiry, technical conference or other additional proceedings as needed in order to explore options by which states can implement feed-in tariffs consistent with federal law. The California Municipal Utilities Association argues that if the Commission finds that certain transactions must be considered subject to exclusive federal jurisdiction, the Commission should convene workshops, technical conferences or other procedural vehicles to explore how effective programs at the state and local level can be crafted to avoid federal preemption.

55. The California Municipal Utilities Association and FuelCell request that the Commission clarify that any ruling on the extent of the federal preemption of the CPUC's AB 1613 program does not apply to public agency sellers that are exempt from Commission jurisdiction under section 201(f) of the FPA.[80]

56. SMUD takes no position regarding the issues raised in the petitions for declaratory order, but urges the Commission to focus its determination narrowly so as to avoid unnecessarily addressing whether distribution-level feed-in tariffs, and related sales for resale from facilities connected to distributions systems, are subject to the Commission's jurisdiction.[81] SMUD asserts that the petitions offer no reason for the Commission to

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[79] California Municipal Utilities Association, Comments, Docket No. EL10-66-000, at 3 (filed June 10, 2010).

[80] 16 U.S.C. § 824(f) (2006).

[81] SMUD's June 10, 2010 amendment to its motion to intervene in Docket No. EL10-64-000 contains the same comments that it filed on June 10, 2010 in Docket No. EL10-66-000.

reach the question of whether distribution-level feed-in tariffs interconnecting generation facilities to utility distribution facilities are subject to Commission authority. Further, SMUD argues that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction because FPA section 201(b)(1) explicitly excludes from Commission jurisdiction facilities used in local distribution and any unbundled retail service occurring over those facilities.[82] SMUD also argues that sales of power under distribution-level feed-in tariffs cannot be interstate commerce because the power sold does not enter the bulk transmission system or interstate commerce, but remains on the state-regulated distribution system. SMUD argues that there is no reason for the Commission to address this jurisdictional question in this proceeding, and contends that a broad Commission ruling would call into question the scope of the Commission's distribution exemption under FPA section 201(b)(1). In this regard, SMUD asserts that a decision asserting Commission jurisdiction over all distribution-level power sales to utilities would bring within the Commission's regulatory reach millions of homeowners, farmers or businesses using rooftop solar panels or small wind turbines who sell power to the local utility, other than on a net-metering basis, creating potentially millions of Commission jurisdictional suppliers of power.

57. In their answer to the comments and protests to the two petitions, the Joint Utilities argue that the Commission should deny SMUD's argument that the Commission should clarify that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction. The Joint Utilities assert that SMUD ignores case law providing that the Commission has jurisdiction over any (non-government owned) facility used for a sale for resale, as well as sales for resale, regardless of the facilities used.

58. In its letter filed in Docket Nos. EL10-64-000 and EL10-66-000,[83] Solutions For Utilities states that there does not appear to be any oversight, once the California legislature and Governor direct the CPUC to implement programs, to ensure that those programs are implemented by the CPUC expeditiously and effectively so that there is actual, real, diverse participation by renewable generators. Solutions For Utilities states that the CPUC's delay in implementing California's feed-in tariff programs is causing private developers of renewable energy and renewable energy generators to have problems financing and constructing renewable generation projects.

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[82] SMUD Comments, Docket No. EL10-66-000, at 2-3 (filed June 10, 2010) (citing 16 U.S.C. § 824(b)(1) (2006)).

[83] Solutions for Utilities has not sought to intervene in Docket Nos. EL10-64-000 and EL10-66-000, and therefore is not a party to these proceedings.

IV. Determination

A. Procedural Matters

59. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceeding in which they intervened.

60. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2010), the Commission will grant the Energy Producers and Users' late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

61. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and/or an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers of San Joaquin Refining, the Joint Utilities and the CPUC and will, therefore, reject them.

62. In response to the requests that we formally consolidate the proceedings in Docket Nos. EL10-64-000 and EL10-66-000, given that we are addressing the two petitions in this order and not ordering a hearing, there is no need for formal consolidation.

63. With respect to the requests for official notice filed by the CPUC and the California Energy Commission, the documents submitted with their petitions are intended to support the environmental arguments advanced by the CPUC in support of its petition. We note, however, that the Commission's analysis of the CPUC's petition is based on a comparison of the CPUC's AB 1613 program with the federal statutes that this Commission is charged with implementing and does not depend upon the documents that the CPUC and the California Energy Commission ask that we take notice of in this proceeding.

B. Substantive Matters

64. The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities.[84] While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States

[84] 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. 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.

