

Case No. B177138

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT**

DIVISION SEVEN

SOUTHERN CALIFORNIA EDISON COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

CPUC Decisions D.03-12-062, D.04-01-050, and D.04-07-037

**SUPPLEMENTAL BRIEF OF REAL PARTIES IN INTEREST
THE CALIFORNIA COGENERATION COUNCIL AND
THE CALIFORNIA WIND ENERGY ASSOCIATION**

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TABLE OF CONTENTS

<u>Section</u>	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND	3
III. EDISON AND PG&E DISTORT THE FACTS	5
A. This Is Not a Case to Establish the Limits of the CPUC’s Ratemaking Authority Under PURPA.....	6
B. PG&E Supported Extending the SO1 Contracts at SRAC Formula Prices in the Underlying Proceeding.....	9
C. The CPUC Considered all of the Evidence Presented and Determined that the SRAC Formula Properly Reflects Avoided Costs.....	12
D. The Ongoing Proceeding to Examine the SRAC Formula Is the Proper Forum for the Utilities’ Concerns to be Addressed	19
IV. EDISON AND PG&E DISTORT THE LAW.....	21
A. This Court Must Defer to the CPUC’s Interpretation of the Evidence.....	21
B. The CPUC Decisions Are Supported By Substantial Evidence.....	22
C. The CPUC’s Actions and the Decisions Comply With PURPA.....	24
1. PURPA does not require as delivered payments to equal avoided costs at all times, and the CPUC and this Court are preempted from finding otherwise.....	24
2. PURPA Does Not Require State Commissions to Review Their SRAC Methodologies Each Time They Authorize a QF-Related Contract.	29
3. Requiring the utilities to enter into contract extensions was the only reasonable way to comply with PURPA.	31

D. Edison's interpretation of Public Utilities Code section 1709
is blatantly wrong and attempts to distort the fact that the SO1
contracts had been in effect for nearly two years before
Edison sought this writ.....32

V. CONCLUSION.....35

TABLE OF AUTHORITIES

<u>Citation</u>	<u>Page</u>
Federal Cases	
<u>AT&T Committee of Cal., Inc. v. Pacific Bell Telegraph Co.,</u> 375 F.3d 894 (9th Cir. 2004).....	24
<u>American Paper Institute v. American Electric Power,</u> 461 U.S. 402 (1983)	4
<u>Arkansas Louisiana Gas Co. v. Hall,</u> 453 U.S. 571 (1981)	26
<u>In re Cal. Wholesale Electric Antitrust Litigation,</u> 244 F. Supp. 2d 1072 (S.D. Cal. 2003)	25
<u>Independent Energy Producers Associate v. Cal. Public Utility</u> <u>Commission,</u> 36 F.3d 848 (9th Cir. 1994).....	4, 21, 31
<u>Miss. Power & Light Co. v. Mississippi,</u> 487 U.S. 354 (1988)	25
<u>Nantahala Power and Light Co. v. Thornburg,</u> 476 U.S. 953 (1986)	25
<u>San Diego Building Trades Council v. Garmon,</u> 359 U.S. 236 (1959)	26
<u>Schneidewind v. ANR Pipeline Co.,</u> 485 U.S. 293 (1988)	25
State Cases	
<u>Babb v. Superior Court,</u> 3 Cal. 3d 841 (1971).....	11
<u>Camp Meeker Water System, Inc. v. Public Utility Commission,</u> 51 Cal. 3d 845 (1990).....	22, 34
<u>City of St. Helena,</u> 119 Cal. App. 4th 793 (2004).....	22
<u>Friends of the Eel River v. Sonoma County Water Agency,</u> 108 Cal. App. 4th 859 (2003).....	22, 24
<u>Greyhound Lines, Inc. v. Public Utility Commission,</u> 68 Cal. 2d 406 (1968).....	21
<u>Hickey v. Roby,</u> 273 Cal. App. 2d 752 (1969).....	34, 35

TABLE OF AUTHORITIES
(continued)

<u>Citation</u>	<u>Page</u>
<u>Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control,</u> 55 Cal. 2d 728 (1961).....	34
<u>Loustalot v. Superior Court,</u> 30 Cal. 2d 905 (1947).....	35
<u>Olive Proration Program Committee v. Agricultural Prorate Commission,</u> 17 Cal. 2d 204 (1941).....	34
<u>PG&E Corp. v. Public Utility Commission,</u> 118 Cal. App. 4th 1174 (2004).....	11, 22
<u>People v. Western Air Lines, Inc.,</u> 42 Cal. 2d 621 (1954).....	34
<u>Roemer v. Pappas,</u> 203 Cal. App. 3d 201 (1988).....	23
<u>San Miguel Consolidated Fire Protection Dist. v. Davis;</u> 25 Cal. App. 4th 134 (1994).....	34
<u>Southern Cal. Edison Co. v. Cal. Public Utility Commission,</u> 101 Cal. App. 4th 384 (2002).....	22, 24
<u>Southern Cal. Edison Co. v. Cal. Public Utility Commission,</u> 101 Cal. App. 4th 982 (2002).....	2-3, 8, 24
<u>Spielholz v. Superior Court,</u> 86 Cal. App. 4th 1366 (2001).....	25-26

Federal Statutes and Regulations

16 U.S.C.	
§ 824a-3, <u>et seq.</u>	<i>passim</i>
§ 824a-3(a).....	3
§ 824a-3(c).....	4
§ 824a-3(f)(1)	4, 21
18 C.F.R	
§ 292.101(b)(6).....	4
§ 292.303(a).....	31
§ 292.304	4, 21

TABLE OF AUTHORITIES
(continued)

<u>Citation</u>	<u>Page</u>
§ 292.304(a)(1)	4
§ 292.304(b)(5)	27
§ 292.304(d)	26, 27
§ 292.304(d)(1)	26
§ 292.304(e)	23

State Statutes

California Public Utilities Code

§ 310	3
§ 311	3
§ 390	12
§ 390(b)	23-24
§ 1709	32, 33, 34, 35
§ 1731(b)	31

Federal Administrative Agency Decisions

<u>Jersey Central Power & Light Company, Order Denying Petition for Declaratory Order,</u> 73 F.E.R.C. ¶ 61,092, 1995 WL 609823 (1995)	27
<u>New York State Electric & Gas Co.,</u> 71 F.E.R.C. ¶ 61,027, 1995 WL 216781 (1995)	25, 27
<u>West Penn Power Company, Order Denying Petition for Declaratory Order,</u> 71 F.E.R.C. ¶ 61,153, 1995 WL 265343 (1995)	27

California Public Utilities Commission Decisions

D.82-12-120	28
D.91-10-039	28
D.96-12-028	8
D.01-03-067	8, 13
D.02-08-071	5, 21, 33
D.02-10-082	10

TABLE OF AUTHORITIES
(continued)

<u>Citation</u>	<u>Page</u>
D.03-12-062	2, 9, 10, 19
D.04-01-050	2
D.04-07-037	2, 11, 14, 15, 20, 28, 30
R.04-04-003	5
R.04-04-025	8, 19

Miscellaneous

FERC Stats. & Regs., Regs. Preambles 1977-1981 ¶ 30,128, 45 Fed. Reg. 12,214 (1980)	3, 26, 27, 28
Cal. Jur. 3d Public Utilities § 96 (2004)	35
Southern California Edison Company's (U 338-E) Prehearing Conference Statement", R.04-04-025 (November 3, 2004).....	20

**SUPPLEMENTAL BRIEF OF REAL PARTIES IN INTEREST
THE CALIFORNIA COGENERATION COUNCIL AND
THE CALIFORNIA WIND ENERGY ASSOCIATION**

**To the Honorable Justices of the Court of Appeal of the State of
California, Second Appellate District, Division Seven:**

I.

INTRODUCTION

The positions taken by Southern California Edison Company (“Edison”) and Pacific Gas & Electric Company (“PG&E”) are indefensible. The utilities distort the record in this case, ignore the legal standard that governs review of the California Public Utilities Commission’s (“CPUC”) decisions and misapply both California and federal law. Their pleadings reflect erroneous interpretations of PURPA¹ and the Federal Energy Regulatory Commission’s (“FERC”) implementation thereof.

