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ATTACHMENT 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55291

CALIFORNIANS FOR RENEWABLE ENERGY, INC., *et al.*,

Plaintiffs-Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the Central District of California, U.S.D.C. C.D.CAL. No. CV 11-04975 JWH (JCGx)

APPELLANTS' OPENING BRIEF
EXCERPTS OF RECORD
VOLUME 1

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

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOLUTIONS FOR UTILITIES, INC., a California Corporation, Plaintiff, and CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation; MICHAEL E. BOYD; ROBERT SARVEY, Plaintiffs - Appellants, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; MICHAEL R. PEEVEY; TIMOTHY ALAN SIMON; MICHAEL R. FLORIO; CATHERINE J.K. SANDOVAL; MARK J. FERRON, in their official and individual capacities as current Public Utilities Commission of California Members, Defendants - Appellees,	No. 13-55206 D.C. No. 2:11-cv-04975-SJO-JCG MEMORANDUM*

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

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

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

Argued and Submitted February 10, 2015
Pasadena, California

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

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

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

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

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

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

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

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

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

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

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

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 11 2015

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U.S. COURT OF APPEALS

SOLUTIONS FOR UTILITIES, INC., a California Corporation,

Plaintiff,

and

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

Plaintiffs - Appellants,

v.

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

Defendants - Appellees,

and

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

Defendants.

No. 13-55206

D.C. No. 2:11-cv-04975-SJO-JCG
U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered March 06, 2015, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court

Rhonda Roberts
Deputy Clerk

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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

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

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

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

==========

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

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

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

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

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

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

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

II. DISCUSSION

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

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

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

A. Legal Standards

1. Amendment Pursuant to Rule 15

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

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

B. Whether Leave to Amend Should Be Granted

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

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

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

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

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

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

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

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

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

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

(3) what efforts were made by CARE to obtain contracts with such local power grid providers;
(4) the complete membership of CARE;
(5) proof that Plaintiffs Boyd and Sarvey are members of CARE and are QFs.

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

2. Remedies Available Under PURPA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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b. Attorneys' Fees

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

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

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

3. Conclusion

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

III. RULING

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

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Solutions for Utilities Inc et al PLAINTIFF(S) v. California Public Utilities Commission et al DEFENDANT(S).	CASE NUMBER: 2:11-cv-04975-SJO-JCG **NOTICE TO FILER OF DEFICIENCIES IN ELECTRONICALLY FILED DOCUMENTS**

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- ☐ Local Rule 19-1 Complaint/Petition includes more than 10 Does or fictitiously named parties
- ☐ Local Rule 56-1 Statement of uncontroverted facts and/or proposed judgment lacking
- ☐ Local Rule 56-2 Statement of genuine disputes of material fact lacking
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Clerk, U.S. District Court

Dated: 4/15/16

By: L Chai 213-894-5730
Deputy Clerk

cc: Assigned District Judge and/or Magistrate Judge

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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

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

Argued and Submitted February 6, 2019
Pasadena, California

Filed April 24, 2019

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

Opinion by Judge Marbley;
Dissent by Judge Nguyen

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

SUMMARY**

Energy Law

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

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

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

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

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

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

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

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

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

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

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

COUNSEL

Meir J. Westreich (argued), Pasadena, California, for Plaintiffs-Appellants.

Christine Jun Hammond (argued), Arocles Aguilar, California Public Utilities Commission, San Francisco, California, for Defendants-Appellees.

Peter J. Richardson, Gregory M. Adams, Richardson Adams, PLLC, Boise, Idaho; Irion Sanger, Sanger Law, PC, Portland, Oregon; for Amici Curiae Community Renewable Energy Association and Northwest and Intermountain Power Producers Coalition.

OPINION

MARBLEY, District Judge:

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

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

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

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

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Statutory Background

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

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

Id.

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

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

To address the barriers facing QFs, PURPA required utilities to purchase electricity from QFs, i.e. the mandatory purchase requirement, 16 U.S.C. § 824a-3(a), and to pay QFs rates that "shall be just and reasonable to the electric consumers of the electric utility and in the public interest." 16 U.S.C. § 824a-3(b). Utilities must compensate QFs at a rate equal to the utility's "avoided cost." 18 CFR § 292.304(d). "Avoided cost" is "the incremental cost[] to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(6).

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

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

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

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

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

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

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

B. The Challenged CPUC Programs

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

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

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

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

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

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

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

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

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

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

II. Procedural Background

A. CARE v. CPUC I

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

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

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

B. The Current Action

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

III. JURISDICTION AND STANDARD OF REVIEW

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

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

The district court next granted summary judgment for CPUC on CARE's PURPA challenges. This Court reviews summary judgment orders *de novo*. *Sonner v. Schwabe North America, Inc.*, 911 F.3d 989 (9th Cir. 2018). This Court "[v]iewing the evidence in the light most favorable to the nonmoving party . . . must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001) (en banc) (citing *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc)). On summary judgment, "it is not our task . . . to scour the record in search of a genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th Cir. 1995)). Rather, "[w]e rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Id.*

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

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

IV. ANALYSIS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Excluding capacity costs from a full avoided cost calculation

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

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

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

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

Order 69, 45 FERC at 12216.

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

1. The QF Settlement Contract price

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

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

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

2. The NEM Program

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

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

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

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

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

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

3. The Re-MAT and CHP Programs

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

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

4. Renewable Energy Credits ("RECs")

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

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

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

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

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

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

D. Equitable damages and attorney fees

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

AFFIRMED IN PART and REVERSED IN PART.

NGUYEN, Circuit Judge, dissenting in part:

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

I.

A.

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

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

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

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

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

B.

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

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

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

Id. at ¶ 61,266 (emphases added).

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

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

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

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

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

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

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

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

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

II.

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

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

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

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

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

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

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

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

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

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

SEP 23 2019

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

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

Plaintiffs - Appellants,

and

SOLUTIONS FOR UTILITIES, INC., a California Corporation,

Plaintiff,

v.

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

Defendants - Appellees,

and

RACHEL CHONG; et al.,

Defendants.

No. 17-55297

D.C. No. 2:11-cv-04975-SJO-JCG
U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered April 24, 2019, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Nixon Antonio Callejas Morales
Deputy Clerk
Ninth Circuit Rule 27-7

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. CV 11-4975 FMO (JCGx) **SCHEDULING AND CASE MANAGEMENT ORDER RE: JURY TRIAL**

PLEASE READ THIS ORDER CAREFULLY. IT GOVERNS THIS CASE AND DIFFERS IN SOME RESPECTS FROM THE LOCAL RULES.

The term "Counsel," as used in this Order, includes parties appearing pro se.

The court has scheduled the dates set forth on the last two pages of this Order after review of the parties' Joint Rule 26(f) Report. Therefore, the court deems a Scheduling Conference unnecessary and hereby **vacates** the hearing. The dates and requirements set forth in this Order are firm and supersede any dates or requirements set in previous case management orders. The court is unlikely to grant continuances, even if stipulated by the parties, unless the parties establish good cause through a proper showing.

In an effort to comply with Fed. R. Civ. P. 1's mandate "to secure the just, speedy, and inexpensive determination of every action[,]" the court **orders** as follows.

I. DISCOVERY.

A. Generally.

Discovery is governed by the Federal Rules of Civil Procedure and applicable Local Rules of the Central District of California. Pro se litigants are entitled to discovery to the same extent as are litigants represented by counsel. The court allows discovery to commence as soon as the first answer or motion to dismiss is filed. The parties should note that absent exceptional circumstances, **discovery shall not be stayed** while any motion is pending, including any motion to dismiss or motion for protective order. **The parties are directed to conduct any necessary discovery as soon as possible, as the court is not inclined to grant any extensions of the discovery or other case-related deadlines**.

Counsel are expected to comply with the Federal Rules of Civil Procedure and all Local Rules concerning discovery. Whenever possible, the court expects counsel to resolve discovery disputes among themselves in a courteous, reasonable and professional manner. The court expects that counsel will adhere strictly to the Civility and Professionalism Guidelines (available on the Central District's website under Information for Attorneys > Attorney Admissions).

B. Discovery Cut-Off.

The court has established a cut-off date for discovery, including expert discovery, if applicable. This is not the date by which discovery requests must be served; it is the date by which all discovery, **including all hearings on any related motions**, is to be completed.

C. Discovery Motions.

Any motion relating to a deposition or challenging the adequacy of discovery responses must be filed, served, and calendared sufficiently in advance of the discovery cut-off date to permit the responses to be obtained and the deposition to be completed before the discovery cut-off if the motion is granted. Given the requirements set forth in the Local Rules (e.g., "meet and confer" and preparation of the Joint Stipulation), any party seeking to file a discovery motion must usually initiate meet and confer discussions at least seven (7) weeks before the discovery cut-off, i.e., by preparing and serving the letter required by Local Rule 37-1.

D. Expert Discovery.

All disclosures must be made in writing. The parties should begin expert discovery shortly after the initial designation of experts. The final pretrial conference and trial dates will not be continued because expert discovery is not completed. Failure to comply with these or any other orders concerning expert discovery may result in the expert being excluded as a witness.

II. MOTIONS.

The court has established a cut-off date for the filing and service of motions for the court's law and motion calendar. Counsel should consult the court's Initial Standing Order and related procedures, located on the Central District's website,[1] to determine the court's requirements concerning motions and other matters. Any motion that is noticed more than 42 days beyond the date the motion is filed shall be stricken or advanced to an earlier motion date. If the motion is advanced to an earlier motion date, counsel shall comply with the briefing scheduled dictated by the new hearing date. See Local Rules 7-9 & 7-10.

If documentary evidence in support of or in opposition to a motion exceeds 50 pages, the evidence must be separately bound and tabbed and include an index. If such evidence exceeds **300 pages**, the documents shall be placed in a **three-ring binder**, with an index and with each item of evidence separated by a tab divider on the right side. In addition, counsel shall provide an electronic copy (i.e., cd, dvd, or flash drive) of the documents in a single, OCR-scanned PDF file with each item of evidence separated by labeled bookmarks. Counsel shall ensure that all documents are legible. Counsel are strongly encouraged to cite docket numbers (and sub-numbers) when citing to the record.

III. TRIAL PREPARATION.

A. Final Pretrial Conference.

Unless excused for good cause, each party appearing in this action shall be represented at the final pretrial conference by the attorney who is to serve as lead trial counsel. Counsel must

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[1] http://www.cacd.uscourts.gov > Judges' Requirements > Judges' Procedures and Schedules > Hon. Fernando M. Olguin (http://www.cacd.uscourts.gov/honorable-fernando-m-olguin).

be prepared to discuss streamlining the trial, including presentation of testimony by deposition excerpts or summaries, time limits, stipulations as to undisputed facts, and qualification of experts by admitted resumes.

B. Pretrial Documents.

The filing schedule for pretrial documents is set forth on the last two pages of this Order. **Unless otherwise indicated, compliance with Local Rule 16 is required. The court does not exempt pro se parties from the requirements of this Order or Local Rule 16.** Carefully prepared memoranda of contentions of fact and law, witness lists, a pretrial exhibit stipulation, and a proposed pretrial conference order shall be submitted in accordance with the Local Rules and the requirements set forth in this Order. All pretrial document copies shall be delivered to the court "binder-ready" (three-hole punched on the left side, without blue-backs, and stapled only in the top left corner). Failure to comply with these requirements may result in the imposition of sanctions as well as the pretrial conference being taken off-calendar or continued.

1. **Witness Lists.**

In addition to the requirements of Local Rule 16-5, the witness lists must include a brief description (one or two paragraphs) of the testimony and a time estimate for both direct and cross-examination (separately stated).

2. **Pretrial Exhibit Stipulation.**[2]

No later than fourteen (14) days before the deadline set forth below to file the Pretrial Exhibit Stipulation, counsel shall conduct a good faith meet and confer in person to discuss all the trial exhibits and each party's position with respect to the admissibility of each exhibit. The Pretrial Exhibit Stipulation shall contain each party's numbered list of trial exhibits, with objections, if any, to each exhibit, including the basis of the objection and the offering party's brief response. All exhibits to which there is no objection shall be deemed admitted. The parties shall stipulate to the authenticity and foundation of exhibits whenever possible, and the Pretrial Exhibit Stipulation shall identify any exhibits to which authenticity or foundation have not been stipulated and the specific

[2] It is not necessary to file the Joint Exhibit List required by Local Rule 16-6.1.

reasons for the parties' failure to stipulate.

The Pretrial Exhibit Stipulation shall be substantially in the following form:

Pretrial Exhibit Stipulation

Plaintiff(s)'/Defendant(s)' Exhibits

Exhibit No.	Description	Stip. to Adm.?[3]	Objection	Response to Objection

Failure to comply with this section may be deemed a waiver of all objections. Each objection must include the grounds for the objection (e.g., a Federal Rule of Evidence) and an explanation of why the disputed exhibit is not admissible. **Do not submit** blanket or boilerplate objections to the opposing party's exhibits. These will be disregarded and overruled.

3. **Proposed Pretrial Conference Order**.

The format of the proposed final pretrial conference order shall conform to the format set forth in Appendix A to the Local Rules. In drafting the proposed pretrial conference order, the parties shall attempt to agree on and set forth as many undisputed facts as possible. The court will usually read the undisputed facts to the jury at the start of trial. A carefully drafted and comprehensively stated stipulation of facts will reduce the length of trial and increase the jury's understanding of the case.

C. Joint Statement of the Case.

No later than the date set forth below, counsel shall file an objective, non-argumentative statement of the case, which the court shall read to all prospective jurors at the beginning of voir dire. The statement should not exceed one page.

D. Motions in Limine.

Each party is allowed a maximum of five motions in limine, which must filed no later than the deadline set forth below. In the event a party believes that more than five motions in limine are necessary, the party must obtain leave of court to file additional motions in limine. The court

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[3] The Pretrial Exhibit Stipulation shall indicate in this column whether an exhibit is admitted for identification purposes only.

will not hear or resolve motions in limine that are disguised summary judgment motions.