65. As noted above, however, a state commission may, pursuant to PURPA, determine avoided cost rates for QFs.[85] Although the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,[86] subject to certain requirements, as discussed below.

66. The Commission addressed issues concerning whether state statutes are consistent with the FPA, and whether they meet the requirements of PURPA, in *Midwest Power Systems* and *Connecticut*. In *Midwest Power Systems*, the Commission found that an Iowa statute and the implementing orders of the Iowa Utilities Board were consistent with federal law to the extent that they required utilities in Iowa to purchase from certain types of generating facilities, but also found that the orders of the Iowa Utilities Board were preempted to the extent they required sales by QFs be made at rates in excess of the purchasing utilities' avoided cost, and to the extent they set rates for wholesale sales of electric energy by non-QF public utilities.[87] In *Connecticut*, the Commission similarly found that, to the extent a Connecticut statute required sales by a QF be made at rates that exceeded avoided cost, the statute was preempted by PURPA.[88] The Commission reasoned there that wholesale QF rates cannot both be capped by full avoided cost (the federal statute) and exceed the avoided cost cap (the state statute). In its order denying reconsideration of *Connecticut*, the Commission found that, "even if a QF has been exempted pursuant to the Commission's regulations from the ratemaking provisions of the Federal Power Act, a state still cannot impose a ratemaking regime inconsistent with

[85] *See* 16 U.S.C. § 824a-3 (2006); 18 C.F.R. § 292.304 (2010).

[86] 18 C.F.R. § 292.101 *et seq*. (2010).

[87] *Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246; *see id*. at 61,246-48.

[88] *Connecticut*, 70 FERC ¶ 61,012 at 61,029.

the requirements of PURPA and this Commission's regulations—i.e., a state cannot impose rates in excess of avoided cost."[89]

67. In light of this precedent, we find that, insofar as the CHP generators that can take part in the AB 1613 program obtain QF status pursuant to the Commission's regulations, the CPUC's program is *not* preempted by the FPA, PURPA or Commission regulations,[90] as long as the program meets certain requirements. Specifically, the AB 1613 program will *not* be preempted by the FPA and PURPA as long as: (1) the CHP generators from which the CPUC is requiring the Joint Utilities to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility.[91]

68. The Joint Utilities have not asked the Commission to find that the CPUC's offer price exceeds the purchasing utility's avoided cost. Nor have they filed a petition pursuant to section 210(h) of PURPA requesting the Commission to enforce its PURPA regulations.[92] Indeed, there is no record in these proceedings on which the Commission may determine whether the CPUC's offer price is consistent with the avoided cost rate requirements of section 210 of PURPA. Thus, nothing in this order shall be read as the Commission ruling on whether the CPUC's offer price is consistent with the avoided cost requirements of PURPA.

69. To the extent a CHP generator is *not* a QF, the CPUC's AB 1613 Decisions are not preempted by the FPA only to the extent that the CPUC is ordering the utilities to purchase capacity and energy from certain resources, but are preempted to the extent that the CPUC is setting wholesale rates for such transactions, as discussed above. Any CHP generator that is not a QF but is a public utility must, pursuant to section 205 of the FPA,

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[89] *Connecticut*, 71 FERC ¶ 61,035 at 61,153. *See* Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 99 (clarifying that a QF will retain exemption from sections 205 and 206 of the FPA when its sales are pursuant to a state regulatory authority's implementation of PURPA and distinguishing between a "state regulatory authority's implementation of PURPA" and "state programs that are not grounded in PURPA").

[90] 18 C.F.R. § 292.101 *et seq*. (2010).

[91] 18 C.F.R. § 292.304 (2010). Under section 210 of PURPA, the rules prescribed by the Commission shall not provide for a rate "which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b) (2006). Under the Commission's regulations, absent agreement of the parties to the contrary, rates shall be capped at the electric utility's full "avoided cost." 18 C.F.R. § 292.304 (2010).

[92] 16 U.S.C. § 824a-3(h) (2006).

file with the Commission the rates it proposes to charge under the CPUC's AB 1613 tariff, and, consistent with section 205 of the FPA, the CHP generator must demonstrate that such rates are just, reasonable and not unduly discriminatory or preferential.[93]