The utilities attempt to cast this case as one involving PURPA’s avoided cost requirement when in fact it concerns implementation of PURPA’s mandatory purchase obligation. While the CPUC cannot, at any time, disregard the avoided cost requirement in implementing PURPA, it is addressing the avoided cost requirement in a separate and currently ongoing proceeding. In contrast, this case involves a mechanism adopted by the CPUC, namely reinstatement of the Standard Offer 1 (“SO1”) contract, to ensure that the utilities continue to purchase QF power after their current contracts expire as required by PURPA’s mandatory purchase obligation. To ensure compliance with PURPA’s avoided cost requirements, the CPUC

¹ Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 et seq.

expressly made the reinstated SO1 contracts subject to the CPUC's pending avoided cost proceeding.

Put in its simplest terms, the utilities are complaining that the CPUC is dealing with the mandatory purchase obligation and the avoided cost requirement in separate procedures. They present no argument or authority, however, that doing so is either unlawful or otherwise improper. Indeed, because of the imminent expiration of existing QF contracts and the complexity of SRAC analysis, the CPUC's acts were both lawful and reasonable.

The utilities also pick and choose evidence from the record that they allege supports their erroneous theories concerning avoided costs, while ignoring substantial contrary evidence that obviously was persuasive to the CPUC. They also persist in advancing their own interpretations of the evidence, choosing to ignore the CPUC's contrary interpretation. Their accusations that the CPUC failed to make required factual determinations on avoided cost compliance or, in the alternative, that there is no evidence to support the determinations made by the CPUC, are false. Under the substantial evidence test by which this Court evaluates the CPUC's actions, the CPUC's Decisions must be affirmed.

The utilities also improperly use as evidence statements in the December Decision² that the CPUC later altered or deleted in the Rehearing Decision. That use is contrary to law. Southern Cal. Edison Co. v. Cal. Pub. Util. Comm'n, 101 Cal. App. 4th 982, 992 (2002) ("Edison II") (holding that "only filed decisions are the final opinions or decisions of the

² CPUC Decision ("D.") 03-12-062 (Dec. 22, 2003) (the "December Decision"). The other decisions at issue are D.04-01-050 (Jan. 22, 2004) (the "January Decision" or together with the December Decision, the "Decisions"), and D.04-07-037 (July 8, 2004) (the "Rehearing Decision").

Commission” and arguments based on drafts or superceded findings shall be disregarded on appeal); see also Cal. Pub. Util. Code §§ 310, 311 (only confirmed and filed decisions contain the Commission’s final findings, opinions, or orders).

Finally, the utilities fail to acknowledge critical components of FERC’s and the CPUC’s implementation of PURPA. As the utilities point out, the “SRAC Formula” is the CPUC’s methodology for calculating avoided cost prices “at the time of delivery” under PURPA. What they fail to point out is that FERC has required that these prices be based on “**estimates**” of the utilities’ avoided cost at the time of delivery, and not the utilities’ “actual” avoided cost. FERC Stats. & Regs., Regs. Preambles 1977-1981 ¶ 30,128, at 30,870, 45 Fed. Reg. 12,214, at 12,215 (1980) (RFJN, Ex. B) (“Order No. 69”). As such, the CPUC’s conclusion that the SRAC Formula complies with PURPA is lawful and must be upheld.

Because it is so central to this case, a brief explanation of how this case arises under PURPA follows.

II.

BACKGROUND

PURPA was enacted, among other things, to encourage the development of alternative electricity generators (referred to as Qualifying Facilities or “QFs”). Order No. 69 at 12,215 (RFJN, Ex. B). Recognizing that the vertically integrated utilities could use their monopoly power to keep QFs out of the power market, Congress took a number of practical steps in PURPA to promote QF development. Id. The primary measure was to require that the utilities purchase the power offered them by QFs. 16 U.S.C. § 824a-3(a). This measure, referred to as the “mandatory

purchase obligation,” is the legal requirement whose implementation by the CPUC has led to Edison’s Petition.

PURPA’s mandatory purchase obligation is supplemented by another requirement, that the prices to be paid to QFs must be just and reasonable to consumers and non-discriminatory to QFs. 16 U.S.C. § 824a-3(c); 18 C.F.R. § 292.304(a)(1) (RFJN, Ex. A). This latter requirement is effectuated by requiring that the utilities pay QFs what the utilities would have spent to generate the electricity themselves or to procure it from other sources. 18 C.F.R. § 292.101(b)(6). This price is referred to as the utilities’ “avoided cost,” and FERC’s implementation of PURPA requires that the utilities pay QFs their full avoided cost, no more and no less. *Id.*; American Paper Inst. v. American Elec. Power, 461 U.S. 402, 412-18 (1983); Indep. Energy Producers Assoc. v. Cal. Pub. Util. Comm’n, 36 F.3d 848, 851 (9th Cir. 1994) (FERC’s regulations “require that utilities purchase electric energy from and sell electric energy to QFs at the utility’s full ‘avoided cost’ rate.”).

Under PURPA, the CPUC is primarily responsible for ensuring that the utilities comply with both the mandatory purchase obligation and the avoided cost requirement. 16 U.S.C. § 824a-3(f)(1); 18 C.F.R. § 292.304 (RFJN, Ex. A). Until California attempted to deregulate the electricity market, the CPUC implemented the mandatory purchase obligation by making available to QFs “standard offer contracts.” Upon the tender of a standard offer contract by a QF, the utility was required to execute and perform under the contract. The CPUC abandoned the standard offer contract approach as part of the deregulation program and now, with the future of the regulatory structure in flux, the CPUC has set out to reevaluate the manner in which the mandatory purchase obligation is to be enforced in California.

Prompted by the imminent expiration of a number of QF standard offer contracts, the CPUC adopted an interim measure to comply with the mandatory purchase obligation. This interim measure is the reinstatement of the short-run, as-available standard offer contract (referred to as the SO1). The CPUC has ordered that the SO1 is to be available to QFs through the end of next year (2005), while the CPUC develops its formal policy on the long-term enforcement of PURPA's mandatory purchase obligation in a separate and currently ongoing proceeding.³ The SO1 was first reinstated in Decision 02-08-071, which decision is not before this Court for review. It is the subsequent extensions of this measure in the Decisions which the utilities now challenge.

Although the utilities dislike having to purchase QF power, the policies of the United States and California require them to do so. Their efforts to undermine those policies by appealing the Decisions must fail.

III.

EDISON AND PG&E DISTORT THE FACTS

We begin by clarifying the essential facts. First, this is not a case to determine the limits of the CPUC's avoided cost ratemaking authority under PURPA, affecting hundreds of QFs and billions of dollars, as Edison alleges. It is, on the contrary, a case involving an interim and limited mechanism adopted by the CPUC to implement PURPA's mandatory purchase obligation in the face of expiring QF contracts.

Second, *amicus curiae* PG&E actually itself proposed extending the SO1 contracts, including the current SRAC Formula, in the underlying

³ R.04-04-003. Proposals for implementing of the mandatory purchase obligation were submitted on November 10, 2004. Replies to these proposals are due on December 8, 2004.

proceeding and now takes the opposite position before this Court. Having gotten what it asked for, PG&E is in no position now to complain.

Third, the record shows that the CPUC considered all of the testimony and evidence submitted by the parties to the underlying proceeding and made a determination that (i) the current SRAC Formula complies with PURPA and will be adjusted on a going forward basis if and when the CPUC determines that it fails to reflect avoided costs; and (ii) if and when that happens, the CPUC will consider retroactive application of any new methodology. Petitioner's repeated claims that the CPUC failed to determine whether the SRAC Formula can lawfully be used is simply wrong.

Finally, notwithstanding its finding that the utilities failed to demonstrate that the SRAC Formula produced prices in excess of avoided costs, the CPUC is actively examining the SRAC Formula (including for use in connection with the SO1 contracts) in a separate proceeding, creating a clear venue for the utilities to address any concerns they may have regarding the SRAC methodology. This Court should defer to the CPUC's authority and expertise and allow the CPUC to continue to exercise the duties delegated to it under PURPA.