Before filing any motion in limine, counsel for the parties shall confer in a good faith effort to eliminate the necessity for the filing of the motion in limine or to eliminate as many of the disputes as possible. Counsel for the moving party shall be responsible for arranging this conference. The conference shall take place in person, with a court reporter present, within seven (7) calendar days of service upon opposing counsel of a letter requesting such conference, but in no event later than fourteen (14) days before the deadline for filing motions in limine. Unless counsel agree otherwise, the conference shall take place at the office of counsel for the moving party. The moving party's letter shall: identify the testimony, exhibits, or other specific matters alleged to be admissible or inadmissible; state thoroughly with respect to each such matter the moving party's position (and provide any legal authority which the moving party believes is dispositive); and specify the terms of the order to be sought.

If counsel are unable to resolve their differences, they shall prepare and file a separate, sequentially numbered joint motion in limine for each issue in dispute. Each joint motion in limine shall consist of one document signed by all counsel. The joint motion in limine shall contain a clear identification of the testimony, exhibits, or other specific matters alleged to be admissible or inadmissible, and a statement of the specific prejudice that the moving party will suffer if the motion is not granted. The identification of the matters in dispute shall be followed by each party's contentions and each party's memorandum of points and authorities. The title page of the joint motion in limine must contain a clear caption identifying the moving party and the nature of the dispute (e.g., "Plaintiff's Motion in Limine No. 1 to Exclude the Testimony of Defendant's Expert") and state the pretrial conference date, hearing date for the motion, and trial date.

Each separately-represented party shall be limited to ten (10) pages, exclusive of tables of contents and authorities. Repetition shall be avoided and, as always, brevity is preferred. Leave for additional space will be given only in extraordinary cases. The excessive use of footnotes in an attempt to avoid the page limitation shall not be tolerated. All substantive material, other than brief argument on tangential issues, shall be in the body of the brief.

The moving party must provide its portion of the joint motion in limine to the nonmoving

party, via e-mail, no later than nine (9) days before the deadline set forth below for filing motions in limine. The nonmoving party shall then provide the integrated joint motion in limine, along with any exhibits, to the moving party no later than two (2) days before the filing deadline. The moving party may not make any further revisions to the joint motion in limine other than finalizing it for filing. The moving party shall be responsible for filing the joint motion in limine and preparing and filing any supporting exhibits.

The moving party may file a reply memorandum of points and authorities no later than the deadline set forth below. The reply memorandum shall not exceed five pages, unless otherwise ordered by the court.

A motion in limine made for the purpose of precluding the mention or display of inadmissible matter in the presence of the jury shall be accompanied by a declaration that includes the following: (A) a clear identification of the specific matter alleged to be inadmissible; (B) a representation to the court that the subject of the motion in limine has been discussed with opposing counsel, and that opposing counsel has either indicated that such matter will be mentioned or displayed in the presence of the jury before it is admitted in evidence or that counsel has refused to stipulate that such matter will not be mentioned or displayed in the presence of the jury unless and until it is admitted in evidence; and (C) a statement of the specific prejudice that will be suffered by the moving party if the motion in limine is not granted.

Any challenge to expert testimony pursuant to Daubert v. Merrell Dow Pharm., 509 U.S. 579, 113 S.Ct. 2786 (1993), or Federal Rules of Evidence 702-704, must be lodged in the form of a joint motion in limine. The court generally does not hold Daubert hearings.

The mandatory chambers copy of all evidence in support of or in opposition to a motion in limine, including declarations and exhibits to declarations, shall be submitted in a separately bound volume and shall include a Table of Contents. **The transcript of the meet and confer session shall be included as an exhibit to the motion in limine.** If the supporting evidence exceeds 50 pages, then each copy of the supporting evidence shall be placed in a three-ring binder with each item of evidence separated by a tab divider on the right side, and shall include a label on the spine of the binder identifying its contents.

The court will not consider any motion in limine in the absence of a joint motion or a declaration from counsel for the moving party establishing that opposing counsel: (A) failed to confer in a timely manner; (B) failed to provide the opposing party's portion of the joint motion in a timely manner; or (C) refused to sign and return the joint motion after the opposing party's portion was added.

E. Jury Instructions and Verdict Forms.

1. No later than thirty-five (35) days before the deadline to file the required jury instructions and verdict forms, the parties shall exchange their respective proposed jury instructions and verdict forms. No later than twenty-eight (28) days before the filing deadline, each party shall serve objections to the other party's instructions and verdict forms. No later than twenty-one (21) days before the deadline to file the required jury instructions and verdict forms, lead counsel for the parties shall meet and confer in person at an agreed-upon location within the Central District of California and attempt to come to agreement on the proposed jury instructions and verdict forms.

2. No later than the deadline set forth below, counsel shall submit both general and substantive jury instructions in the form described below. Counsel must provide the documents described below in WordPerfect (the court's preference) or Word format. The parties should use the most recent version of the Ninth Circuit's Manual of Model Civil Jury Instructions, which is available on the Ninth Circuit's website,[4] for all applicable jury instructions. If there is no applicable Ninth Circuit model jury instruction, the parties should consult the current edition of O'Malley, et al., Federal Jury Practice and Instructions. If neither the Ninth Circuit nor O'Malley provides an applicable jury instruction, the parties should consult the model jury instructions published by other Circuit Courts of Appeal. Where California law applies, counsel should use the current edition of the Judicial Council of California Civil Jury Instructions ("CACI"), which is available on the California Judicial

[4] http://www3.ce9.uscourts.gov/jury-instructions/model-civil.

Branch website.[5] **The parties shall not modify or supplement a model instruction's statement of applicable law** unless absolutely necessary and strongly supported by controlling case law or other persuasive authority. Each requested instruction shall: (a) cite the authority or source of the instruction; (b) be set forth in full; (c) be on a separate page; (d) be numbered; (e) cover only one subject or principle of law; and (f) not repeat principles of law contained in any other requested instruction.

The proposed jury instructions shall be submitted as follows:

a. **Joint Jury Instructions:** Counsel shall file a **joint set of jury instructions** on which the parties agree. Model jury instructions should be modified as necessary to fit the facts of the case, i.e., inserting names of defendant(s) or witness(es) to whom an instruction applies. Where language appears in brackets in the model instruction, counsel shall select the appropriate text and eliminate the inapplicable bracketed text. The court expects counsel to agree on the substantial majority of jury instructions, particularly when pattern or model instructions provide a statement of applicable law. If one party fails to comply with the provisions of this section, the other party must file a unilateral set of jury instructions.

b. **Disputed Jury Instructions:** Counsel shall file a separate **joint set of disputed jury instructions** propounded by one party to which another party objects. On a separate page following each disputed jury instruction, the party opposing the instruction shall briefly state the basis for the objection, any authority in support thereof and, if applicable, an alternative instruction. On the following page, the party proposing the disputed instruction shall briefly state its response to the objection, and any authority in support of the instruction. Each requested jury instruction shall be numbered and set forth in full on a separate page, citing the authority or source of the requested instruction.

3. For both the Joint Jury Instructions and Disputed Jury Instructions, counsel

[5] http://www.courts.ca.gov/partners/317.htm/civiljuryinstructions/.

must provide an index of all instructions submitted, which must include the following:

a. the number of the instruction;

b. the title of the instruction;

c. the source of the instruction and any relevant case citations; and

d. the page number of the instruction.

For example:

Number	Title	Source	Page Number
1	Trademark-Defined (15 U.S.C. § 1127)	9th Cir. 8.5.1	1

F. Voir Dire.

1. The court will conduct the voir dire. Counsel may, but are not required to, file a list of proposed case-specific voir dire questions no later than the date set forth below.

2. In most cases, the court will conduct its initial voir dire of 16 prospective jurors who will be seated in the jury box. Generally, the court will select eight jurors.

3. Each side will have three peremptory challenges. After all peremptory challenges have been exercised, the eight jurors in the lowest numbered seats will be the jury. The court will not necessarily accept a stipulation to a challenge for cause. If one or more challenges for cause are accepted, and all six peremptory challenges are exercised, the court may decide to proceed with six or seven jurors.

G. Trial Exhibits.

Exhibits must be placed in three-ring binders indexed by exhibit number with tabs or dividers on the right side. The spine portion of the binder shall indicate the volume number **and** contain an index of each exhibit included in the volume. Plaintiff shall be responsible for submitting hard copies of all trial exhibits as follows:

1. On the **first day of trial**, plaintiff shall submit to the Courtroom Deputy Clerk ("CRD") one (1) three-ring binder containing all **original exhibits** to be used at trial (except those to be used for impeachment only) with official exhibit tags attached and bearing the same number shown on the exhibit list.

2. **Plaintiff shall also submit to the CRD** two (2) three-ring binders with **copies** of each exhibit, tabbed with exhibit numbers, for use by the court and the witness.

3. Exhibit tags may be obtained from the Clerk's Office, located on the fourth floor of the First Street Courthouse. Plaintiff shall use yellow tags and defendant shall use blue tags. Digital exhibit tags are also available on the Court's website under Court Forms > General forms > Form G-14A (plaintiff) and G-14B (defendant). Digital exhibit tags may be used in lieu of tags available from the Clerk's Office. The tags shall be stapled to the upper right-hand corner of each exhibit with the case number, case name, and exhibit number placed on each tag. Exhibits shall be numbered 1, 2, 3, etc., **not** 1.1, 1.2, 1.3, etc. The defense exhibit numbers shall not duplicate plaintiff's numbers. Counsel shall designate any "blow-up" enlargement of an existing exhibit with the number of the original exhibit followed by an "A."

4. Admitted exhibits will be given to the jury during deliberations. Counsel shall review all admitted exhibits with the CRD before the jury retires to begin deliberations.

5. Where a significant number of exhibits will be admitted, the court encourages counsel, preferably by agreement, to consider ways in which testimony about exhibits may be made intelligible to the jury while it is presented. For example, counsel should consider using courtroom technology or other devices, such as jury notebooks for admitted exhibits. Information concerning the availability, training, and use of courtroom technology is available on the Central District's website. The court does not permit exhibits to be "published" by passing them up and down the jury box. Exhibits may be displayed briefly using the screens in the courtroom, unless the process becomes too time-consuming.

IV. JURY TRIAL.

A. Generally.

On the first day of trial, **counsel must appear at 8:45 a.m.** to discuss preliminary matters with the court. The jury panel will be called when the court is satisfied that the matter is ready for trial. Jury selection usually takes only a few hours. Counsel should be prepared to proceed with opening statements and witness examination immediately after jury selection.

B. Advance Notice of Unusual or Difficult Issues.

If any counsel have reason to anticipate that a difficult question of law or evidence will necessitate legal argument requiring research or briefing, counsel must give the court advance notice. Counsel are directed to notify the CRD at the day's adjournment if an unexpected legal issue arises that could not have been foreseen and addressed by a motion in limine. See Fed. R. Evid. 103. Counsel must also advise the CRD at the end of each trial day of any issues that must be addressed outside the presence of the jury, so that there is no interruption of the trial. **The court will not keep jurors waiting**.

C. Opening Statements, Examining Witnesses and Summation.

1. Counsel must use the lectern at all times.

2. Counsel shall not discuss the law or argue the case in opening statements.

3. Counsel must not consume time by writing out words, drawing charts or diagrams, etc. Counsel must prepare such materials in advance.

4. The court will honor (and may establish) reasonable time estimates for opening and closing arguments, examination of witnesses, etc.

D. Objections to Questions.

1. Counsel must not use objections to make a speech, recapitulate testimony, or attempt to guide the witness.

2. When objecting, counsel must rise to state the objection and state only that counsel objects and the legal ground of objection. If counsel wishes to argue an objection further, counsel must ask for permission to do so.

E. General Decorum.

1. Counsel should not approach the CRD or the witness box, or enter the well of the court, without specific permission and must return to the lectern when the purpose for approaching has been accomplished.

2. Counsel should rise when addressing the court and when the court or the jury enters or leaves the courtroom, unless directed otherwise.

3. Counsel should address all remarks to the court. Counsel are not to address

the CRD, the court reporter, persons in the audience, or opposing counsel. If counsel wish to speak with opposing counsel, counsel must ask permission to do so. Any request for the re-reading of questions or answers or to have an exhibit placed in front of a witness shall be addressed to the court.

4. Counsel should not address or refer to witnesses or parties by first names alone, with the exception of witnesses under 14 years of age.

5. Counsel must not offer a stipulation unless counsel have conferred with opposing counsel and have verified that the stipulation will be acceptable.

6. While court is in session, counsel must not leave the counsel table to confer with any person in the back of the courtroom unless permission has been granted in advance.

7. Counsel shall not make facial expressions; nod or shake their heads; comment; or otherwise exhibit in any way any agreement, disagreement, or other opinion or belief concerning the testimony of a witness. Counsel shall admonish their clients and witnesses not to engage in such conduct.

8. Counsel should not talk to jurors at all, and should not talk to co-counsel, opposing counsel, witnesses, or clients where the conversation can be overheard by jurors. Each counsel should admonish counsel's own clients and witnesses to avoid such conduct.

9. Where a party has more than one lawyer, only one may conduct the direct or cross-examination of a particular witness, or make objections as to that witness.

10. Water is permitted in the courtroom. Food is not permitted in the courtroom.

F. Promptness of Counsel and Witnesses.

1. Promptness is expected from counsel and witnesses. Once counsel are engaged in trial, this trial is counsel's first priority. The court will not delay the trial or inconvenience jurors.

2. If a witness was on the stand at a recess or adjournment, counsel who called the witness shall ensure the witness is back on the stand and ready to proceed when trial resumes.

3. Counsel must notify the CRD in advance if any witness needs to be accommodated based on a disability or for other reasons.

4. No presenting party may be without a witness. If a party's remaining witnesses are not immediately available and there is more than a brief delay, the court may deem that party to have rested.