70. We disagree with the arguments of the CPUC and certain commenters that the Commission's orders in *Midwest Power Systems* and *Connecticut* are no longer controlling precedent. While we appreciate that the CPUC's AB 1613 feed-in tariff program is intended to reduce greenhouse gas emissions, the arguments concerning the environmental considerations underlying the CPUC's AB 1613 feed-in tariff program do not excuse the Commission of its statutory obligations.[94] In addition, we disagree with the argument that the Commission already has allowed the sale of energy and capacity by QFs at a rate that is higher than the purchasing utility's avoided cost, based on the exemption from scrutiny under FPA sections 205 and 206 of sales of energy and capacity from QFs that are 20 MW or smaller.[95] Various parties argue that this exemption from section 205 means that the sale of energy and capacity from smaller QFs do not need to comply with PURPA. However, contrary to this argument, whether a rate is filed under section 205 of the FPA for Commission approval, or is exempt from scrutiny from FPA sections 205 and 206 pursuant to the Commission regulations, the CPUC may not set rates for the sale for resale of energy and capacity by a QF that exceeds the purchasing utility's avoided cost.[96]

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[93] If the CPUC believes that it needs additional guidance on how CHP generators may establish rates that are just, reasonable and not unduly discriminatory or preferential, it may file a petition for declaratory order seeking guidance.

[94] *Cf. Free Enterprise Fund v. Public Company Accounting Oversight Board*, No. 08-861, slip op. at 18 (U.S. June 28, 2010) (fact that a given law or procedure may be, e.g., useful does not save it if it is contrary to the Constitution).

[95] 18 C.F.R. § 292.601(c) (2010).

[96] *See* Order No. 671, FERC Stats. & Regs. ¶ 31,203 at P 95 (describing the effect of the exemption as allowing QFs to "make sales that were not subject to either Commission or state regulatory authority oversight"). *Cf. Southern California Edison*, 70 FERC ¶ 61,215 at 61,675; *American REF-FUEL Company of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989) (finding "states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations. Similarly, with regard to review and enforcement of avoided cost determinations under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA…."); *LG&E Westmoreland Hopewell*, 62 FERC ¶ 61,098, at 61,712 (1993).

71. With respect to the requests of the California Municipal Utilities Association and FuelCell that we clarify that any ruling on the extent of federal preemption of the CPUC's AB 1613 program does not apply to public agency sellers that are exempt from Commission jurisdiction under section 201(f) of the FPA, we clarify that for those facilities and sellers that are neither QFs nor public utilities selling at wholesale, but may, for example, be states or their subdivisions, agencies, authorities, or instrumentalities, rates for such sales are not within the Commission's authority.[97] That is, as relevant in this context, they are not subject to our regulation because they are not rates for QF sales at wholesale under PURPA, and they are not rates for public utility sales at wholesale under the FPA.[98] Such rates are accordingly not preempted by the FPA.

72. We deny SMUD's request that the Commission clarify that distribution-level facilities and distribution-level feed-in tariffs do not implicate Commission jurisdiction. The FPA grants the Commission exclusive jurisdiction to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities.[99] The Commission's FPA authority to regulate sales for resale of electric energy and transmission in interstate commerce by public utilities is not dependent on the location of generation or transmission facilities, but rather on the definition of, as particularly relevant here, wholesale sales contained in the FPA.[100]

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[97] *Connecticut*, 70 FERC ¶ 61,012 at 61,030; *see also Midwest Power Systems*, 78 FERC ¶ 61,067 at 61,246-47.

[98] *See* 16 U.S.C. § 824(f) (2006). *But see* 16 U.S.C. § 824e(2) (2006) (providing that "[i]f an entity described in section 201(f) voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation."); *California Independent System Operator Corp.*, 128 FERC ¶ 61,103, at P 22-23, *order on reh'g*, 129 FERC ¶ 61,241, at P 101 (2009).

[99] *FPC v. Southern California Edison Co.*, 376 U.S. 205 (1964) (finding that Commission jurisdiction is plenary and extends to all wholesale sales in interstate commerce except those that Congress has made explicitly subject to regulation by the states).

[100] 16 U.S.C. § 824(d) (2006); *see Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 695-96 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002); *Detroit Edison Co. v. FERC*, 334 F.3d 48, 51 (D.C. Cir. 2003). *See also FPC v. Florida Power & Light Co.*, 404 U.S. 453 (1972) (finding a utility with no direct connections to any out-of-state utility and that sold no power to out-of-state utilities to be

(continued…)

C. Exemption from Filing Fees

73. The Commission's regulations provide that states are exempt from the filing fees required in Part 381.[101] The CPUC explains that it is a state administrative agency established under the laws of California. Accordingly, the CPUC is exempt from the filing fee otherwise required for a petition for declaratory order.

The Commission orders:

The petitions for declaratory order of the CPUC and the Joint Utilities are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission. Commissioner LaFleur voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

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subject to the jurisdiction of the Commission due to the fact that power supplied to a bus from a variety of sources was merged and commingled).

[101] 18 C.F.R. § 381.108 (2010).