A. **This Is Not a Case to Establish the Limits of the CPUC's Ratemaking Authority Under PURPA**

Edison maintains in the introduction to its Reply that this Court should review the Decisions in order to "clearly establish the limits of the Commission's ratemaking authority for QFs under PURPA." Reply at 2. Edison attempts to portray this case as involving the rates paid to hundreds of QFs in its and PG&E's service areas, involving billions of dollars annually. *Id.* Edison completely distorts reality.

While Edison and PG&E each may have contracts with over 300 QFs, only a handful of these QFs, the ones with contracts expiring prior to December 31, 2005, are affected by the Decisions. Of PG&E's nearly 300 QFs, only twelve have received new SO1 contracts under the Decisions to date. Amicus Brief at 14. Indeed, of the CCC member's 47 QF projects in California, accounting for roughly 2,700 megawatts of generation in California, only seven QFs, accounting for roughly 180 megawatts, have executed SO1 contracts under either of the Decisions. Only one CalWEA member, accounting for seven of 200 megawatts of generation, has executed an SO1 contract.

Edison also ignores the fact that, as the record in the underlying proceeding reflects, the overwhelming majority (over 85%) of the electricity produced in this state by QFs is not currently priced under the SRAC Formula or any other SRAC methodology. Ex. 12 at 1054. This is because a majority of QFs operate under negotiated contracts or contract amendments that contain their own pricing formulae and do not rely on the SRAC Formula. *Id.* These negotiated formulae will remain in place until after the CPUC is expected to conclude its currently ongoing inquiry into avoided cost prices.

While this case is obviously important to the few affected QFs that are relying on the Decisions to allow them to continue selling electricity to the utilities after their original contracts expire, the Decisions will not impact the vast majority of QF generation in this state. The Decisions, therefore, do not have the significant financial and precedential impact on ratepayers as Edison would have this Court believe.

Edison and PG&E also conveniently ignore the fact that the SRAC Formula that each so desperately attacks is the same exact formula that each is using to determine energy prices for the 15% of QF generation not

priced under negotiated terms. This is not a “new” formula calculated in conjunction with “new” SO1 contracts. Indeed, the SRAC Formula in question is the exact one that Edison fought so hard to uphold merely two years ago in Edison II, and the exact one that PG&E chastises the CPUC for not applying retroactively for the 2000-2001 period. Amicus Brief at 20-21.

Perhaps most telling is the fact that neither Edison nor PG&E has filed a petition to modify the current SRAC Formula. As the CPUC set forth in its 1996 decision adopting the SRAC Formula, a party who wishes to modify the SRAC Formula may file a petition with the CPUC after conferring with the other affected parties regarding the accuracy of the formula. D.96-12-028, 1996 Cal. PUC LEXIS 1089, *21-22 (1996) (RFJN, Ex. J). The CPUC also specified that any party wishing to file such a petition must present at least four months of reliable data available for review. Id. at *22. Edison followed this very procedure when it filed a petition to modify the SRAC Formula in July 2000. See D.01-03-067 (RFJN, Ex. K). That petition led to modifications to the SRAC Formula that were subsequently upheld by this Court. Id.; Edison II, 101 Cal. App. 4th 982 (2002).

Here, however, Edison is attempting to have this Court review the SRAC Formula while skipping all of the procedural steps required by D.96-12-028. Indeed, not only did Edison fail to even submit its own evidence on the alleged inaccuracy of the SRAC Formula in the Procurement Proceeding, it ignores in its papers the ongoing Avoided Cost Proceeding commenced to address these very concerns.⁴

⁴ R.04-04-025.

Edison's and PG&E's attempts to turn this case into a referendum on the SRAC Formula is misplaced. In reality, this case is about an interim mechanism adopted by CPUC to implement PURPA's mandatory purchase obligation over a limited time frame and involving a small number of QFs. In the proceeding leading to the Decisions, the CPUC was faced with the imminent expiration of a handful of QF contracts. Ex. 72 at 4329. If the CPUC did not act, it knew that the utilities, and Edison in particular, would refuse to buy electricity generated by the QFs in violation of PURPA's mandatory purchase obligation. Edison has said as much in the proceeding. Ex. 3 at 104.⁵

At the same time, the CPUC understood that it cannot evade PURPA's avoided cost requirement, and that it is responsible for maintaining a methodology to determine accurately avoided costs in compliance with FERC's regulations. The CPUC, therefore, took the most responsible action it could. It continued the previously-reinstated SO1 contracts that included a refined, fully vetted SRAC Formula already in use for 15% of the QF generation in California. It further committed to review the SRAC Formula in response to certain concerns expressed by Edison and PG&E and required that the new SO1 contracts include a provision to ensure the incorporation of any revised SRAC methodology subsequently adopted. The CPUC did exactly what PURPA requires.

B. PG&E Supported Extending the SO1 Contracts at SRAC Formula Prices in the Underlying Proceeding

The CPUC has been working toward developing a long-term strategy for complying with PURPA's mandatory purchase obligation for a

⁵ Edison's proposal was that it only purchase a QF's power if it is a successful bidder in its all-source procurement solicitations.

number of years. Pursuant to that goal, the CPUC ordered the utilities to file short- and long-term procurement plans specifically addressing how they propose to satisfy their mandatory purchase obligations under PURPA. D.02-10-082 at 27 (RFJN, Ex. N). Each utility filed a short-term plan for procuring power during calendar year 2004, and a separate plan for long-term procurement, including proposals for procuring power from QFs. Exs. 3, 4, 6, 9, 10, 11.

PG&E specifically proposed to satisfy its PURPA mandatory purchase obligation by offering SO1 contracts to QFs. Ex. 10 at 861. Raising concerns with the current SRAC Formula, PG&E asked the CPUC to initiate a separate proceeding to evaluate whether that SRAC Formula should be changed. While it did propose one modification to the SO1 contract (it sought the right to curtail QFs during 1000 hours each year) it did not predicate its own proposal to offer SO1 contracts on the adoption of a revised SRAC Formula. Ex. 10 at 862.

As such, PG&E essentially got in the Decisions what it asked for, a reinstated SO1 contract and a separate proceeding to re-evaluate the SRAC Formula.⁶ In the December Decision, the CPUC committed to complete a “thorough review of pricing policies relating to QFs” before the end of 2005 by initiating a new avoided cost rulemaking proceeding. Ex. 72 at 4331. This Avoided Cost Proceeding has been opened, and the CPUC is scheduled to receive testimony and hold hearings in early 2005. PG&E disregards these facts, as well as the fact that the Decisions also specify that any modifications to the SRAC Formula (or other aspects of its avoided cost pricing methodologies) that may result from the ongoing Avoided Cost

⁶ The CPUC rejected PG&E’s proposed curtailment right as being contrary to PURPA and unduly harmful to QFs. Ex. 72 at 4334.

Proceeding will be incorporated automatically into the SO1 contracts that the Decisions require the utilities to sign. Id.

The CPUC also did not ignore or refuse Edison's request for retroactive application of any revised SRAC Formula as PG&E attempts to argue in its *amicus* brief. *Amicus Brief* at 20. The CPUC reviewed the evidence in the Procurement Proceeding and confirmed that the SRAC Formula does not violate PURPA and can lawfully be used for the QF contracts required by the Decisions. Ex. 89. In light of these findings, the Rehearing Decision properly rejected Edison's request for a true-up mechanism. The CPUC found that Edison's demand was "premature," because "as stated, we have not found that the SRAC methodology is inadequate, and unless and until we do it is premature to consider whether retroactive adjustments should be made." Id. at 5712. Indeed, PG&E has pending before the CPUC at this very time a petition asking that the CPUC apply any new SRAC methodology adopted in the Avoided Cost Proceeding retroactively. This issue therefore is not appropriate for review by this Court. Babb v. Superior Court, 3 Cal. 3d 841, 851 (1971); PG&E Corp. v. Pub. Util. Comm'n, 118 Cal. App. 4th 1174, 1220 (2004).

In sum, the CPUC did exactly what PG&E requested in the underlying Procurement Proceeding. It continued the SO1 contracts mechanism for the utilities to comply with PURPA's mandatory purchase obligation, and it opened the Avoided Cost Proceeding. More germane to the issues raised in this proceeding, the CPUC determined that SRAC prices currently comply with PURPA, will be adjusted on a going forward basis if and when the SRAC Formula is determined to yield prices that do not reflect avoided costs, and that only if and when this happens will the issue of retroactivity be ripe for discussion. Until then, the SRAC prices paid by the utilities will be calculated using the SRAC Formula that both

the CPUC and this Court have found to be lawful and compliant with PURPA's avoided cost standard.