5. The court attempts to cooperate with professional witnesses and will, except in extraordinary circumstances, accommodate them by permitting them to be called out of sequence. Counsel must anticipate any such possibility and discuss it with opposing counsel. If there is an objection, counsel must confer with the court in advance.

G. Exhibits.

1. Each counsel should keep counsel's own list of exhibits and should note when each exhibit has been admitted into evidence (if not already admitted pursuant to the pretrial exhibit stipulation).

2. Each counsel is responsible for any exhibits that counsel secures from the CRD and must return them before leaving the courtroom at the end of the session.

3. An exhibit not previously marked should, at the time of its first mention, be accompanied by a request that it be marked for identification. Counsel must show a new exhibit to opposing counsel before the court session in which it is mentioned.

4. Counsel are to advise the CRD of any agreements with respect to the proposed exhibits and as to those exhibits that may be received without further motion.

5. When referring to an exhibit, counsel should refer to its exhibit number. Witnesses should be asked to do the same.

6. Counsel must neither ask witnesses to draw charts or diagrams nor ask the court's permission for a witness to do so. Any graphic aids must be fully prepared before the court session starts.

H. Depositions.

1. The parties shall submit to the CRD all depositions that they intend to use as substantive evidence at trial (i.e., not merely for impeachment purposes) **on the first day**

of trial or such earlier date as the court may order, with all objections noted in the margins. Counsel should verify with the CRD that the relevant deposition is in the CRD's possession.

2. In using depositions of an adverse party for impeachment, either one of the following procedures may be adopted:

a. If counsel wishes to read the questions and answers as alleged impeachment and ask the witness no further questions on that subject, counsel shall first state the page and line where the reading begins and the page and line where the reading ends, and allow time for any objection. Counsel may then read the portions of the deposition into the record.

b. If counsel wishes to ask the witness further questions on the subject matter, the deposition shall be placed in front of the witness and the witness shall be told to read the relevant pages and lines silently. Then counsel may: (a) ask the witness further questions on the matter and thereafter read the quotations; or (b) read the quotations and thereafter ask further questions. Counsel should have an extra copy of the deposition for this purpose.

3. Where a witness is absent and the witness's testimony is offered by deposition, counsel may: (a) have a reader occupy the witness chair and read the testimony of the witness while the examining lawyer asks the questions; or (b) have counsel read both the questions and answers.

I. Interrogatories and Requests for Admissions.

Whenever counsel expects to offer a group of answers to interrogatories or requests for admissions extracted from one or more lengthy documents, counsel must prepare a new document listing each question and answer and identifying the document from which it has been extracted. Copies of this new document should be given to the court and opposing counsel.

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V. COMPLIANCE WITH THIS ORDER, THE LOCAL RULES, AND THE FEDERAL RULES OF CIVIL PROCEDURE.

All parties and their counsel are ordered to become familiar with the Federal Rules of Civil Procedure, the Local Rules of the Central District of California, and the court's standing orders. The failure of any party or attorney to comply with the requirements of this Order, the Local Rules, or the Federal Rules of Civil Procedure may result in sanctions being imposed.

Solutions for Utilities, et al. v. California Public Utilities Commission, et al.
Case No. CV 11-4975 FMO (JCGx)

CASE DEADLINES

The court hereby enters the following scheduling order:

1. All fact and expert discovery shall be completed no later than **February 1, 2021**. The scope of discovery shall be governed by Rule 26 of the Federal Rules of Civil Procedure and the remaining claims and issues as set forth in the Ninth Circuit's decision.

2. The parties must serve their Initial Expert Witness Disclosures no later than **December 1, 2020**. Rebuttal Expert Witness Disclosures shall be served no later than **December 31, 2020**. The parties should commence expert discovery shortly after the initial designation of experts, because Local Rules 7-3 and 37-1 require ample time to meet and confer as well as brief the matters, and because the final pretrial conference and trial dates will not be continued merely because expert discovery is still underway.

3. Any motion for summary judgment or other potentially dispositive motion shall be filed no later than **March 1, 2021** and noticed for hearing regularly under the Local Rules. Any untimely or non-conforming motion will be denied. *All potentially dispositive motions shall comply with the requirements set forth in the Court's Order Re: Summary Judgment Motions issued contemporaneously with the filing of this Order.* Each party is allowed one potentially dispositive motion.

4. The parties shall file memoranda of contentions of fact and law; witness lists; the Pretrial Exhibit Stipulation; and joint motions in limine no later than **April 23, 2021**.

5. The parties shall lodge their proposed Pretrial Conference Order and file the Joint Jury Instructions; Disputed Jury Instructions; a joint proposed verdict form; a joint statement of the case; proposed additional voir dire questions, if desired; and reply memoranda to motions in limine no later than **April 30, 2021**.

The parties shall also send copies of the proposed Pretrial Conference Order; Joint Jury Instructions; Disputed Jury Instructions; the joint proposed verdict form; the joint statement of the case; and any proposed additional voir dire questions, to the chambers e-mail address

(fmo_chambers@cacd.uscourts.gov) in WordPerfect (the court's preference) or Word format.

6. The final pretrial conference and hearing on motions in limine is scheduled for **May 14, 2021** at 10:00 a.m.

7. The trial is scheduled to begin on **Tuesday, June 1, 2021** at 9:00 a.m. On the first day of trial, **counsel must appear at 8:45 a.m.** to discuss preliminary matters with the court.

Dated this 31st day of July, 2020.

/s/
Fernando M. Olguin
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, vs. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCGx **ORDER APPROVING JOINT APPLICATION FOR SCHEDULING STATUS CONFERENCE AND ORDERING FILING OF A JOINT STATUS REPORT PROPOSING NEW SCHEDULING ORDER**

A joint application having been submitted by Plaintiffs and Defendants, by and through their respective undersigned counsel, with supporting declarations, requesting a status conference in this case, with the advance filing of a Joint Status Report proposing a new scheduling order, and good cause appearing therefore:

IT IS HEREBY ORDERED that the parties appear before the court for scheduling status conference on January 25, 2021, at 2:00 p.m., and file a joint status report proposing a new scheduling order no later than January 15, 2021.

Date: December 28, 2020

The Honorable John W. Holcomb
U.S. District Judge

ORDER SUBMITTED BY:

Dated: December 23, 2020

MEIR J. WESTREICH

By:/s/ MEIR J. WESTREICH
MEIR J. WESTREICH

Attorney for Plaintiffs

AROCLES AGUILAR
CHRISTINE JUN HAMMOND
STEPHANIE E. HOEHN
GALEN LEMEI

By:/s/CHRISTINE JUN HAMMOND
CHRISTINE JUN HAMMOND

Attorneys for Defendants CPUC and CPUC Commissioners Marybel Batjer, Liane Randolph, Martha Guzman Aceves, Clifford Rechtschaffen, and Genevieve Shiroma, in their official capacities

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES INC, et al. Plaintiff(s), v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al. Defendant(s).	CASE NUMBER: 2:11−cv−04975−JWH−JCG **NOTICE TO FILER OF DEFICIENCIES IN ELECTRONICALLY FILED DOCUMENTS**

PLEASE TAKE NOTICE:

The following problem(s) have been found with your electronically filed document:

Date Filed: 5/17/2021

Document Number(s): 267

Title of Document(s): Sixth Amended and Second Supplemental AMENDED COMPLAINT

ERROR(S) WITH DOCUMENT:

Leave of court wat not granted for such filing.

Other:

Note: In response to this notice, the Court may: 1) order an amended or corrected document to be filed; 2) order the document stricken; or 3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so.

Clerk, U.S. District Court

Dated: May 19, 2021

By: /s/ *Yvette Louis yvette_louis@cacd.uscourts.gov*
Deputy Clerk

cc: Assigned District Judge and/or Magistrate Judge

Please refer to the Court's website at www.cacd.uscourts.gov for Local Rules, General Orders, and applicable forms.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 11-04975-JWH (JCGx)	Date	May 17, 2021
Title	*Solutions for Utilities Inc., et al. v. California Public Utilities Commission, et al.*		

Present: The Honorable	JOHN W. HOLCOMB, UNITED STATES DISTRICT JUDGE	
Irene Vazquez		Miriam Baird
Deputy Clerk		Court Reporter
Attorney(s) Present for Plaintiff(s): Meir J. Westreich		Attorney(s) Present for Defendant(s): Christine Jun Hammond, Galen Duke Lemei, Stephanie Hoehn

Proceedings: VIDEO HEARING RE: STATUS CONFERENCE

Counsel state their appearances. The Court confers with counsel regarding the posture of the case and case schedule. For the reasons stated on the record, the Court **ORDERS** as follows:

1. Plaintiffs are **DIRECTED** to file their proposed Sixth Amended and Second Supplemental Complaint, attached to the Notice of Lodging [ECF No. 266], on or before May 19, 2021.

2. The Court sets the following briefing schedule pertaining to Defendants' anticipated motion in response to Plaintiffs' Sixth Amended and Second Supplemental Complaint: Defendants' deadline to file response: July 9, 2021; Plaintiffs' opposition deadline: August 6, 2021; Defendants' reply deadline: August 20, 2021; and hearing on motion and Status Conference: September 10, 2021, at 9:00 a.m.

Time: 00:30
Initials of Preparer: iv

3. Discovery is **STAYED** until the Court resolves Defendants' anticipated motion.

IT IS SO ORDERED.

Time: 00:30
Initials of Preparer: iv

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 11-04975-JWH (JCGx)	Date	October 4, 2021
Title	*Solutions for Utilities, Inc., et al. v. California Public Utilities Commission, et al.*		

Present: The Honorable	JOHN W. HOLCOMB, UNITED STATES DISTRICT JUDGE

Irene Vazquez	Courtsmart RS-10-4-21
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s): Meir J. Westreich	Attorney(s) Present for Defendant(s): Ian P. Culver

Proceedings: **VIDEO HEARING RE: DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS' MOTION TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT [ECF No. 271] & STATUS CONFERENCE**

Counsel state their appearances. The Court confers with counsel regarding the status of the case and hears oral argument pertaining to Defendants' motion [ECF No. 271]. For the reasons stated on the record, the Court takes Defendants' motion [ECF No. 271] under submission. The Court will reset the Status Conference after it issues its ruling on the motion.

IT IS SO ORDERED.

Time: 00:42
Initials of Preparer: iv

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California corporation, CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation, MICHAEL E. BOYD, and, ROBERT SARVEY,

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency, SOUTHERN CALIFORNIA EDISON CO., a California Corporation, MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN, GENEVIEVE SHIROMA, and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California,

Defendants.

Case No. 2:11-CV-04975-JWH-JCGx

ORDER GRANTING IN PART AND DENYING IN PART THE MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT [ECF No. 271]

Before the Court is the motion of Defendants California Public Utilities Commission and current and former Commissioners of the CPUC,[1] in their official and individual capacities, (collectively, the "CPUC") to dismiss the Sixth Amended Complaint of Plaintiffs Californians for Renewable Energy, Inc. ("CARE") and two of its members, Michael E. Boyd and Robert Sarvey, (collectively, "Plaintiffs").[2] In its Motion, the CPUC also asks the Court to strike from Plaintiffs' Sixth Amended Complaint any references to a "Second Supplement."[3] After considering the arguments of counsel at the hearing on the Motion, as well as the papers filed in support and in opposition,[4] the Court orders that the Motion is **GRANTED in part** and **DENIED in part**, as set forth herein.

I. BACKGROUND

A. Regulatory Overview

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

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[1] Named Defendants Martha Guzman Aceves and Marybel Batjer are no longer current CPUC Commissioners. *See* CALIFORNIA PUBLIC UTILITIES COMMISSION https://www.cpuc.ca.gov/about-cpuc/commissioners/former-commissioners (last visited March 6, 2022).

[2] Defs.' Mot. to Dismiss the Sixth Am. Compl. and Mot. to Strike References to Second Suppl. From Sixth Am. Compl. (the "Motion") [ECF No. 271].

[3] *Id.*

[4] The Court considered the following papers: (1) Sixth Am. Compl. (the "Sixth Amended Complaint") [ECF No. 267]; (2) the Motion (including its attachments); (3) Pl.'s Opp'n to the Motion (the "Opposition") [ECF No. 279]; and (4) Defs.' Reply in Supp. of the Motion (the "Reply") [ECF No. 281].

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

Section 201 of PURPA designates certain facilities as Qualifying Facilities ("QFs"), which include small power production and cogeneration facilities that meet requirements set by the Federal Energy Regulatory Commission ("FERC"). *See* 16 U.S.C. § 796(18)(B). Section 210 creates a marketplace for electricity produced by QFs by requiring FERC to establish regulations that obligate public utilities to sell electricity to, and to purchase electricity from, QFs at certain rates. *See* 16 U.S.C. § 824-3(a). Section 210 also requires that those rates are, *inter alia*, "just and reasonable . . . and in the public interest[.]" 16 U.S.C. § 824a-3(b). In view of that requirement, FERC has implemented rules to ensure that public utilities purchase electric energy from QFs at the utility's full "avoided cost" rate. 18 C.F.R. § 292.304(d). "'Avoided costs' are a utility's incremental costs for electric energy or capacity which, but for the purchase from the QF, the utility would generate itself or purchase from another source." *Indep. Energy Producers Ass'n*, 36 F.3d at 851 (citing 18 C.F.R. § 292.101(b)(6)).

Under PURPA, States implement FERC's regulations related to the determination of avoided costs and the setting of rates for QFs. 16 U.S.C. § 824a-3(f). In doing so, States are given broad latitude: "PURPA delegates to the states broad authority to implement section 210. . . . Thus, the states play the primary role in calculating avoided costs and in overseeing the contractual relationship between QFs and utilities[.]" *Indep. Energy Producers Ass'n*, 36 F.3d at 856. In California, the CPUC is the state agency authorized to play that role to fix retail rates and to establish rules for California utilities. Cal. Pub. Util. Code § 701.