Despite such a positive outcome for PG&E, it now has decided that it is better to align itself with Edison, who proposed that it not be required to sign contracts with QFs as part of its proposal in the Procurement Proceeding, rather than stand by its own recommendations to the CPUC. In filing its *amicus* brief, PG&E shows that it will say anything, including contradicting its own testimony and recommendations, to thwart the QF program in California. PG&E's opportunistic, self-serving behavior should be given little weight by this Court.

C. The CPUC Considered all of the Evidence Presented and Determined that the SRAC Formula Properly Reflects Avoided Costs

The plain and simple fact is that both initially and on rehearing the CPUC found that the evidence in the Procurement Proceeding did not show that the current SRAC Formula produces rates that exceed avoided costs. The current SRAC Formula methodology was established in 1996 with the addition of a new section of the California Public Utilities Code (Section 390). While this formula was intended, at the time of its adoption, to be replaced eventually with market-based pricing, the precursors for this transition never materialized. That does not mean, however, that the SRAC Formula fails to reflect current avoided costs.

In fact, in response to petitions by Edison, the CPUC revised certain elements of the SRAC Formula on a going-forward basis in 2001 to make them more current. At the time, Edison argued only that the natural gas indices and the intrastate gas transportation rates should be updated, as updating these factors would lower the prices paid to QFs. The QF parties argued that if some components of the SRAC Formula were to be updated,

all of its components should be updated so as not to prejudice unfairly any party. D.01-03-067 at 7-8 (RFJN, Ex. K). The CPUC agreed and convened a proceeding to review the other components of the SRAC Formula. Id. at Conclusions of Law 2, 8, 11.

Incredibly, Edison attempts to use the fact that the CPUC has not yet issued a decision on the other elements of the SRAC Formula as evidence of CPUC malfeasance in connection with SRAC matters. Petition at 14-15. This is incredible because Edison argued in the 2001 proceeding that the CPUC should not update the other components of the SRAC Formula. In other words, Edison has received from the CPUC exactly what it has asked for. Just like PG&E, however, this does not appear to be good enough for Edison, which now asks the Court for more than was requested of the CPUC.

Now, only two and a half years after this Court approved the revised SRAC Formula that Edison and the CPUC argued so strenuously to defend in Edison II, Edison seeks to challenge the legality of that formula to pursue its anti-QF agenda. Edison's position that it should not be required to sign new contracts with QFs under PURPA's mandatory purchase obligation was rejected flatly by CPUC, so it now seeks to avoid its obligation through an attack on the SRAC Formula. Edison's obvious goal is to let QF contracts expire without any attempt to renew or renegotiate them in violation of PURPA.

Edison's attempt to undermine the SO1 contract requirement through an attack on the SRAC Formula was fully considered and properly rejected by the CPUC in the Rehearing Decision. After re-evaluating the evidence regarding SRAC prices in response to Edison's complaints, the CPUC specified that "the evidence in this proceeding has **not** demonstrated that SRAC prices are in violation of the PURPA avoided cost standard."

Ex. 89 at 5712 (emphasis added). Based on this unequivocal language, the CPUC properly concluded that it should continue to employ the SRAC Formula in QF contracts when implementing the mandatory purchase obligation as it has been doing for many years.

In its Reply, Edison again ignores the plain language of the CPUC in its Rehearing Decision, claiming that “prior to ordering a utility to enter into a new obligation under PURPA, a state commission has a legal duty to ensure that the purchase rate does not exceed the utility’s avoided cost.” Reply at 5. The CPUC has met this standard. In its Rehearing Decision, the CPUC explained that Edison had misinterpreted the December Decision and stated that because its “statements may have been misleading,” it was now modifying its language to clarify those statements to make clear that it had fully considered the evidence and found that SRAC prices did not exceed Edison’s avoided costs. Ex. 89 at 5711. On rehearing the CPUC affirmed that while “the evidence presented here raises questions and supports the need to revisit SRAC pricing system, the utilities have not demonstrated the SRAC formula is inadequate or that it exceeds avoided costs in violation of PURPA.” *Id.* at 5729. It would be hard for the CPUC to be more clear.

Edison simply ignores these clarifications and improperly cites portions of the December Decision that the CPUC replaced with language adopted in the Rehearing Decision. The CPUC expressly rejected Edison’s interpretation of the December Decision, explaining that, “although we were clear in D.03-12-062 on the need for SRAC prices to be reviewed, we did not state they are inadequate or in violation of PURPA.” Ex. 89 at 5711. The CPUC emphasized that its statement in the December Decision that utilities have “paid too much for QF power **in certain time periods relative to market prices . . .**” did not mean that SRAC prices exceeded

Edison's avoided costs. *Id.* (emphasis in original). Edison's claim that the CPUC "affirmatively declined to determine" whether the SRAC Formula violated PURPA is false and inexcusable. Reply at 6.

Edison and PG&E also continue to ignore the CPUC's consistent language that the spot market energy prices discussed in the Procurement Proceeding are not the same thing as Edison's "avoided costs."⁷ In the Rehearing Decision, the CPUC explicitly rejected Edison's argument on this issue, confirming that "spot market prices are not necessarily the same as avoided costs." Ex. 89 at 5711. The CPUC explained that any statement suggesting that SRAC prices may have been higher than spot market prices during certain periods "is not a statement that avoided cost has been exceeded." *Id.* The CPUC further confirmed this position in its Answer, stating that Edison:

failed to present any evidence that could lead the Commission to conclude that the Dow Jones price indexes represent Edison's avoided costs. In fact, there is no persuasive evidence in the record to support the conclusion that the Dow Jones prices indexes represent *any* utility's avoided costs.

CPUC Answer at 13 (emphasis in original).

Instead of addressing the CPUC's analysis and findings, both Edison and PG&E rely heavily on limited portions of the testimony of the CCC's witness, R. Thomas Beach, especially Mr. Beach's comparison of SRAC prices with spot market energy prices during the period from April 1998 to June 2003. Petition at 17-18, 34-36; Amicus Brief at 12-13. Mr. Beach

⁷ Indeed, PG&E goes so far as to impute dishonesty to the CPUC, alleging that the CPUC deleted language concerning these issues because it did not support the CPUC's "litigation strategy," despite the fact that these statements were made in the Rehearing Decision prior to judicial review being sought by any party. Amicus Brief at 14, fn. 16.

prepared this comparison in response to Edison's data request to the CCC asking for data to support Mr. Beach's testimony that SRAC prices had tracked market prices "reasonably well" in recent years. This comparison was intended only to demonstrate that there have been corresponding trends between fluctuations in SRAC prices and market prices during recent years. Ex. 21 at 1641. The utilities ignore entirely the underlying evidence presented by Mr. Beach which showed the SRAC Formula does indeed fairly reflect the utilities' avoided costs. The CPUC, however, did not overlook this evidence.

Moreover, in response to the utilities' claims concerning spot market prices as avoided costs, Mr. Beach emphasized that the spot market prices reflected in his comparison do not accurately reflect utilities' avoided costs due to the lack of depth and liquidity in the markets for which prices are reported. Mr. Beach explained that "over the most recent two years, the relatively small volumes traded in the bilateral spot market in California, as sampled by Dow Jones, may not accurately represent the full costs avoided by the large block of QF generation in California." Id. at 1641. As a result, Mr. Beach testified that:

[T]he bilateral market that's reported by Dow Jones has become much smaller than it was before the crisis, and so . . . I am concerned that the reported Dow Jones prices over the last several years don't fully reflect avoided costs in terms of the value of the large block of QF power that supplies California.

Ex. 20 at 1543:23-1544:1.

Mr. Beach also explained his statements that SRAC energy prices between April 1998 and June 2003 were "[a] little less than 10 percent" higher than the spot market, testifying that this small deviation between SRAC prices and the spot market price reflects the manner in which he

calculated the “average” prices used in the comparison that was the subject of the cross-examination questions. Petition at 17.

In calculating the average prices represented in the graph, Mr. Beach excluded all prices during the crisis months of 2000 and 2001, when SRAC prices were dramatically lower than the spot market. In fact, the graph shows that, for the period from July 2000 through June 2001, the average SRAC price was 55 percent lower than the average spot market price during the same period. Ex. 12 at 1057, Figure 1. Mr. Beach also explained that he is “100 percent certain that if the market had functioned properly under the conditions that we had during the energy crisis, that the market would have been substantially above SRAC during that period” that “would have brought the two prices even closer together.” Ex. 20 at 1581:16-25.

The CPUC found Mr. Beach’s evidence persuasive, rejecting Edison’s contrary assertion that the Dow Jones market prices represent Edison’s “avoided costs” and finding that the SRAC Formula accurately reflects the utilities’ avoided costs. Contrary to the claims of Edison and PG&E, there is substantial evidence in the record that the SRAC Formula tracks avoided costs. While they seek to limit the Court’s focus only upon the evidence that appears favorable to their point of view, the Court must (as did the CPUC) consider all of the record evidence when determining if the Decisions are based on substantial evidence, including Mr. Beach’s testimony showing that the SRAC Formula is in compliance with PURPA.

Both Edison and PG&E also misrepresent the testimony of PG&E’s witness John Pappas, who testified that he did not intend to suggest that the Dow Jones spot market prices are an accurate measure of PG&E’s avoided costs. Ex. 24 at 1901:26-1902:3. Instead, Mr. Pappas explained that he was “merely presenting a benchmark that the Commission can consider in

making its decision as to whether or not the current methodology should be considered for revision” in a new rulemaking proceeding.⁸ Id.

PG&E also suggests that the QFs’ receipt of capacity payments under their contracts exacerbates the problems with the SRAC Formula. Amicus Brief at 13-14. This is not correct, and there is ample evidence in the record to demonstrate that this is not correct. As Mr. Beach explained, for example, there is in the market today a variety of capacity costs that QFs enable the utilities to avoid. Ex. 20 at 1549:17-28. The capacity payments included in the SO1 contract, especially Edison’s, are relatively low in comparison. Id. at 1533:7-25. In addition, it is not the case that the value of capacity, if any, in the spot market prices referred to by PG&E witness Pappas is at all comparable to the capacity being provided by QFs under the SO1 contracts. Cogeneration QFs that provide dedicated, reliable long-term capacity around the clock are, in fact, being significantly underpaid for capacity under the SO1 contract, which pays QFs only for less valuable, “as-available” capacity.

Finally, in arguing that the SRAC Formula does not reflect current market conditions, Edison and PG&E ignore one of the most important features of the SRAC Formula – the fact that it is “self-correcting” in nature. This means that the price is adjusted every month to reflect changes in prevailing natural gas prices (which is the key driver of electricity generation costs in California) and the corresponding changes to a utility’s avoided costs. The self-correcting nature of the formula has allowed each

⁸ Mr. Pappas also admitted that Dow Jones NP15 prices are “backward” looking prices that are not suitable for sending forward price signals to QFs, which also makes them an unsuitable substitute for current SRAC prices. Ex. 24 at 1905:5-22.

SRAC methodology to remain in place for long periods of time as prices are adjusted automatically to reflect changes in the utilities' avoided costs.

D. The Ongoing Proceeding to Examine the SRAC Formula Is the Proper Forum for the Utilities' Concerns to be Addressed

The CPUC opened the ongoing Avoided Cost Rulemaking proceeding in response to PG&E's request, designating it as the forum for considering whether changes should be made to the SRAC Formula or other avoided cost pricing methodologies. Order Instituting Rulemaking, R.04-04-025 (April 22, 2004) (Edison's RFJN, Ex. C at *2). Based upon the discussion at the November 9, 2004 prehearing conference in that proceeding, testimony is expected to be filed in January, and hearings expect to be held in April 2005. The CPUC anticipates issuing a decision in 2005. Both PG&E and Edison are active participants in the proceeding, and have each already submitted multiple filings.

Besides being a clear and appropriate venue for the utilities to address any concerns they may have over the SRAC Formula, if needed the proceeding will allow the CPUC to modify the prices used in the SO1 contracts. To eliminate any doubt that changes in the SRAC methodology and pricing would be integrated into the SO1 contracts, the CPUC ordered in the December Decision that any changes to its SRAC policies will be automatically and immediately incorporated into the SO1 contract extensions. Specifically, the CPUC stated "to the extent that the Commission adopts a revised SRAC policy, the pricing terms of the [SO1] contract shall be modified to reflect said revised SRAC policy as of the effective date of the Commission decision adopting a revised SRAC policy." Ex. 72 at 4331.

Furthermore, the CPUC has acknowledged that if the SRAC Formula is determined at a later date to be insufficient to meet the avoided

cost requirements of PURPA, then that would be the time to address any retroactive application of the updated formula. Ex. 89 at 5712. PG&E added further protection for itself by reserving its right to true-up any payments made under SO1s entered into under the January Decision should the SRAC Formula later be modified. Amicus Brief at 14, fn.17. Each of these elements shows that in ordering the SO1 contract extensions, the CPUC implemented a reasonable, interim mechanism to maintain the utilities' compliance with PURPA's mandatory purchase obligation and to ensure that subsequent adjustments to the SRAC Formula and pricing would be incorporated into the extended contracts.

In fact, Edison has conceded in the Avoided Cost Proceeding that revising the SRAC methodology will require resolution of many complicated threshold legal and policy matters. "Southern California Edison Company's (U 338-E) Prehearing Conference Statement" at 7, R.04-04-025 (November 3, 2004). This will necessitate "extensive" prepared testimony and hearings, and will introduce "complex and contentious issues" into the proceeding. Id. SRAC methodology is not an issue that can be studied or modified quickly or superficially. It is a complex, complicated formula that requires substantial expertise, evidence, and patience to resolve. Consistent with PURPA's delegation of avoided cost pricing to state commissions, only the CPUC encompasses the necessary skills to establish and periodically evaluate the accuracy of the SRAC Formula to determine if and how it should be revised, as it has done for more than two decades.

The reality of the situation is this. If the CPUC had not ordered the utilities to continue purchasing QF power from those QFs with expiring contracts – by either renewing the contract, entering into a negotiated contract, or executing an SO1 contract – the utilities would have allowed

these QF contracts to expire. Edison admitted as much in its short- and long-term procurement plans. Exs. 3 at 104, 14 at 1190-92. California might have lost the important generation resources that these QFs provide, not to mention falling out of compliance with PURPA. The only reasonable course of action for the CPUC to have taken under the circumstances was to implement an interim mechanism to maintain the status quo and comply with PURPA's mandatory purchase obligation. This Court should affirm the CPUC's Decisions.

IV.

EDISON AND PG&E DISTORT THE LAW

A. This Court Must Defer to the CPUC's Interpretation of the Evidence

The CPUC's actions are presumed valid. Greyhound Lines, Inc. v. Pub. Util. Comm'n, 68 Cal. 2d 406, 410-11 (1968). PURPA gives state regulatory commissions responsibility for determining each utility's avoided costs and establishing the prices to be paid by utilities for QF power. 16 U.S.C. § 824a-3(f)(1); 18 C.F.R. § 292.304 (RFJN, Ex. A). This reflects the recognition that only state commissions have the unique expertise and information needed to make factual avoided cost determinations for individual utilities—not the courts, not the generators, and not the utilities. Accordingly, state commissions have broad discretion in determining a utility's avoided costs, provided they do so in accordance with PURPA and FERC's regulations. Independent Energy Producers Ass'n v. Cal. Pub. Util. Comm'n, 36 F.3d 848, 856 (9th Cir. 1994); D.02-08-071 (RFJN, Ex. M at 31-32).

The California Public Utilities Code generally limits this Court's review of CPUC decisions to "whether the commission has regularly pursued its authority," meaning that if there is evidence to support the

CPUC's findings of fact, these findings "are final and unreviewable unless the evidence is undisputed and subject to only one reasonable inference." Camp Meeker Water System, Inc. v. Pub. Util. Comm'n, 51 Cal. 3d 845, 863-64 (1990). As both this Court and the California Supreme Court have explained, a court cannot substitute its judgment as to the weight of the evidence in the underlying proceeding or to the factual findings of the CPUC. Id. at 864; Southern Cal. Edison Co. v. Cal. Pub. Util. Comm'n, 101 Cal. App. 4th 384, 395 (2002) ("Edison I"); Edison II, 101 Cal. App. 4th 982, 992 (2002) (holding that the decision regarding which gas indices should be used to calculate SRAC prices "was a decision for the [CPUC] and not for this court").