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

B. Procedural History

This case boasts a voluminous procedural history that spans a decade. CARE and two of its members, Michael E. Boyd and Robert Sarvey, are small-scale solar producers. CARE and now-dismissed Plaintiff Solutions for Utilities, Inc. ("SFUI") initially sued the CPUC and now-dismissed Defendant Southern California Edison Company ("SCE")[5] in 2011.[6] That lawsuit sought remedies for violations of PURPA and 42 U.S.C. § 1983, with the latter claims based, *inter alia*, upon allegations of the suppression of SFUI's and CARE's First Amendment rights.[7] The Court dismissed the 42 U.S.C. § 1983 claims and

[5] SFUI and SEC were dismissed as parties to this action in 2013. *See* Min. Order Granting Mot. for Summ. J. [ECF No. 147] 10.

[6] Compl. [ECF No. 1].

[7] *Id.*; *see also* First Am. Compl. [ECF No. 20].

CARE's PURPA violation claim, but it left intact SFUI's PURPA claim.[8] SFUI's claim did not survive, though, as the Court later entered summary judgment for the CPUC and SCE, finding that SFUI lacked standing.[9] CARE appealed. The Ninth Circuit affirmed the dismissal of the 42 U.S.C. § 1983 claims but reversed and remanded with respect to CARE's PURPA claim, finding that CARE had met PURPA's administrative exhaustion requirement.[10]

Thereafter, in March 2016, Plaintiffs CARE, Boyd, and Sarvey moved for leave to file a fourth amended complaint.[11] The Court denied that motion,[12] ruling that Plaintiffs could not assert a claim for equitable damages and attorney fees.[13] However, the Court permitted Plaintiffs to file a fifth amended complaint[14] in which they alleged that the CPUC's programs did not comply with PURPA.[15] Specifically, Plaintiffs contend that the CPUC has incorrectly defined the amount that PURPA requires utilities to pay QFs.[16] The CPUC moved for summary judgment.[17] In December 2016, the Court granted summary judgment for the CPUC on all claims.[18] *See Sols. for Utilities, Inc. v.*

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[8] Minute Order Granting Def.'s Mot. to Dismiss [ECF No. 61] 10.

[9] Min. Order Granting Mot. for Summ. J. [ECF No. 147] 10.

[10] Mem. of Ninth Cir. Regarding Notice of Appeal [ECF No. 173]. SFUI was not a party to that appeal. *Id.* at 3 n.1.

[11] Pls.' Mot. for Leave to File Fourth Am. and First Suppl. Complaint [ECF No. 178].

[12] Min. Order Den. without Prejudice Pls.' Mot. for Leave to File Fourth Am. Compl. and First Suppl. Compl. [ECF No. 184] 9.

[13] *Id.* at 7.

[14] Fifth Am. Compl. [ECF No. 185].

[15] *Id.* at ¶ 17.

[16] *Id.* at ¶¶ 19-25.

[17] Defs.' Mot. for Summ. J. [ECF 206].

[18] Order Granting Defs.' Mot. for Summ. J. [ECF No. 216].

California Pub. Utilities Comm'n., 2016 WL 7613906, at *15 (C.D. Cal. Dec. 28, 2016). Plaintiffs then appealed to the Ninth Circuit.[19]

The Ninth Circuit affirmed the Court in all respects except one. *See Californians for Renewable Energy v. California Pub. Utilities Comm'n*, 922 F.3d 929, 942 (9th Cir. 2019). Specifically, the Ninth Circuit held as follows:

> Because the district court did not read CPUC as requiring an avoided cost based on renewable energy where energy from QFs was being used to meet RPS [*i.e.*, Renewable Portfolio Standard] obligations, it did not consider whether utilities are fulfilling any of their RPS obligations through the challenged CPUC programs. We therefore remand the case to the district court for a determination in the first instance of whether CPUC's programs comply with this aspect of PURPA.

Id. at 938.

In view of that decision, Plaintiffs filed their Sixth Amended Complaint in May 2021.[20] Plaintiffs assert two claims for relief: (1) enforcement of PURPA, 16 U.S.C. § 824a-3, and (2) equitable relief, injunctive relief, and declaratory relief under 16 U.S.C. § 824a-3.[21] The CPUC filed the instant Motion on July 9.[22] Plaintiffs opposed on September 10, and the CPUC replied on September 17.[23] This Court conducted a hearing on the Motion on October 4.

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19 Notice of Appeal to the Ninth Cir. Ct. of Appeals [ECF No. 222].

20 *See generally* Sixth Amended Complaint.

21 *Id.* at ¶¶ 52-76.

22 *See generally* Motion.

23 *See generally* Opposition & Reply.

II. LEGAL STANDARD

A. Rule 12(b)(1)

The CPUC moves to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction. Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). When a defendant makes a Rule 12(b)(1) motion, the burden of establishing subject matter jurisdiction rests upon the party asserting jurisdiction. *Kokkonen*, 511 U.S. at 377. Furthermore, in every federal case, the basis for federal jurisdiction must appear affirmatively from the record. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

A Rule 12(b)(1) motion to dismiss can be appropriate when the plaintiff has failed to exhaust administrative procedures typically established by statute, when the plaintiff's claim is barred the doctrine of sovereign immunity, or when the plaintiff lacks standing to bring a particular lawsuit before the district court. *See* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1350 (3d ed. 2021). All three scenarios are germane here.

Standing can be statutory or constitutional. *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Article III standing is always required; its absence compels dismissal for lack of subject matter jurisdiction. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). To demonstrate Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). When a case is at the pleading stage, as it is here, the plaintiff must "clearly . . . allege facts demonstrating" each element. *Id.* To establish an injury in fact, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S.

555, 560 (1992). Furthermore, causation cannot be the result of an independent action of "some third party not before the court." *Id.*

B. Rule 12(b)(6)

The CPUC also moves to dismiss pursuant to Rule 12(b)(6) for failure to state a claim. A claim should be dismissed under Rule 12(b)(6) when the plaintiff fails to assert a "cognizable legal theory" or the complaint contains "[in]sufficient facts . . . to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss, the complaint must allege "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The claim must be pleaded with "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and that rises "above the speculative level." *Twombly*, 550 U.S. at 555. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

Importantly, the Court must construe all factual allegations and "draw all reasonable inferences from them ***in favor of*** the nonmoving party." *Tinoco v. San Diego Gas & Elec. Co.*, 327 F.R.D. 651, 656 (S.D. Cal. 2018) (emphasis added) (quoting *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996)); *see also Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005).

C. Leave to Amend

If this Court concludes that Plaintiffs have failed to state a claim, then it must consider whether to grant leave to amend. Pursuant to Rule 15(a), a district court "should freely give leave when justice so requires." The purpose underlying the amendment policy is to "facilitate decision on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127

(9th Cir. 2000). Leave to amend, though, is "not automatic." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 2020 WL 5775174, at *1 (C.D. Cal. July 8, 2020). The Ninth Circuit instructs courts to consider five factors in connection with the potential amendment of pleadings: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) the futility of amendment; and (5) whether the plaintiff has previously amended his or her complaint. *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004); *see also Doe v. United States*, 8 F.3d 494, 497 (9th Cir. 1995). The Ninth Circuit instructs that "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

D. Rule 12(f)

The CPUC requests this Court to strike the phrase "and Second Supplemental" from the title of the Complaint. "The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "The court may act: (1) on its own; or (2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading." *Id.*

"The purpose[] of a Rule 12(f) motion is to avoid spending time and money litigating spurious issues." *Barnes v. AT & T Pension Ben. Plan-Nonbargained Program*, 718 F. Supp. 2d 1167, 1170 (N.D. Cal. 2010). Motions to strike are generally disfavored and "only are appropriate when the movant can show that the challenged matter has no bearing on the subject matter of the litigation." *Sultan v. Medtronic Inc.*, 2011 WL 13131112, at *2 (C.D. Cal. Nov. 16, 2011).

III. DISCUSSION

A. Standing

In their Complaint, Plaintiffs assert that the CPUC violated PURPA and that, as a result, Plaintiffs should be afforded declaratory, injunctive, or other relief.[24] Interpreting the Complaint in the light most favorable to Plaintiffs, this Court perceives two alleged violations of PURPA. The first violation stems from the CPUC's alleged failure to calculate avoided costs properly when determining what utilities should pay QFs when the QFs supply energy to help meet that utility's Renewable Portfolio Standard ("RPS") obligations.[25] The second alleged violation is that non-party, investor-owned utilities like Pacific Gas & Electric ("PG&E") have refused to provide Plaintiffs with standard offer or bilateral contracts that would pay to those Plaintiffs an appropriate quantum of avoided costs.[26]

The Court concludes that ***some*** Plaintiffs have statutory standing, but ***none*** of them has Article III standing. Specifically, CARE has no statutory standing whatsoever, but Boyd and Sarvey possess statutory standing with respect to the first alleged violation of PURPA described above. No Plaintiff has statutory standing with respect to the second alleged PURPA violation by non-party, investor-owned utilities. Furthermore, no Plaintiff possesses Article III standing as currently alleged in the complaint.

1. Statutory Standing

The CPUC argues that (a) CARE is not a QF and thereby lacks standing under PURPA to maintain this lawsuit,[27] *see* 16 U.S.C. § 824a-3(h)(2)(B); and

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[24] Sixth Amended Complaint ¶¶ 52-76.

[25] *Id.* at ¶¶ 24-30.

[26] *Id.* at ¶¶ 54-58.

[27] Motion 13:1-12.

(b) this Court lacks statutory jurisdiction over Plaintiffs' claims regarding how the CPUC has applied PURPA to CARE and its members.[28]

a. QF Certification for CARE

The CPUC contends that CARE is not alleged to be a QF in the Sixth Amended Complaint and, therefore, that CARE lacks statutory standing to bring this lawsuit.[29] The Court agrees.

PURPA authorizes lawsuits against state implementation agencies like the CPUC by only "[a]ny electric utility, qualifying cogenerator, or qualifying small power producer." 16 U.S.C. § 824a-3(h)(2)(B). The Sixth Amended Complaint alleges, and the CPUC does not dispute, that Boyd and Sarvey obtained FERC certifications as QFs on March 19, 2003, and March 28, 2003, respectively.[30] This Court previously ruled in January 2013 on a motion for summary judgment that those certifications were sufficient for statutory standing under PURPA.[31]

With respect to CARE, Plaintiffs assert that Boyd amended his certification to include CARE and that the Ninth Circuit understood CARE, Boyd, and Sarvey to function "as a unit."[32] The CPUC responds that this most recent certification is dated August 13, 2021—which postdates the Sixth Amended Complaint by almost three months—implying that CARE lacked standing at the time of the pleading.[33] The Court agrees with the CPUC that the timing of the certification is damning to CARE's instant claim.

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28 *Id.* at 13:13-14:15.
29 *Id.* at 13:6.
30 Sixth Amended Complaint ¶ 52.
31 Min. Order [ECF No. 147] 7-8.
32 Opposition 23:11-15.
33 Reply 6:19-27.

The Court is also troubled that it can find no direct quote or other support in the Ninth Circuit's decision for the notion that CARE, Boyd, and Sarvey functioned as a unit.[34] At the hearing on the Motion, Plaintiffs' counsel suggested that standing was implied. That response will not suffice because the basis for federal jurisdiction must appear affirmatively from the record. *See DaimlerChrysler Corp.*, 547 U.S. at 342 n.3. Accordingly, CARE did not have statutory standing as a QF at the time that Plaintiffs filed the Sixth Amended Complaint.

Ordinarily, if "jurisdiction is lacking at the outset," the district court has "no power to do anything with the case except dismiss." *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). However, because evidence of CARE's subsequent certification could cure this jurisdictional deficiency, CARE may file a motion for leave to file a supplemental pleading under Rule 15(d). *See* Fed. R. Civ. P. 15(d); *Northstar Fin. Advisors Inc. v. Schwab Investments*, 779 F.3d 1036, 1044 (9th Cir. 2015), *as amended on denial of reh'g and reh'g en banc* (Apr. 28, 2015). CARE is advised, though, that it must support its potential motion with sufficient, admissible evidence that warrants a supplemental pleading. *Accord Lyon v. U.S. Immig. & Cust. Enf't*, 308 F.R.D. 203, 214 (N.D. Cal. 2015). Therefore, this Court **GRANTS** the CPUC's Motion with respect to CARE and **dismisses with leave to file a motion to supplement**.

b. Statutory Jurisdiction over the CPUC's Application of PURPA

The CPUC next argues that this Court lacks subject matter jurisdiction over Plaintiffs' claim that the CPUC is not properly implementing PURPA.[35]

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[34] *Compare* Opposition 23:15 *with* Mem. of Ninth Cir. Regarding Notice of Appeal [ECF No. 173] *and Californians for Renewable Energy*, 922 F.3d 929.

[35] Motion 13:17-21.

The Court agrees in part, finding that subject matter jurisdiction depends upon the specific violation alleged.

PURPA's statutory scheme "differentiates between 'implementation' claims and 'as-applied claims.'" *Allco Renewable Energy Ltd. v. Massachusetts Electric Co.*, 208 F. Supp. 3d 390, 396 (D. Mass. 2016), *aff'd*, 875 F.3d 64 (1st Cir. 2017). In an "implementation claim," a plaintiff alleges that a state agency has failed to implement FERC's PURPA regulations or has implemented them in a way that is inconsistent with FERC's regulations. *See Power Resource Group, Inc. v. Pub. Util. Commn. of Texas*, 422 F.3d 231, 234-35 (5th Cir. 2005); *see also* 16 U.S.C. § 824a-3(f) (governing the responsibilities of state regulatory authorities and utilities to implement PURPA and FERC regulations). In contrast, an "as-applied claim" challenges the application of a state agency's rules to an individual petitioner; this type of claim is reserved for adjudication by the state courts. *See Allco*, 208 F. Supp. 3d at 396. A utility or QF may bring an enforcement action in federal district court only after it has petitioned FERC to enforce subsection 16 U.S.C. § 824a-3(f) and FERC declines to enforce the action within 60 days. *See* 16 U.S.C. § 824a-3(h)(2)(B); *Power Resource Group*, 422 F.3d at 235.