Questions of fact determined by the CPUC are subject to judicial review by the substantial evidence standard. City of St. Helena, 119 Cal. App. 4th 793, 801 (2004). A court should not interfere with discretionary judgments made by an agency, and, in evaluating whether a decision is supported by substantial evidence, must resolve reasonable doubts in favor of the agency's findings. Friends of the Eel River v. Sonoma County Water Agency, 108 Cal. App. 4th 859, 867-68 (2003). Moreover, when the CPUC has interpreted statutes within its administrative jurisdiction, deference to the CPUC's interpretation is the "general rule" and this interpretation "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language...." PG&E Corp. v. Pub. Util. Comm'n, 118 Cal. App. 4th 1174, 1194 (2004).

B. The CPUC Decisions Are Supported By Substantial Evidence.

Edison and PG&E continue to distort both the facts and the law to persuade this Court that the CPUC acted capriciously in contradiction to the submitted evidence. This Court must examine the full record (including significant portions that Edison neglects to mention) to come to an educated

conclusion as to the evidence. By doing this, the Court will have to conclude that the CPUC's finding that SRAC prices do not violate PURPA's avoided cost standard was fully supported by substantial evidence.

The record in this proceeding is replete with evidence concerning the CPUC's decision that the SRAC Formula complies with PURPA. The CCC and CalWEA have cited pages of direct quotes from the Rehearing Decision affirming the SRAC Formula and have referred to considerable evidence presented by CCC witness Mr. Beach supporting these quotes. The CPUC's analysis of this evidence, its conclusions regarding the invalidity of Edison's arguments, and its affirmation that the current SRAC Formula complies with PURPA is clear. Edison, however, dismisses this evidence with a brief footnote. Answer at 17-19, 22-25; Reply at fn. 4. In the face of this evidence, Edison uses its Reply to yet again argue that the CPUC declined to determine if the SRAC Formula complies with PURPA. Reply at 6. Edison cannot simply ignore the direct evidence that is contrary to its arguments, while distorting other evidence to be in its favor. Roemer v. Pappas, 203 Cal. App. 3d 201, 208 (1988) (holding that a party who challenges the sufficiency of the evidence to support a particular finding must summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient).

The utilities' arguments concerning spot market prices, as discussed above, are likewise hollow. Not only does the testimony fail to support the use of spot market prices as an accurate proxy for avoided costs, as Edison and PG&E are well aware, neither federal nor state law allows the CPUC to rely merely on spot market prices to determine a utility's avoided costs. 18 C.F.R. § 292.304(e) (RFJN, Ex. A) (specifying a number of factors that must be considered in developing an avoided cost price); Cal. Pub. Util.

Code § 390(b) (requiring the CPUC to abide by the formula set forth in the statute to determine avoided costs). The utilities cannot be allowed to use this Court to make an end-run around established state and federal law and the CPUC's unquestionable authority to implement these laws.

The CPUC considered all of the evidence in the record and made a determination that SRAC prices determined under the SRAC Formula do not violate PURPA's avoided cost standard. These findings more than satisfy PURPA's requirements. See Edison I, 101 Cal. App. 4th at 396 (holding that PURPA requires the CPUC to conduct hearings, hear conflicting evidence, and issue a decision). Even if the Court believes that the record contains conflicting evidence, or evidence from which conflicting inferences may be drawn, the Court must defer to the CPUC's findings regarding the weight of that evidence. AT&T Comm. of Cal., Inc. v. Pacific Bell Tel. Co., 375 F.3d 894, 909 (9th Cir. 2004); Friends of the Eel River v. Sonoma County Water Agency, 108 Cal. App. 4th 859, 867-68 (2003).

C. The CPUC's Actions and the Decisions Comply With PURPA.

- 1. PURPA does not require as delivered payments to equal avoided costs at all times, and the CPUC and this Court are preempted from finding otherwise.**

Edison and PG&E argue that, because the SO1 contracts are "as-available" contracts to be priced "at the time of delivery," the CPUC's, CCC's and CalWEA's arguments that the SRAC Formula appropriately estimates avoided costs over time should be rejected. Reply at 19-21; Amicus Brief at 21-22. The utilities argue that the SRAC Formula must yield prices that equal their "actual" avoided costs in each particular time period. This argument is contrary to decades of PURPA implementation by the CPUC. It is also contrary to FERC's implementation of PURPA. As

such, not only should the Court refrain from adopting the utilities' interpretation of PURPA, the Court is compelled to reject their interpretation.

States are required to implement PURPA in accordance with FERC's regulations. Although FERC tries to avoid "second-guessing" state regulatory authorities' determinations of avoided costs, FERC has confirmed that states must ensure that their methodology for determining avoided costs complies with PURPA and FERC's regulations. New York State Electric & Gas Co., 71 FERC ¶ 61,027, 1995 WL 216781, at *15 (1995).

Indeed, the United States Supreme Court consistently finds preemption where enforcement of a state law would encroach on FERC's exclusive jurisdiction. See, e.g., Miss. Power & Light Co. v. Mississippi, 487 U.S. 354, 371 (1988) (state proceedings affecting interstate rates were preempted); Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953, 966 (1986) (state regulatory action preempted where it affected rates within FERC's jurisdiction). It has also found conflict preemption to bar state laws and actions when they "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 298 (1988). Thus, a state law or action is preempted where it "presents the prospect of interference with the federal regulatory power . . . even though [the] collision . . . may not be an inevitable consequence." In re Cal. Wholesale Elec. Antitrust Litig., 244 F. Supp. 2d 1072, 1082 (S.D. Cal. 2003), quoting Schneidewind, 485 U.S. at 310.

Preemption bars not only state regulatory acts, but also any "judicial acts" – including awarding monetary or injunctive relief – "that interfere or conflict with congressional intent." Spielholz v. Superior Court, 86 Cal.

App. 4th 1366, 1371 (2001); Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571, 584 (1981); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959).

When drafting its regulations implementing PURPA, FERC was very specific in explaining exactly what it meant when it determined that when QFs delivered energy on an “as-available” basis, the rates for such purchases are to be based on the utility’s “avoided costs calculated at the time of delivery.” 18 C.F.R. § 292.304(d)(1) (RFJN, Ex. A). In Order No. 69, which established the federal rules regarding the implementation of PURPA, FERC discussed a prior draft of Section 292.304(d)(1) which would have specified that rates for “as-available” purchases “should be based on actual avoided costs.” FERC Stats. & Regs., Regs. Preambles 1977-1981 ¶ 30,128, at 30,870, 45 Fed. Reg. 12,214, at 12,224 (1980).

FERC explained in Order No. 69 that it was revising Section 292.304(d)(1) to delete the reference to “actual avoided costs” because “basing rates for purchases in such cases on the utility’s ‘actual avoided costs’ is misleading and could require retroactive ratemaking.” Id. FERC clarified that it therefore had revised Section 292.304(d)(1) “to provide that the rates for purchase are to be based on the purchasing utility’s avoided costs *estimated* at the time of delivery.” Id. (emphasis added).

The version of Section 292.304(d)(1) that was adopted by FERC in Order No. 69 is the same version that appears in FERC’s regulations today. Section 292.304(d)(1) specifies that rates applicable to as-available purchases shall be based on the purchasing utility’s “avoided costs calculated at the time of delivery.” 18 C.F.R. § 292.304(d) (RFJN, Ex. B). FERC’s discussion in Order No. 69 demonstrates that for a QF that is providing energy on an “as-available” bases, the utility’s “avoided costs

calculated at the time of delivery” are intended to reflect the utility’s avoided costs *estimated* at the time of delivery, and should not be based on the utility’s “actual” costs calculated on a retroactive basis. FERC further stated, when discussing both Sections 292.304(b)(5) and 292.304(d) that it “believes that, in the long run, ‘overestimations’ and ‘underestimations’ of avoided costs will balance out.” Order No. 69 at 12,224 (RFJN, Ex. A).

By insisting on an estimate of avoided costs, FERC has clearly determined that avoided costs calculated at the time of delivery were not meant to equal actual avoided costs at all times. This interpretation of PURPA’s avoided cost mandate for as-available contracts is consistent with how FERC interprets calculating avoided costs in firm capacity contracts. Id. Again, FERC’s interpretation shows that periodic deviations between avoided cost prices and actual avoided costs are permissible under PURPA, and were expected when FERC’s implementing regulations were promulgated. New York State Electric & Gas Co., 71 FERC ¶ 61,027, 1995 WL 216781, at *15 (1995) (upholding estimated rates as being consistent with PURPA’s avoided cost standard even where they are later determined to have exceeded actual avoided costs during certain time periods, and emphasizing that, in the long-run, “overestimations and underestimations will balance out to provide accurate avoided costs.”); see also Jersey Central Power & Light Company, Order Denying Petition for Declaratory Order, 73 FERC ¶ 61,092, 1995 WL 609823, at *9 (1995); West Penn Power Company, Order Denying Petition for Declaratory Order, 71 FERC ¶ 61,153, 1995 WL 265343, at *1 (1995).

In accordance with FERC’s regulations and interpretation of PURPA, California’s SRAC Formula was never meant to yield prices that exactly equal the utilities’ avoided costs on an hourly or even monthly basis, and no past SRAC formula ever has. The CPUC confirmed this in its

Rehearing Decision, explaining that “PURPA does not require that QF prices be less than avoided cost at all times....Rather, PURPA requires a reasonable approximation of avoided costs over time.” Ex. 89 at 5711.

While the utilities would like this Court to see this as a cover-up, the CPUC has never wavered from understanding of FERC’s directives in its implementation of PURPA. In 1982, for example, the CPUC explained that SRAC prices are merely intended to be a “representation” of avoided costs, and may in fact turn out to be higher or lower than actual avoided costs during certain periods but that any deviations should cancel out over time. D.82-12-120 (RFJN, Ex. D at *54-55); see also D.91-10-039 (RFJN, Ex. G at *9).

In response to this evidence, both Edison and PG&E attempt to direct the Court’s attention to alternate portions of the FERC regulations, ignoring completely the language in Order No. 69 applying to avoided cost estimations for as-available contracts. Indeed, Edison goes so far as to assert that the FERC rules do not permit contracts with pricing at the time of delivery to differ from the utility’s avoided cost. Reply at 21. The claim is blatantly false.

The utilities ignore FERC’s language because it directly contradicts the positions they argue before this Court. FERC has stated conclusively that as-available deliveries must be based on **estimated** avoided costs to circumvent retroactive ratemaking, making deviations between actual avoided costs and calculated avoided costs inevitable and expected. As shown in the cited regulations, FERC authority, and case law precedent, this view of avoided costs permeates the entire avoided cost pricing scheme, regardless of the type of contract or the payment terms. Avoided costs, by necessity, must be allowed to deviate on a day-by-day or month-

by-month basis in order to effectuate the overriding goal of PURPA – the encouragement of QF generation.

2. PURPA Does Not Require State Commissions to Review Their SRAC Methodologies Each Time They Authorize a QF-Related Contract.

Edison seeks to impose a novel and unprecedented legal obligation on the CPUC – that before the CPUC orders a utility to comply with PURPA’s mandatory purchase obligation at rates determined using the current CPUC-approved avoided cost pricing methodologies, it has an affirmative duty to review and re-approve those methodologies. In attempting to defend its theory against the CCC’s and CalWEA’s critique that Edison’s view would require the CPUC to reevaluate continuously its SRAC Formula, an overly burdensome and unwarranted prospect, Edison argues that the obligation to re-evaluate the formula only exists at the time the CPUC issues new decisions and imposes new obligations. Reply at 9-10. As such, the logic would go, this should not be overly burdensome. This theory disintegrates, however, when applied to reality.

Under Edison’s logic, if the CPUC only had the duty to reaffirm its SRAC methodology at the time it issues a decision creating a new obligation, then so long as the SRAC methodology complied with PURPA at the time the decision was issued, any later contracts arising from that decision would necessarily be valid (even if the SRAC methodology ceased to reflect avoided costs) because the underlying decision complied with PURPA at the time it was issued. Under this standard, the CPUC would only need to revise its SRAC methodology if it wanted to issue a new decision; it would have no obligation to ensure that the prevailing SRAC methodology complies with PURPA on an ongoing basis. This cannot be the law because it just does not make sense.

In reality, the CPUC has been implementing its SRAC formulas consistently for more than two decades. It has never conducted a new analysis of a formula just because a new obligation was being created vis-a-vis a QF wanting to enter into a standard offer contract. The SRAC Formula, as explained above, automatically and continuously updates SRAC prices to reflect current avoided costs by incorporating changes in prevailing gas prices. As the CPUC explained “when we adopted the modified SRAC [Formula], in D.01-03-067,” its application was intended to apply “for the indefinite future.” Ex. 89 at 5710. The CPUC cited the holding in its decision modifying the SRAC Formula (D.01-03-067) that “payments to qualifying facilities paid short-run avoided costs or based on the short-run avoided cost formula, shall be made consistent with the [SRAC Formula] as modified today,” until such time as it is modified again by the CPUC. Id.

The CPUC concluded that “this language is broad enough to include any extension we may order, and [Edison] has no basis for arguing that the extensions require a new SRAC determination.” Id. This “is particularly true since [the Decisions] specifically hold that any new contract must incorporate future SRAC modifications.” Id. The CPUC correctly concluded that Edison’s “contentions regarding adequate findings and substantial evidence to support the adequacy of the SRAC formula are unavailing.” Id.

If a utility or other interested party wants to assert that a certain SRAC methodology no longer produces avoided cost prices in compliance with PURPA, it can submit evidence to the CPUC to prove that the formula is wrong. The utilities failed to do so in the Procurement Proceeding. Despite that fact, they have been given another opportunity to make their

case in the CPUC's Avoided Cost Proceeding. Until an affirmative decision is made by the CPUC that the SRAC methodology needs updating, the formula in place represents the CPUC's determination of the suitable methodology to make avoided cost payments to QFs. Thus, the CPUC fully complied with PURPA's avoided cost standard when it required Edison to buy QF power at prices determined according to the current CPUC-approved avoided cost pricing methodologies.

3. Requiring the utilities to enter into contract extensions was the only reasonable way to comply with PURPA.

The subject of the Procurement Proceeding was how utilities should purchase QF power in accordance with PURPA's mandatory purchase obligation and state law. Ex. 83 at 5572, 5574. As interpreted by FERC, subject to very limited exceptions, PURPA requires Edison to buy "any energy and capacity" that is "made available" to it by QFs. 18 C.F.R. § 292.303(a) (RFJN, Ex. A). PURPA gives the CPUC broad discretion to decide how to implement PURPA's mandatory purchase obligation, as long as it does so in a manner that is consistent with PURPA and FERC's implementing regulations. Independent Energy Producers, 36 F.3d 848 at 856; D.02-08-071 (RFJN, Ex. M at 31-32). Because the existing QFs whose contracts are now expiring desire to continue selling their power to the utilities and PURPA clearly requires the utilities to continue buying these QFs' power, the CPUC has a responsibility to determine how this requirement will be implemented.

Of the three utilities in the underlying Procurement Proceeding, only Edison refused to offer any form of SO1 contract to satisfy its mandatory purchase obligation. It argued that it was not obligated to accept deliveries of QF power unless a QF successfully bid into one of Edison's all-source resource solicitations. Ex. 3 at 104. Edison, however, is not conducting

solicitations for the kind of power provided by cogeneration QFs. Two of Edison's recent solicitations contained a 25 megawatt minimum capacity requirement that prevented almost 80% of QFs under contract to Edison from participating. Ex. 12 at 1070:14-22. In addition, Edison proposed to fill its resource needs by procuring 1054 megawatts of capacity from an Edison affiliate under a 30-year agreement that was not obtained through any competitive solicitation. Ex. 19 at 1517-19. Clearly, Edison is attempting to reenter the generation industry and is only out for itself and its profits regardless of federal or state requirements.