The Court concludes that the violation of PURPA asserted here—arising from the CPUC's alleged failure to calculate avoided costs correctly in view of California's RPS mandate—is properly construed as an implementation claim. 16 U.S.C. §§ 824a-3(a), (f), & (h)(B). FERC has stated that avoided costs must "reflect prices available from all sources able to sell to the utility whose avoided costs are being determined." *Re Southern California Edison Co. (SoCal Edison)*, 70 FERC ¶ 61215, 61676 (1995). FERC has also clarified that the "all sources" requirement could be modified by state requirements:

> [I]f a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for

> example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs.

California Pub. Utilities Commn., et al., 133 FERC ¶ 61059, 61267 (2010). Whether the CPUC's programs properly calculated avoided costs in view of California's RPS mandates is the remaining question that lies at the heart of this dispute. Those RPS mandates require utilities to purchase a certain percentage of their electricity from certain renewable energy sources. Cal. Pub. Util. Code §§ 399.11 *et seq*. Because Boyd and Sarvey petitioned FERC to enforce this section and FERC declined, Boyd and Sarvey have statutory standing to seek a remedy for this alleged violation of PURPA.[36]

Plaintiffs' other alleged violation of PURPA is that investor-owned utilities continue to offer only non-compliant contracts to Plaintiffs. Those contracts allegedly fail to pay avoided capacity costs.[37] However, the Court previously dismissed those claims on summary judgment because they constituted "as-applied claims." *See Sols. for Utilities, Inc. v. California Pub. Utilities Commn.*, 2016 WL 7613906, at *15 (C.D. Cal. Dec. 28, 2016). The Ninth Circuit affirmed, explicitly noting that allegations pertaining to the denial of standard contracts "veer[] into the category of an as-applied challenge that can only be brought in state court." *Californians for Renewable Energy*, 922 F.3d at 939 (9th Cir. 2019). Accordingly, no Plaintiff has statutory standing to bring an as-applied claim in this Court. For that reason, the Court **GRANTS** the CPUC's Motion with respect to any as-applied claim and **DISMISSES** any such claim **with prejudice.**

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36 Sixth Amended Complaint ¶ 59.

37 *Id.* at ¶¶ 54-58.

2. Article III Standing

Boyd and Sarvey have statutory standing to bring an implementation claim with respect to avoided costs and California's RPS mandates, but it does not necessarily follow that they have Article III standing to do so. The problem with Boyd and Sarvey's alleged PURPA violation is that, as presently pleaded, it appears entirely hypothetical. In short, CARE, Boyd, and Sarvey fail to show an injury in fact.

In the Sixth Amended Complaint, Plaintiffs assert, in relevant part, that:

- California has enacted RPS mandates;[38]
- when a utility is using a QF's energy to meet California's RPS mandates, the utility cannot calculate the avoided costs based upon energy sources that would not also meet the RPS mandates;[39]
- when a utility uses energy from a QF to meet its RPS obligations, the relevant comparable energy sources are other renewable energy providers;[40]
- when a utility uses energy from a QF to meet a state RPS mandate, the avoided costs must be based upon the sources that the utility could rely upon to meet that RPS mandate;[41]
- the CPUC may choose to calculate avoided costs for each type of energy source or simply aggregate all sources that could satisfy its RPS obligations;[42] and
- when avoided costs are based upon renewable energy where energy from QFs is being used to meet RPS obligations, the CPUC must consider

38 *Id.* at ¶ 24.
39 *Id.* at ¶ 25.
40 *Id.* at ¶ 28.
41 *Id.* at ¶ 29.
42 *Id.* at ¶ 30.

whether utilities are fulfilling any of their RPS obligations through its CPUC programs.[43]

What is plainly missing here is any allegation that Plaintiffs' energy resources were actually used to satisfy RPS obligations or that their resources participated in the RPS program. To demonstrate that Plaintiffs have been injured from an incorrect calculation of avoided costs, they must first allege that utilities are fulfilling any of their RPS obligations through the challenged CPUC programs with ***their*** energy. It is unclear from Plaintiffs' operative pleading that this injury has actually occurred. Plaintiffs merely make a slew of conclusory statements that the CPUC and its Commissioners have shirked their obligations under PURPA.

3. Eleventh Amendment Immunity

In addition to declaratory and injunctive relief, Plaintiffs amend their prayer for relief to include a demand for money damages.[44] Plaintiffs cite *Tanzin v. Tanvir*, 141 S. Ct. 486 (2020),[45] a religious freedom case, in support of their argument that money damages is an available remedy under PURPA because the statute allows petitioners to "bring an action in the appropriate United States district court . . . and such court may issue such injunctive or other relief as may be appropriate." 16 U.S.C. § 824a-3(h)(2)(B). The Court finds Plaintiffs' argument unconvincing not only because the *Tanzin* is inapposite here, but also because the Eleventh Amendment squarely proscribes such relief. *See generally Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Air Transport Ass'n of America v. Public Utilities Comm'n of Cal.*, 833 F.2d 200, 204 (9th Cir. 1987) (concluding that, as an arm of the state, the CPUC is protected by the Eleventh Amendment). All claims for monetary relief are **DISMISSED with prejudice**.

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[43] *Id.* at ¶ 32.

[44] *Id.* at Prayer, 18:4-8.

[45] Opposition 23:3-8.

B. Failure to State a Claim

In the alternative, this Court finds that Plaintiffs have failed to state a claim. Despite having six opportunities to amend their complaint, and despite clear guidance from the Ninth Circuit,[46] Plaintiffs do not allege that their ***particular*** resources are aiding a utility to meet that utility's Renewable Portfolio Standard obligations or that CARE is certified as such.[47] As discussed previously with respect to standing, *see supra* Part III.A.2, those missing allegations—and any attendant facts—are necessary for Plaintiffs to meet the pleading requirements to show a plausible claim for relief. Put differently, in order to determine whether the CPUC's programs comply with PURPA, Plaintiffs must first allege facts with sufficient particularity that utilities are fulfilling their California RPS obligations through those utilities' use of ***Plaintiffs'*** energy. Since the Complaint does not set forth such facts or allegations, the Court finds that Plaintiffs have failed to state a claim.

During the hearing, Plaintiffs' counsel represented that Plaintiffs could make this allegation if given an opportunity to amend. In theory, such an allegation could cure both the Article III standing issue and the Rule 12(b)(6) deficiency. But the Court is cognizant of the longevity of this litigation and the numerous opportunities already afforded to Plaintiffs to move this case out of the pleading stage. Such delay comes at a cost to the CPUC. Balancing the equities, the Court will afford Plaintiffs one final opportunity to amend their pleading to correct its deficiencies. *AE* ex rel. *Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012) ("A district court abuses its discretion by denying leave to amend unless amendment would be futile or the plaintiff has failed to

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[46] *See id.* at 3:10-14, where Plaintiff renounces claims from the Fifth Amended Complaint and affirms it has amended the pleading to "leave only the remaining avoided cost claims, as modified to reflect the Ninth Circuit Ruling[.]" *Id.*

[47] *See* Sixth Amended Complaint ¶¶ 24-30.

cure the complaint's deficiencies despite repeated opportunities."). Thus, this Court **GRANTS** the CPUC's Motion and **DISMISSES with leave to amend**, but only as it relates to Boyd and Sarvey's implementation claim set forth in the Ninth Circuit's remand order.

C. Motion to Strike

In its Motion, the CPUC requests this Court to strike "and Second Supplemental" from the title of Plaintiffs' pleading and any references therein. While Plaintiffs make no objection to the CPUC's request,[48] the relief that CPUC seeks through its Motion to Strike is no longer applicable, as the Sixth Amended Complaint will not be the operative pleading in view of the Court's other rulings in this Order. Either the Plaintiffs will amend or supplement their pleadings (ideally, with proper captions) or all of their claims will be dismissed. Thus, the Court **DENIES** the Motion to Strike as **moot**.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. The Motion of Defendant CPUC to dismiss Plaintiffs' Sixth Amended Complaint is **GRANTED** in substantial part, as follows:

   a. All claims of Plaintiff CARE are **DISMISSED without prejudice** for lack of standing. CARE may file a motion pursuant to Rule 15(d) to file a supplemental pleading in order potentially to cure its standing deficiency. CARE is **DIRECTED** to file that motion, if at all, on or before March 25, 2022. If CARE fails to file a motion to supplement by that date, then the Court will **DISMISS** CARE from this action **with prejudice**.

   b. To the extent that Plaintiffs assert any as-applied claims, such claims are **DISMISSED with prejudice**.

[48] *See generally* Opposition.

c. Plaintiffs' claims for monetary relief are **DISMISSED with prejudice**.

d. Plaintiffs Boyd and Sarvey's PURPA implementation claim is **DISMISSED with leave to amend**. Boyd and Sarvey are **DIRECTED** to file an amended complaint—but only as it relates to their implementation claim within the scope of the Ninth Circuit's remand—no later than March 25, 2022. If Boyd and Sarvey choose to file an amended pleading, then they are also **DIRECTED** to file contemporaneously therewith a Notice of Revisions to Sixth Amended Complaint that provides the Court with a redline version that shows the amendments. If Boyd and Sarvey fail to file their amended pleading by March 25, 2022, then the Court will **DISMISS** Boyd and Sarvey from this action **with prejudice**.

2. The Motion of Defendant CPUC to strike "second supplemental" references from Plaintiffs' Sixth Amended Complaint is **DENIED as moot**.

IT IS SO ORDERED.

Dated: March 9, 2022

John W. Holcomb
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—
GENERAL

Case No.	2:11-cv-04975-JWH-JCGx	Date	March 29, 2022
Title	*Solutions for Utilities, Inc., et al. v. California Public Utilities Commission, et al.*		

Present: The Honorable	JOHN W. HOLCOMB, UNITED STATES DISTRICT JUDGE

Irene Vazquez	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: ORDER REGARDING PLAINTIFFS' APPLICATION TO MODIFY SEQUENCE OF NEW PLEADING FILINGS AND EXTEND TIME TO DO SO [ECF NO. 288] (IN CHAMBERS)

Defendants California Public Utilities Commission and current and former Commissioners of that entity (collectively, the "CPUC") previously moved to dismiss the sixth amended complaint of Plaintiffs Californians for Renewable Energy, Inc. ("CARE") and two of its members, Michael Boyd and Robert Sarvey, (collectively, "Plaintiffs").[1] On March 9, 2022, the Court granted that motion in part and denied it in part.[2] Relevant here, the Court dismissed CARE's claims without prejudice for lack of standing, and it dismissed Boyd and Sarvey's implementation claim under the Public Utility Regulatory Policies Act

[1] Defs.' Mot. to Dismiss the Sixth Am. Compl. and Mot. to Strike References to Second Suppl. From Sixth Am. Compl. [ECF No. 271].

[2] Order Granting in Part and Den. in Part the Mot. of California Public Utilities Commission and Commissioners to Dismiss Sixth Am. Compl. and Mot. to Strike References to Second. Suppl. from Sixth Am. Compl. (the "Order") [ECF No. 287].

("PURPA") with leave to amend.[3] In view of that Order, Plaintiffs now apply for an extension of time and a modified sequence to amend their pleadings.[4] The arguments that Plaintiffs make in their Application reveal their misunderstanding of the Order.

The Order gave Plaintiffs a choice of four options: (1) file a ***motion*** for leave to file a ***supplemental*** pleading with respect to CARE's claim that the Order dismissed for lack of standing; (2) ***amend*** their existing pleading with respect to Boyd and Sarvey's PURPA claim that the Order dismissed with leave to amend; (3) do both; or (4) do neither.[5] There was no option for Plaintiffs simultaneously to supplement and amend with a confusing multicolor redline. *See* Fed. R. Civ. P. 15(d) (requiring a motion to file a supplemental pleading). Regrettably, it appears that Plaintiffs misread or misunderstood the Order, as they have attempted to do just that.

Plaintiff should note that a supplemental complaint is distinct from an amended complaint. *Compare* Fed. R. Civ. P. 15(a) *with* Fed. R. Civ. P. 15(d). Each pleading should stand alone and should contain allegations pertaining only to the claims asserted therein and not to claims that have been previously dismissed or abandoned. This Court's Local Rules do not suggest or require that a ***supplemental*** complaint should be contained within an ***amended*** complaint. *Cf.* L.R. 15-2.

In its Opposition, the CPUC insists that all of Plaintiffs' claims should now be dismissed with prejudice, as the Order itself contemplates, for Plaintiffs' failure to amend or to file a motion to supplement by March 25, 2022—the deadline for Plaintiffs to act.[6] While the Court agrees that Plaintiffs did not meet that deadline, the Court strongly favors deciding cases on the merits, rather than through procedural technicalities. Because it appears that Plaintiffs have the substance of their amended pleading ready (but Plaintiffs may have been confused regarding the

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[3] *Id.* at 18:18-19:13.

[4] Pls.' Appl. to Modify Sequence of New Pleading Filings and Extend Time to Do So (the "Application") [ECF No. 288].

[5] Order 18:16-19:13.

[6] Opp'n by Defs. to the Application [ECF No. 289] 1:8-2:8.

form or sequence),[7] dismissing this action now would run counter to that policy of deciding cases on the merits. *See also* Fed. R. Civ. P. 1.

For those reasons, the Court hereby **ORDERS** as follows:

1. Plaintiffs' Application is **GRANTED in part** and **DENIED in part**.

2. The deadline for Boyd and Sarvey to file an amended complaint—but only as it relates to their PURPA implementation claim within the scope of the Ninth Circuit's remand—is **EXTENDED** to no later than April 5, 2022. If Boyd and Sarvey choose to file an amended pleading, then they are also **DIRECTED** to file contemporaneously therewith a Notice of Revisions to the Sixth Amended Complaint that provides the Court with a redline version that shows the amendments. If Boyd and Sarvey fail to file their amended pleading by the extended deadline, then the Court will dismiss Boyd and Sarvey from this action with prejudice.