As Edison's Petition demonstrates, if the CPUC had not taken these actions, Edison would have allowed its existing QF contracts to expire and would have refused to continue purchasing power from those QFs. Petition at 38-39. This would have violated PURPA and FERC's regulations. Furthermore, history has shown that it is extraordinarily difficult to negotiate any QF contract that Edison has not been specifically ordered to provide to QFs. There can be no doubt that requiring Edison to enter into SO1 contract extensions at CPUC-approved SRAC prices was a reasonable – and necessary – measure for ensuring compliance with PURPA's mandatory purchase obligation.

D. Edison's interpretation of Public Utilities Code section 1709 is blatantly wrong and attempts to distort the fact that the SO1 contracts had been in effect for nearly two years before Edison sought this writ.

Edison asserts that the CPUC "affirmatively acted to alter the status quo" in the Decisions by "reviving the SO1 contract suspended in D.96-10-036," and insists that the CPUC was required to "ascertain and affirmatively" approve SO1 contract's pricing formula before reviving it. Petition at 38-39. Edison continues to claim that the SO1 contracts at issue in the Procurement Proceeding were "new" and unprecedented in its Reply.

It makes this unmeritorious argument despite the undisputed evidence that the CPUC ordered the reinstatement of the SO1 contract in a 2002 decision. D.02-08-071 (RFJN, Ex. M at 31-32). Indeed, in accordance with D.02-08-071 Edison had already entered into some of these “new” SO1 contracts a year prior to the December Decision even being issued! In reality, the Decisions **maintain** the status quo of preserving QF relationships with the utilities through SO1 contracts rather than alter it.

In their Answer, the CCC and CalWEA explained that since the decision to reinstate the SO1 contracts using the SRAC Formula occurred in 2002, many of Edison’s arguments, including that the CPUC was required to “re-evaluate” or “affirm” the SRAC Formula before reinstating the SO1 contract, are simply too late. Under section 1731(b) of the California Public Utilities Code, in order for a cause of action to arise out of a CPUC decision, Edison was required to file an application for rehearing to the CPUC within thirty days after the date of issuance. Edison failed to seek rehearing of D.02-08-071, making it a final decision no longer subject to judicial review. Cal. Pub. Util. Code § 1731(b). Furthermore, section 1709 of the California Public Utilities Code (“Section 1709”) states, in full, that “In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.” Again, it is simply too late for Edison to now argue, more than two years later, that the CPUC had a “duty” to “affirmatively” review and re-approve the SRAC Formula before requiring Edison to sign the reinstated SO1 contracts.

In response, Edison attempts to distort the plain meaning of Section 1709 by arguing that it only applies to orders and decisions of the CPUC that were made while exercising its judicial power. Reply at 11-12. Although Edison lists several cases to support this novel interpretation,

only two actually cite to Section 1709.⁹ Both of these cases, moreover, uphold the plain meaning of Section 1709 and do not limit its application to judicial decisions of the CPUC. See Camp Meeker Water System, Inc. v. Pub. Util. Comm'n, 51 Cal. 3d 845, 852 fn. 3 (1990) (holding that “Pursuant to section 1709, the commission decision...is binding as, ‘[i]n all collateral actions or proceedings, the orders and decision of the commission which have become final shall be conclusive.”); People v. Western Air Lines, Inc., 42 Cal. 2d 621 630 (1954) (holding that when the CPUC’s “determinations within its jurisdiction have become final they are conclusive in all collateral actions and proceedings. (Pub. Util. Code, § 1709.)”). Neither of these cases limits the application of Section 1709 to judicial decisions.

What Edison misinterprets is the later discussion in each of these cases of the common law doctrine of *res judicata*, which is limited to the CPUC’s judicial decisions. Section 1709, however, is not a codification of *res judicata* and does not have such limitations on its application. Thus, an order or decision of the CPUC, even if “palpably erroneous in point of law,” is binding and conclusive on all courts of California until the decision is annulled on judicial review. Hickey v. Roby, 273 Cal. App. 2d 752, 763

⁹ The remaining cases merely discuss the common law theories of *res judicata* and administrative collateral estoppel in forums outside of the CPUC, and therefore do not have any bearing on the interpretation of Section 1709. See Hollywood Circle, Inc. v. Dept. of Alcoholic Beverage Control, 55 Cal. 2d 728 (1961) (concerning the doctrine of *res judicata* within the context of agency review); Olive Proration Program Comm. v. Agricultural Prorate Comm'n, 17 Cal. 2d 204 (1941) (determining whether an agency itself can alter or modify its past determinations); San Miguel Consolidated Fire Protection Dist. v. Davis; 25 Cal. App. 4th 134 (1994) (setting forth the common law elements of administrative collateral estoppel).

(1969) (citing to Section 1709); Loustalot v. Superior Court, 30 Cal. 2d 905, 911-12 (1947); 53 Cal. Jur. 3d Public Utilities § 96 (2004).

Edison further misinterprets the point made by the CCC and CalWEA concerning Section 1709. The Answer clearly explains that it is Edison's novel claim that the federal law required the CPUC to "re-affirm" the SRAC Formula before reinstating the SO1 contract that is now barred by Section 1709, as the CPUC reinstated the SO1 in a final and conclusive decision issued more than two years ago. Answer at 40. The Answer further countered Edison's misleading statements that these SO1 contracts are somehow "new" and unprecedented, rather than being more than two years old. Id. The CCC and CalWEA never argued that a utility was not entitled to seek a ruling on the accuracy of the SRAC Formula; indeed, they pointed out multiple times that the CPUC did review and re-affirm the accuracy of the SRAC Formula in the Rehearing Decision. Edison's misguided arguments as to the interpretation of Section 1709 and the purpose for which it was cited should be disregarded by this Court.

V.

CONCLUSION

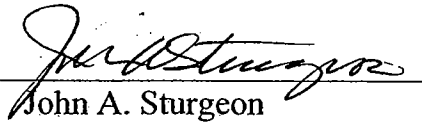
The facts show that the CPUC made well-reasoned decisions based on an extensive review of the voluminous testimony. It adopted a reasonable mechanism to implement PURPA's mandatory purchase obligation on an interim basis and determined, in no uncertain terms, that the current SRAC Formula complies with PURPA and should be used on a going forward basis. As an extra precaution, the CPUC expressly required that the SO1 contracts incorporate any revised SRAC methodology developed in the ongoing Avoided Cost Proceeding. This Court must defer

to the CPUC's interpretation of the evidence and should affirm the CPUC's
Decisions.

Dated: November 22, 2004

WHITE & CASE LLP

By:



John A. Sturgeon

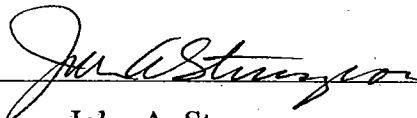
Attorneys for Real Parties Interest
the California Cogeneration Council and
the California Wind Energy Association

CERTIFICATE OF COMPLIANCE

I, John A. Sturgeon, declare and state as follows:

I am an attorney licensed to practice in the State of California. I am counsel for real parties in interest the California Cogeneration Council and the California Wind Energy Association, and have aided in the preparation of the foregoing Answer And Brief Of Real Parties In Interest The California Cogeneration Council And The California Wind Energy Association In Opposition To Petition For Writ Of Review. I have performed a word count in accordance with California Rule of Court 14(c) via the computer program used to prepare the brief. The word count of this document is 10,029, inclusive of footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on November 22, 2004, at Los Angeles, California.


John A. Sturgeon

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 633 W. Fifth Street, Suite 1900, Los Angeles, CA 90071-2007.

On November 22, 2004, I served the foregoing document described as:

**SUPPLEMENTAL BRIEF OF REAL PARTIES IN INTEREST
THE CALIFORNIA COGENERATION COUNCIL AND
THE CALIFORNIA WIND ENERGY ASSOCIATION**

by placing true copies thereof enclosed in sealed envelopes addressed as stated on the attached service list.

(BY MAIL) I placed such envelopes with postage thereon prepaid in the United States Mail at 633 W. Fifth Street, 18th Floor, Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 22, 2004, at Los Angeles, California.

Diane M. Petrek
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