3. The deadline for CARE to file a motion pursuant to Rule 15(d) for leave to file a supplemental complaint is **EXTENDED** to April 8, 2022. If CARE fails to file a motion for leave to file a supplemental complaint by that date, then the Court will dismiss CARE from this action with prejudice.

4. Any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint will be **STRICKEN *unless*** the Court has granted a motion to supplement. *See* Fed. R. Civ. P. 15(d). Furthermore, the Court will strike any amended or supplemental pleading that contains allegations relating to claims that have been dismissed with prejudice.[8]

IT IS SO ORDERED.

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[7] *See generally* Application, Lodging of Combined Redline-Blueline of Intended Proposed Seventh Am. and Third Compl. for Equitable Relief [ECF No. 288-2].

[8] *See generally* Order.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—
GENERAL

Case No.	2:11-cv-04975-JWH-JCG	Date	July 5, 2022
Title	*Solutions for Utilities Inc, et al. v. California Public Utilities Commission, et al.*		

Present: The Honorable	JOHN W. HOLCOMB, UNITED STATES DISTRICT JUDGE

Elsa Vargas	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: ORDER REGARDING THE MOTION FOR RECONSIDERATION [ECF No. 301] (IN CHAMBERS)

Before the Court is the motion[1] of Plaintiffs Californians for Renewable Energy, Inc. ("CARE") and two of its members, Michael Boyd and Robert Sarvey, (collectively, the "Plaintiffs") to reconsider portions of this Court's order dated March 29, 2022,[2] and its subsequent minute order dated April 5, 2022.[3] Defendants California Public Utilities Commission and current and former Commissioners of that entity (collectively, the "CPUC") oppose.[4] The Court finds this matter appropriate for resolution without a hearing. *See*

[1] Pls.' Notice of Mot. and Mot. to Reconsider Order of March 29, 2022, and Min. Entry of April 4, 2022 (the "Motion") [ECF No. 301].

[2] Order Regarding Pls.' Appl. to Modify Sequence of New Pleading filings and Extend Time to Do So (the "Order") [ECF No. 294].

[3] Min. Order (the "Minute Order") [ECF No. 296].

[4] Defs.' Opp'n to the Motion (the "Opposition") [ECF No. 305].

Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support and in opposition,[5] the Court orders that the Motion is **DENIED**, as set forth herein.

A. Legal Standard

Under the Federal Rules of Civil Procedure, the court may relieve a party from an order for reasons including, but not limited to, "mistake, inadvertence, surprise, or excusable neglect"; "fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party"; or "any other reason that justifies relief." Fed. R. Civ. P. 60(b). "Reconsideration is not, however, to be used to ask the court to rethink what it has already thought." *Howze v. Orozco*, 2020 WL 6927604, at *4 (E.D. Cal. Nov. 20, 2020) (citing *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998)). The decision to reconsider and vacate a prior order rests with the Court's discretion. *See Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994).

Similarly, under the Local Rules, a party may move the Court to reconsider an order "only on the grounds of (a) a material difference in fact or law from that presented to the Court that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time the Order was entered, or (b) the emergence of new material facts or a change of law occurring after the Order was entered, or (c) a manifest showing of a failure to consider material facts presented to the Court before the Order was entered." L.R. 7-18. "No motion for reconsideration may in any manner repeat any oral or written argument made in support of, or in opposition to, the original motion." *Id.*

B. Discussion

The Court previously afforded Plaintiffs leave to file a motion for a supplemental pleading. The Court clarified that any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint would be stricken, unless the Court first granted a motion to supplement.[6] Thus, any pleading ***amended*** under Rule 15(a) of the

[5] The Court considered the following papers: (1) the Motion (including its attachments); (2) the Opposition; and (3) Combined Reply Re Pls.' Mot. to File Eighth Am. and Third Suppl. Compl. and the Motion (the "Reply") [ECF No. 307].

[6] *See* Order 3.

Federal Rules of Civil Procedure would not be allowed to contain allegations or material that should properly be contained in a ***supplemental*** pleading. *Compare* Fed. R. Civ. P. 15(a) *with* Fed. R. Civ. P. 15(d). Nonetheless, Plaintiffs insist that a supplemental pleading only concerns events, transactions, or occurrences that transpired after they filed their seventh amended complaint,[7] rather than their initial complaint.[8]

Two deficiencies compel this Court to deny the Motion. First, the Motion fails to specify with any particularity the grounds to justify reconsideration.[9] Neither the Court nor a defendant ought to play a guessing game. *See* Fed. R. Civ. P. 7(b)(1)(B) (requiring every motion to "state with particularity the grounds for seeking the order"). Given that there are multiple grounds available to support a potential motion for reconsideration, the onus lies with Plaintiffs to identify upon ***which*** grounds they seek relief.[10] *Accord Frees v. Duby*, 2010 WL 4923535, at *2 (W.D. Mich. Nov. 29, 2010) ("the grounds for the relief sought must be specified in the motion itself and cannot be buried somewhere in a supporting brief").

Second, the Court is unconvinced that it has made any legal error. Instead, it appears that counsel for Plaintiffs is profoundly confused. Rule 15(d) allows the Court to grant a party leave to supplement a complaint with facts "setting out" transactions, occurrences, or events that have transpired since the filing of the pleading to be supplemented. Fed. R. Civ. P. 15(d). Over four decades ago, the Ninth Circuit clarified that ***that*** pleading refers to the original complaint: "[t]he purpose of Rule 15(d) is to promote as complete an adjudication of the dispute between the parties as possible by allowing the addition of claims which arise ***after***

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7 *See* Seventh Am. Compl. [ECF No. 298].

8 Motion 2:3-5.

9 *See id.* at 2:13-14 (invoking L.R. 7-18, without specifying which aspect of that rule affords Plaintiffs the basis for their Motion).

10 Plaintiffs cite *Lee v. City of Los Angeles*, 250 F.3d 668, 683 n.7 (9th Cir. 2001), for the general proposition that they are entitled to be heard for reconsideration of an issue first raised *sua sponte* by the Court. The trouble is, *Lee* concerns a *sua sponte* dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See id.* Here, however, the procedural posture is markedly different: Plaintiffs are moving for reconsideration of two orders based on a motion, which was fully briefed and with respect to which the Court held a hearing. *See* Order & Minute Order. Therefore, Plaintiffs must rely on the proper grounds for reconsideration, which they do not invoke with any particularity.

the initial pleadings are filed." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981) (emphasis added). That interpretation of the rule has been reaffirmed repeatedly; it has become black letter law. *See Keith v. Volpe*, 858 F.2d 467, 471 (9th Cir. 1988) (explaining that Rule 15(d) "is designed to permit expansion of the scope of existing litigation to include events that occur after the filing of the ***original*** complaint") (emphasis added); *see also Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) (holding that "Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist ***when the original complaint was filed***") (emphasis added). Plaintiffs cite no authority to the contrary.[11]

Whether Plaintiffs' seventh amended complaint has superseded its sixth amended complaint, or whether another amended complaint can supersede that complaint, is wholly immaterial (and not now at issue).[12] The issue is whether alleged incidents and events, such as CARE's status as a qualified facility, occurred before the case was filed or thereafter. If the latter, then those facts must be alleged in a supplemental complaint under Rule 15(d), not in an amended complaint under Rule 15(a). *Cf. Eid*, 621 F.3d at 874 (explaining that the "only available mechanism" for adding a claim "arising from conduct which happened nearly a year *before* they filed their first complaint" was through a Rule 15(a) amendment). It is no excuse to say, as Plaintiffs do, that their prior complaints overlooked that distinction and conflated facts that should have been set out in a supplemental pleading.[13] That admission only means that the error has become compounded, thereby warranting even greater fidelity to the dictates of Rule 15 moving forward.

The reason for this arrangement is straightforward: the text says so. If a party could simply amend its pleading indefinitely under Rule 15(a) to add facts and claims arising after the litigation has commenced, then Rule 15(d) would be superfluous. Pragmatic reasons exist for this arrangement, as well. While augmenting the scope of the litigation ***can*** promote "judicial economy and convenience," *Keith*, 858 F.2d at 473, it can also transform a plaintiff's claims and theories into a constant moving target, *see Thomas v. Spaulding*, 2021 WL 3516474,

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[11] *See generally* Motion; Reply.

[12] *See, e.g.*, Motion 3:3-25 (discussing *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012)) & 4:5-8; *see also* Reply 9:7-15 (discussing *Lee*). *Lacey* is also inapt because it discusses the mechanics of pleading facts and claims vis-à-vis an appeal. *Id.* at 928.

[13] Reply 9:15-25.

at *5 (D. Mass. Aug. 10, 2021) (noting that "Rule 15(d) is not an open invitation to make supplemental filings that subject defendants to a moving target of litigation" or "bombard the [Court] with filing upon filing") (internal quotations omitted). That risk of prejudice warrants the extra precautions embedded in the Rule. *See* Fed. R. Civ. P. 15(d) (permitting a supplemental pleading only on "motion and reasonable notice" and on "just terms"). The Court sees no reason to make any exception for Plaintiffs.

Therefore, the Court finds ample reason to **DENY** Plaintiffs' Motion.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California corporation, CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation, MICHAEL E. BOYD, and, ROBERT SARVEY,

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency, SOUTHERN CALIFORNIA EDISON CO., a California Corporation, MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN, GENEVIEVE SHIROMA, and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE THEIR EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [ECF No. 299]

Before the Court is the motion of Plaintiffs Californians for Renewable Energy, Inc. ("CARE") and two of its members, Michael E. Boyd and Robert Sarvey, (collectively, "Plaintiffs") for leave to file a supplemental pleading.[1] Defendants California Public Utilities Commission and current and former Commissioners of the CPUC,[2] in their official and individual capacities, (collectively, the "CPUC") oppose.[3] The Court finds this matter appropriate for resolution without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15. After considering the papers filed in support and in opposition,[4] the Court orders that the Motion is **DENIED**, for the reasons set forth herein.

I. BACKGROUND

As this case now spans over 11 years,[5] the Court finds it appropriate to summarize only the (relatively) recent procedural history for the purpose of this Motion.[6] In December 2016, after this Court ruled in favor of the CPUC on all of Plaintiffs' claims, Plaintiffs appealed. *See Sols. for Utilities, Inc. v. California Pub. Utilities Comm'n*, 2016 WL 7613906, at *15 (C.D. Cal. Dec. 28, 2016) ("*Solutions I*") (granting the CPUC's motion for summary judgment). In April 2019, the Ninth Circuit affirmed the decision in *Solutions I* in full, except for one narrow question. *See Californians for Renewable Energy v. California Pub. Utilities*

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[1] Pls.' Notice of Mot. and Mot. for Leave to File [Proposed] Eighth Am. and Third Suppl. Compl. (the "Motion") [ECF No. 299].

[2] Named Defendants Martha Guzman Aceves and Marybel Batjer are no longer current CPUC Commissioners. *See* CALIFORNIA PUBLIC UTILITIES COMMISSION https://www.cpuc.ca.gov/about-cpuc/commissioners/former-commissioners (last visited July 15, 2022).

[3] Defs.' Opp'n to the Motion (the "Opposition") [ECF No. 306].

[4] The Court considered the following papers: (1) the Motion (including its attachments); (2) the Opposition; and (3) Combined Reply Re the Motion and Mot. to Reconsider Order of March 29, 2022, and Min. Entry of April 4, 2022 (the "Reply") [ECF No. 307].

[5] *See* Compl. (the "Complaint") [ECF No. 1] (filed on June 10, 2011).

[6] For a more fulsome discussion of the procedural history, *see Sols. for Utilities, Inc. v. California Pub. Utilities Comm'n*, 2022 WL 1741128, at *2–*3 (C.D. Cal. Mar. 9, 2022) ("*Solutions II*").

Comm'n, 922 F.3d 929, 942 (9th Cir. 2019) ("Californians"); *see also Boyd v. California Pub. Utilities Comm'n*, 140 S. Ct. 2645 (2020) (denying Plaintiffs' petition for a writ of certiorari for review of the decision in *Californians*).

That question concerned whether the CPUC's programs using avoided-cost calculations complied with the Public Utility Regulatory Policies Act ("PURPA") in instances where utility companies fulfilled some of their Renewable Portfolio Standard ("RPS") obligations with renewable energy sourced from various electricity generators, known as Qualified Facilities ("QFs").[7] *Californians*, 922 F.3d at 938. CARE had argued that the CPUC's avoided-cost calculations—which impact what utilities pay QFs for their electricity[8]—overlooked the fact that utilities had to satisfy their RPS obligations with renewable energy sources. *Id.* at 936. Since renewable energy sources have (in theory, at least) different avoided-cost profiles than non-renewable sources, and since California's RPS can ***only*** be satisfied with renewable energy, then—the logic goes—the CPUC's avoided-cost calculations would need to reflect those constraints. *See id.*

While the Ninth Circuit did not "think that PURPA require[d] utilities to always use multi-tiered pricing" to reflect the avoided cost for each type of energy source (*i.e.*, calculating the unique avoided costs for energy derived from solar, wind, coal, natural gas, etc.), it did find that this Court granted summary judgment too hastily. *Id.* The Ninth Circuit explained:

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[7] California first enacted its RPS in 2002. *See Californians*, 922 F.3d at 934. California's RPS requires utility companies to source a sizeable percentage of their electricity production from renewable energy sources. *Id.*

[8] Pursuant to PURPA, utilities must compensate QFs at a rate equal to the utility's "avoided cost." 18 C.F.R. § 292.304(d). Avoided cost is "the incremental cost[] to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(6). State regulatory agencies, like the CPUC, generally have the responsibility of calculating avoided cost. *See* 18 C.F.R. § 292.304(e).

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

Id. at 937–38.

In view of that decision, in May 2021 Plaintiffs filed their Sixth Amended Complaint in this Court.[9] Given the narrow scope of remand, that pleading was supposed to address only the question of whether (or not) the CPUC's avoided-cost calculations complied with PURPA in instances where a utility purchased electricity from a QF to meet its RPS obligations. But it soon became clear that Plaintiffs' Sixth Amended Complaint did not accomplish that task. The CPUC moved to dismiss on the grounds that, *inter alia*, that pleading went far beyond the scope of remand and—more importantly—that it failed to allege that CARE even qualified as a QF.[10] Without that QF qualification, CARE would lack statutory standing to challenge the CPUC's programs under PURPA.

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[9] Sixth Am. Compl. (the "Sixth Amended Complaint") [ECF No. 267]

[10] *See* Defs.' Mot. to Dismiss the Sixth Am. Compl. and Mot. to Strike References to Second Suppl. From Sixth Am. Compl. [ECF No. 271] 13:1-12.

After reviewing the briefing and conducting a hearing, in March 2022[11] the Court granted in substantial part the CPUC's motion to dismiss. *See Solutions II*, 2022 WL 1741128, at *8. In that order, the Court dismissed CARE without prejudice for lack of standing because, among other reasons, Plaintiffs essentially admitted that CARE was not yet a QF at the time of the Sixth Amended Complaint. *Id.* at *5. Thus, CARE lacked statutory standing under 16 U.S.C. § 824a-3(h)(2)(B). Nonetheless, the Court afforded CARE leave to seek permission to file, on or before March 25, a supplemental pleading pursuant to Rule 15(d) of the Federal Rules of Civil Procedure, as Plaintiffs indicated that CARE's certification had been recently amended.[12] *Id.* The Court did so because it did not want to foreclose a decision on the merits if CARE did have bona fide statutory standing and an equitable basis to allege it.

When Plaintiff's March 25 deadline to seek leave to file a supplemental complaint arrived, however, Plaintiffs filed neither an amended complaint nor a motion to file a supplemental pleading. Instead, Plaintiffs filed an *ex parte* application to ask for an extension. *See Sols. for Utilities, Inc., et al. v. California Pub. Utilities Comm'n, et al.*, 2022 WL 1741126, at *1 (C.D. Cal. Mar. 29, 2022) ("*Solutions III*"). Wishing to afford Plaintiffs every opportunity to be heard on the merits, the Court extended to April 8 the deadline for Plaintiffs to file a motion for leave to file a supplemental pleading. *Id.* at *2. But, concerned with Plaintiffs' proposal to combine their amended complaint and supplemental complaint into a mangled hybrid pleading, the Court warned Plaintiffs' counsel

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[11] Hereinafter, all dates are in 2022 unless otherwise noted.

[12] At the time, the Court had concerns regarding the propriety of Plaintiffs' attempts to cure CARE's standing issue by amending CARE's QF certification so late in the litigation (*i.e.*, in August 2021, months after the CPUC had filed its motion to dismiss and over a decade since the case opened). Those concerns prompted the Court to afford Plaintiffs leave to file a motion for a supplemental pleading, as the Rule 15(d) briefing would allow the Court and the parties to examine the equitable basis for (and against) allowing CARE to cure its standing deficiencies.

that any pleading containing allegations concerning transactions, occurrences, or events that happened after the date of the filing of the original complaint would be stricken, unless the Court first received and granted a motion for leave to supplement. *Id.*

On April 1, Plaintiffs filed a request for clarification of the order issued in *Solutions III*.[13] What puzzled Plaintiffs was the word "complaint" and whether the Court was referring to the Sixth Amended Complaint or the original Complaint. The Court clarified that the "complaint" referred to Plaintiffs' original Complaint.[14] *See* Fed. R. Civ. P. 15(d).

On April 5, Plaintiffs filed their Seventh Amended Complaint.[15] Three days later, they filed the instant Motion.[16] Five days after that, Plaintiffs moved the Court to reconsider portions of its March 29 order and its April 5 minute order.[17] There, Plaintiffs insisted that they would need to file a motion for a supplemental pleading pertaining to only claims or allegations arising from events, transactions, or occurrences that occurred after they filed their Seventh Amended Complaint. The Court denied the Motion for Reconsideration, citing longstanding precedent establishing that Rule 15(d) applies to the original complaint.[18] *See, e.g.*, *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981). The Court now turns to Plaintiffs' instant Motion in which they seek permission to file a supplemental pleading.

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[13] Req. for Clarification of Order of March 29, 2022 [ECF No. 295].

[14] *See* In Chambers Order [ECF No. 296] (citing the Complaint).

[15] Seventh Am. Compl. (the "Seventh Amended Complaint") [ECF No. 298].

[16] *See generally* Motion.

[17] Pls.' Notice of Mot. and Mot. to Reconsider Order of March 29, 2022, and Min. Entry of April 4, 2022 (the "Motion for Reconsideration") [ECF No. 301].

[18] *See generally* Order Regarding the Motion for Reconsideration [ECF No. 312].

II. LEGAL STANDARD

"On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed. R. Civ. P. 15(d). A supplemental pleading is not a synonym for amending a complaint. *Compare id. with* Fed. R. Civ. P. 15(a). Rule 15(d) provides a mechanism for parties to file additional claims for relief based upon facts and occurrences that did not yet exist when the original complaint was filed. *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998) (per curiam).

Courts consider five factors when deciding whether to grant a motion to file a supplemental pleading: (1) undue delay; (2) bad faith or dilatory motive on the part of the movant; (3) repeated failure of previous amendments; (4) undue prejudice to the opposing party; and (5) futility of the amendment. *See Lyon v. U.S. Immigr. & Customs Enf't*, 308 F.R.D. 203, 214 (N.D. Cal. 2015) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)) (hereinafter the "*Foman* factors"). The Ninth Circuit instructs that "it is the consideration of prejudice to the opposing party that carries the greatest weight." *Eminence Capital, L.L.C. v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

III. DISCUSSION

As an initial matter, Plaintiffs allude only briefly to the *Foman* factors, which supply the standard that the Court will use to evaluate the propriety of a supplemental pleading.[19] In their papers, Plaintiffs make no serious attempt to invoke the *Foman* factors or to explain why they are satisfied, even though the CPUC structures its Opposition explicitly to address them.[20] Accordingly, the

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19 *See* Motion 2:4-7.

20 *Compare* Motion & Reply *with* Opposition.

Court does its best to construe Plaintiffs' arguments in their Motion and Reply to map to the *Foman* factors, where applicable.[21]

A. Undue Delay

Plaintiffs make no argument why a supplemental pleading would ***not*** incur or otherwise constitute undue delay.[22] Furthermore, the CPUC points out that this litigation has persisted for 11 years.[23] That longevity may not be a reason to deny a motion to supplement in and of itself, but it makes the Court especially sensitive to further delay.

The Court observes that Plaintiffs did not initiate the motion to supplement themselves, even though they were in possession of the knowledge that Boyd amended CARE's certification papers in August 2021—an allegation that could potentially cure CARE's statutory standing defect. Rather, the ***Court*** identified the issue and then afforded Plaintiffs that opportunity. Only after a protracted back and forth of *ex parte* applications and requests for clarification did Plaintiffs finally avail themselves of their opportunity—at the last minute—to seek leave to supplement. The Court looked to Plaintiffs to present a compelling justification for what superficially appeared to be a complete lack of diligence, but Plaintiffs' papers are silent regarding why they did not affirmatively take steps sooner to seek leave to supplement their pleadings.[24] Plaintiffs' lack of diligence leads the Court to conclude that undue delay exists. *See Ruvalcaba v. Ocwen Loan Servicing, LLC*, 2018 WL 295973, at *3 (S.D. Cal. Jan. 4, 2018) (denying leave to amend where the record showed that the plaintiff

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[21] The CPUC also discusses at length how Plaintiffs' proposed supplemental briefing violates the Court's prior orders. *See* Opposition 4:13-8:13. Because the Court finds that that Motion should be denied based solely on the merits, it does not reach those issues.

[22] *See generally* Motion; Reply.

[23] Opposition 9:11-20.

[24] *See generally* Motion; Reply.

was not diligent in seeking leave to amend). This factor weighs against granting the Motion.

B. Bad Faith or Dilatory Motive

A charitable reading of Plaintiffs' motive is that they are being forced to supplement their claims because the CPUC continues to revamp several of its energy programs, such as those pertaining to net metering, in defiance of the Ninth Circuit's opinion in *Californians*.[25] But it appears just as likely that Plaintiffs' motive is to protract the litigation indefinitely.[26] Plaintiffs' proposed supplemental pleading is rife with issues expanding the scope of the litigation.[27] Indeed, Plaintiffs explicitly state that their aim is "to add claims . . . which have arisen since the Fifth Amended and Second Supplemental Complaint."[28] Meanwhile, their Motion barely affords lip service to the narrow issue on remand from the Ninth Circuit and the even narrower issue of CARE's standing, for which the Court afforded Plaintiffs leave to file their Motion.[29] In short, it appears that Plaintiffs are trying to use the Court's hall pass to go on a field trip. This factor therefore weighs against granting the Motion, as a supplemental pleading is not meant to enable a litigation treadmill. *See Thomas v. Spaulding*, 2021 WL 3516474, at *5 (D. Mass. Aug. 10, 2021).

C. Repeated Failure

Plaintiffs argue that this supplemental pleading is their first opportunity to make corrections to their claims, in view of the defects that prompted the Court

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[25] *See, e.g.*, Motion 9:9-10:11.

[26] Opposition 10:15-23; *see also* Reply 4:17-5:4.

[27] *See, e.g.*, [Proposed] Eight Am. and Third Suppl. Compl. for Equitable Relief (the "Proposed Eighth Amended and Third Supplemental Complaint") [ECF No. 299-3] ¶¶ 36i, 42g-h, & 71a-d.

[28] Motion 5:15-16. The Fifth Amended Complaint was not filed until April 2016. *See* Fifth Am. and First Suppl. Compl. for Equitable Relief (the "Fifth Amended Complaint") [ECF No. 186].

[29] *See, e.g.*, Motion 4:9-12 & 5:3-7.

to dismiss Plaintiffs' previous pleading.[30] While that proposition may be technically correct, it is highly misleading. It is true that Plaintiffs' last operative pleading—the Sixth Amended Complaint—exhibited new defects relative to their Fifth Amended Complaint and that the Court pointed out those defects in its order dismissing the Sixth Amended Complaint. *See Solutions II*, 2022 WL 1741128, at *8. But the perennial creation of new defects does not mean that Plaintiffs may reset the clock every time. If anything, it shows that Plaintiffs have repeatedly failed to file adequate pleadings.

As the title of their proposed pleading itself indicates (*i.e.*, an Eighth Amended and Third Supplemental Complaint), Plaintiffs have availed themselves of multiple opportunities to amend their pleadings.[31] Furthermore, Plaintiffs had a clear directive from the Ninth Circuit upon remand. Still, their Sixth Amended Complaint was wholly inadequate with respect to alleging CARE's standing, among other issues. *See Solutions II*, 2022 WL 1741128, at *4–*7. Thus, this factor weighs against granting the Motion.

D. Undue Prejudice

The non-moving party may show that it would be unduly prejudiced by a supplemental pleading in a variety of ways. Common examples include instances where the motion is made after the cutoff date to file such motions has passed or after discovery has closed. *See Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002). In this case, discovery was initially

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30 *Id.* at 5:11-12.

31 For context, on Westlaw the search term "eighth amended complaint" returns only 132 entries for federal cases going back to 1984. While in no way dispositive to the Court's analysis, that data point suggests, at least on its face, that parties are rarely permitted to amend their complaint nine times.

completed a decade ago—in 2012.[32] That fact alone would tilt heavily against granting the Motion.

In fairness, that finding might be counterbalanced by the Court's decision to reopen discovery in July 2020 after the case was remanded from the Ninth Circuit.[33] At that time, the Court set February 1, 2021, as the date to finalize this second round of discovery.[34] However, that deadline was subsequently vacated in December 2020 when the parties jointly requested a new scheduling order.[35] Then, after conferring with the parties on the matter, the Court stayed discovery until the Court resolved the CPUC's then-pending motion to dismiss the Sixth Amended Complaint.[36]

Plaintiffs suggest, therefore, that the CPUC should not cry foul when they consented to reset case calendar dates.[37] Although the Court can agree narrowly with that statement, the CPUC's decision to stipulate to a new case schedule does not wash the Motion clean of all its prejudicial impact. Recall that the question on remand from the Ninth Circuit did not arise from thin air—it was an issue that this Court originally adjudicated on summary judgment six years ago. *See Solutions I*, 2016 WL 7613906, at *9–*14. From that vantage point, the relevant discovery period has come and gone.

If Plaintiffs' proposed supplemental pleading tracked narrowly to the question on the remand, then the need for additional discovery (and, thus, the

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[32] Proceedings: Scheduling Conference [ECF No. 88] (setting initial discovery cutoff in December 2012); Proceedings: Scheduling Conference [ECF No. 202] (ordering no further duplicative discovery as of July 2016).

[33] *See generally* Scheduling and Case Management Order Re: Jury Trial [ECF No. 247].

[34] *See id.* at 17:5-7.

[35] *See* Order Approving Joint Appl. For Scheduling Status Conference and Ordering Filing of a Joint Status Report Proposing New Scheduling Order [ECF No. 254].

[36] *See* Min. Order of Video Hr'g Re: Status Conference [ECF No. 269].

[37] Opposition 3:7-4:5.

prejudicial potential of the Motion) may have very well been attenuated. But Plaintiffs' proposed supplemental pleading expands the scope of the litigation, including allegations regarding new "pending proposed PUC guideline[s]" and revamped "NEM" programs.[38] Thus, it appears likely that granting the Motion would require the parties to undergo further discovery.

Additionally, the CPUC maintains that it has objected to CARE's standing for years.[39] Allowing Plaintiffs to cure their pleading deficiencies on the issue of standing with allegations of events occurring in August 2021—well after the CPUC moved to dismiss the last complaint—strikes the Court as highly prejudicial.[40] And Plaintiffs make no argument to the contrary, despite ample opportunities to do so. Nor do Plaintiffs explain how some other events, such as those that happened long ago, would or could cure CARE's standing defects.[41] Thus, the Court concludes that it would be highly prejudicial to allow CARE to cure its standing defects over a decade into the litigation, especially when it has become clear that CARE lacked standing for nearly all (or perhaps entirely all) of the duration of this litigation. This factor counsels against granting the Motion.

E. Futility

"[A] proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." *Miller v. Rykoff–Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

Among several challenges that the CPUC highlights in its Opposition, the Court is concerned that issues pertaining to administrative exhaustion would

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[38] Proposed Eighth Amended and Third Supplemental Complaint ¶¶ 36i & 42g.

[39] Opposition 11:19-12:2.

[40] *See* Proposed Eighth Amended and Third Supplemental Complaint ¶ 52b.

[41] That omission is important for other reasons, such as administrative exhaustion, discussed in Part III.E. below.

render the supplemental pleading futile, as it is currently drafted.[42] The allegation that CARE amended its certification in August 2021—which it accomplished specifically to give it statutory standing pursuant to 16 U.S.C. § 824a-3(h)(2)—would give it standing to challenge only supposed PURPA violations by the CPUC ***after*** that date. But that would have nothing to do with the issues carefully considered on appeal by the Ninth Circuit in *Californians*. Furthermore, CARE would still need to exhaust administrative remedies post-certification, which Plaintiffs have not alleged has happened.[43] Both of those defects suggest that further motion practice (and further need for amendment) would be almost inevitable. Therefore, granting the Motion would be futile.

In summation, all five *Foman* factors weigh against granting the Motion.

IV. CONCLUSION

For the foregoing reasons, the Court hereby **ORDERS** as follows:

1. The Motion is **DENIED**.

2. Plaintiff CARE is **DISMISSED** from this action.

IT IS SO ORDERED.

Dated: July 20, 2022

John W. Holcomb
UNITED STATES DISTRICT JUDGE

[42] Opposition 12:11-21.

[43] *See generally* Proposed Eighth Amended and Third Supplemental Complaint.

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California corporation,
CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation,
MICHAEL E. BOYD, and
ROBERT SARVEY,

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency,
SOUTHERN CALIFORNIA EDISON CO., a California Corporation,
MARYBEL BATJER,
MARTHA GUZMAN ACEVES,
CLIFFORD RECHTSCHAFFEN,
GENEVIEVE SHIROMA, and
DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California,

Defendants.

Case No. 2:11-cv-04975-JWH-JCG

MEMORANDUM OPINION AND ORDER (1) GRANTING MOTION OF DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SEVENTH AMENDED COMPLAINT [ECF No. 316]; and (2) DENYING PLAINTIFFS' RENEWED MOTION FOR LEAVE TO FILE EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [ECF No. 322]

This case approaches its thirteenth year of existence. Since its origin in 2011, it has proceeded through summary judgment, two appeals to the Ninth Circuit, multiple rounds of amended pleadings, numerous motions to dismiss, myriad *ex parte* applications, and several motions for reconsideration.[1] Many of the parties have come and gone: two of the original Plaintiffs—Solutions for Utilities, Inc. ("SFUI") and, more recently, Californians for Renewable Energy, Inc. ("CARE")—plus one of the original defendants—Southern California Edison Co.—have been dismissed.[2] Defendants Martha Guzman Aceves, Marybel Batjer, and Clifford Rechtschaffen are also no longer current Commissioners of the California Public Utilities Commission ("CPUC").[3]

Before the Court are two motions. The first is the motion of Defendants CPUC and the current Commissioners of the CPUC in their official capacities (collectively, "Defendants") to dismiss the Seventh Amended Complaint of Plaintiffs Michael E. Boyd and Robert Sarvey.[4] The second is the resubmitted motion of Boyd and Sarvey for leave to file an eighth amended and third supplemental complaint.[5] The Court finds these matters appropriate for resolution without a hearing. *See* Fed. R. Civ. P. 78; L.R. 7-15.

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1 *See, e.g.*, *Sols. for Utilities, Inc. v. California Pub. Utilities Comm'n*, 2011 WL 13152588, at *11 (C.D. Cal. Dec. 13, 2011), on reconsideration in part, 2012 WL 12919356 (C.D. Cal. Feb. 13, 2012), and order amended and superseded on reconsideration, 2012 WL 12919409 (C.D. Cal. Feb. 13, 2012), *aff'd* in part, *rev'd* in part, 596 F. App'x 571 (9th Cir. 2015) (affirming in part Defendants' motion to dismiss); *Sols. for Utilities, Inc. v. California Pub. Utilities Comm'n*, 2016 WL 7613906, at *15 (C.D. Cal. Dec. 28, 2016) (granting Defendants' motion for summary judgment in full) ("*Solutions I*").

2 *See Solutions I*, 2016 WL 7613906, at *2 n.1 (noting that SFUI and Southern California Edison had been dismissed); *Sols. for Utilities, Inc. v. California Pub. Utilities Comm'n*, 2022 WL 3575308, at *6 (C.D. Cal. July 20, 2022) ("*Solutions IV*") (dismissing CARE from the case).

3 *See* California Public Utilities Commission https://www.cpuc.ca.gov/about-cpuc/commissioners/former-commissioners (last visited March 5, 2023).

4 Mot. of CPUC and Commissioners to Dismiss Seventh Am. Compl. or, in the Alterative, to Strike Portions Thereof (the "Motion to Dismiss") [ECF No. 316].

5 Pls.' Resubmitted Notice of Mot. and Mot. for Leave to File [Proposed] Eighth Am. and Third Suppl. Compl. [Fed. R. Civ. P. 60(b)]; Supporting Decls. of Meir J. Westreich and Michael Boyd (the "Renewed Motion for Leave") [ECF No. 322].

After considering the papers[6] filed in support and in opposition,[7] the Court orders that the Motion to Dismiss is **GRANTED** and that the Renewed Motion for Leave is **DENIED**, for the reasons set forth herein.

I. BACKGROUND

In 2019, the Ninth Circuit affirmed this Court's grant of summary judgment in favor of Defendants, except for one narrow question on remand. *See Californians for Renewable Energy v. California Pub. Utilities Comm'n*, 922 F.3d 929, 938 (9th Cir. 2019) ("*Californians*"). That question concerns how to calculate "avoided cost" for utilities sourcing renewable energy from qualified generation facilities ("QFs") when taking California's Renewable Portfolio Standards ("RPS") into account—and, therefore, what price those QFs should receive for their electricity. 18 C.F.R. § 292.304(d); *see also* 16 U.S.C. § 796(18)(B).

As they allege in their most recent pleading, Boyd and Sarvey own and operate solar generating facilities.[8] They believe that the CPUC has shirked its obligations under the Public Utility Regulatory Policies Act ("PURPA") and the attendant regulations of the Federal Energy Regulatory Commission ("FERC"). Specifically, they complain that the CPUC's programs and policies allowed investor-owned utilities, like non-party Pacific

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[6] After the Court took these matters under submission, Boyd and Sarvey sought to "re-open" the two submitted motions in light of "new events" that "should be considered now by judicial notice." *See* Application to Reopen Defs.' Motion to Dismiss Pls.' Seventh Amended Complaint; Application to Reopen Pls.' Resubmitted Motion to File Eighth Amended Complaint and Third Supplemental Complaint; and Request for Judicial Notice of Pls.' New FERC Petition Proceedings and Briefing Schedule (the "Application to Reopen") [ECF No. 328] 3:27-4:1. L.R. 7-12 provides in pertinent part: "The Court may decline to consider any memorandum or other document not filed within the deadline set by order or local rule." Pursuant to that Local Rule, and in the absence of good cause or prior permission, the Court exercises its discretion to decline to consider Boyd and Sarvey's late-filed application. The relief that Boyd and Sarvey seek in their Application to Reopen is **DENIED**.

[7] The Court considered the documents of record in this action, including the following papers: (1) Seventh Am. Compl. (the "Seventh Amended Complaint") [ECF No. 298]; (2) Motion to Dismiss (including its attachments); (3) Opp'n to the Motion to Dismiss (the "Opposition") [ECF No. 319]; (4) Renewed Motion for Leave; (5) Defs.' Reply to Pl.'s Opposition (the "Reply") [ECF No. 323]; (6) Defs.' Opp'n to Pls.' Renewed Motion for Leave (the "Opposition to Motion for Leave") [ECF No. 324]; and (7) Mem. of P. & A. in Supp. of Pls.' Renewed Motion for Leave (the "Reply for Motion for Leave") [ECF No. 326].

[8] Seventh Amended Complaint ¶ 36k.

Gas & Electric ("PG&E"), to underpay them for the renewable electricity that they produced.[9]

Since the initial complaint was filed, many versions of and variations on that theory (and related claims) have been heard and dismissed.[10] Prior to the Ninth Circuit remand, Boyd, Sarvey, and CARE (which was still a party at that time)[11] filed a fifth amended and first supplemental complaint.[12] That pleading was then succeeded by a sixth amended and second supplemental complaint.[13] Problematically, the Sixth Amended Complaint did not adequately state a claim for relief on the narrow issue on remand, among other deficiencies. *See Sols. For Utilities, Inc. v. California Pub. Utilities Comm'n*, 2022 WL 1741128, at *7 (C.D. Cal. Mar. 9, 2022) ("*Solutions II*") (granting Defendants' motion to dismiss the Sixth Amended Complaint, in part with leave to amend). After filing several more motions, Boyd and Sarvey eventually filed their Seventh Amended Complaint in April 2022.[14] *See Solutions IV*, 2022 WL 3575308, at *3 (summarizing the procedural history following the dismissal of the Sixth Amended Complaint). Boyd and Sarvey assert two claims for relief: one asking the Court to compel CPUC to enforce PURPA (with a prayer for monetary damages nestled therein) and a second, derivative claim for declaratory, injunctive, or equitable relief related thereto.[15]

The CPUC moved to dismiss those claims on July 22.[16] While that motion was being briefed, Boyd and Sarvey filed a Renewed Motion for Leave to file their eighth amended and third supplemental complaint.[17] That Renewed Motion for Leave seeks reconsideration of the Court's July 20 order in which it denied CARE, Boyd, and Sarvey leave to file a supplemental pleading. *See Solutions IV*, 2022 WL 3575308, at *6 (finding that the factors set forth in *Foman v. Davis*, 371 U.S. 178, 182 (1962), counseled against

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[9] *See, e.g.*, *id*. at ¶ 42g; *see also id*. at ¶ 43 (alleging that the CPUC has "surrendered" regulatory authority to investor-owned utilities).

[10] Compl. [ECF No. 1] (filed June 10, 2011).

[11] From time to time in this order, the Court will refer to Boyd, Sarvey, and CARE collectively as "Plaintiffs," as those three parties together filed many of the more recent pleadings and motions, and CARE was dismissed less than a year ago—on July 20, 2022.

[12] Fifth Am. Compl. (the "Fifth Amended Complaint") [ECF No. 185].

[13] Sixth Am. Compl. (the "Sixth Amended Complaint") [ECF No. 267].

[14] Hereinafter, all dates are in 2022 unless otherwise noted.

[15] Seventh Amended Complaint ¶¶ 52-76.

[16] *See generally* Motion to Dismiss.

[17] *See generally* Renewed Motion for Leave.

granting leave to file a supplemental pleading under Rule 15(d) of the Federal Rules of Civil Procedure). Both motions are fully briefed.

II. MOTION TO DISMISS THE SEVENTH AMENDED COMPLAINT

Defendants seek the dismissal of the Seventh Amended Complaint on three grounds: (1) Boyd and Sarvey's pleading fails to state a claim; (2) Boyd and Sarvey lack of Article III standing; and (3) Boyd and Sarvey have failed to comply with this Court's orders. The Court concludes that each ground provides an independent reason to **GRANT** the Motion and to **DISMISS** the Seventh Amended Complaint **without leave to amend**. As such, Defendants' request to strike portions of the Seventh Amended Complaint, which they present in the alternative, is **DENIED as moot**.

A. Failure to State a Claim

1. Legal Standard

A claim should be dismissed under Rule 12(b)(6) when the plaintiff fails to assert a "cognizable legal theory" or the complaint contains "[in]sufficient facts . . . to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To survive a motion to dismiss, the complaint must allege "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The claim must be pleaded with "sufficient factual matter . . . to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and that rises "above the speculative level," *Twombly*, 550 U.S. at 555.

Additionally, Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires a "short and plain statement of the claim showing that a pleader is entitled to relief," in order to give the defendant "fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555; *see also Horosny v. Burlington Coat Factory, Inc.*, 2015 WL 12532178, at *3 (C.D. Cal. Oct. 26, 2015). For the allegations in a complaint "to be entitled to the presumption of truth," they "may not simply recite the elements of a cause of action, but must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively." *AE* ex rel. *Hernandez v. Cty. of Tulare*, 666 F.3d 631, 637 (9th Cir. 2012). "[T]he factual allegations that are taken as true must plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Id.*

2. Discussion

Despite the length and prolixity of the Seventh Amended Complaint, much of it is filler. For instance, Boyd and Sarvey spill considerable ink summarizing various aspects of PURPA's regulatory regime,[18] recapitulating the question regarding avoided costs and Renewable Portfolio Standards,[19] and insinuating that the CPUC colludes with investor-owned utilities as result of (or as an example of) politically incestuous relationships.[20] That pleading also rehashes allegations that have since become immaterial; for example, it dedicates several paragraphs to a description of CARE—a party that has been dismissed.[21]

The rest of the Seventh Amended Complaint recites conclusions of law; *e.g.*, that utility companies "do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations"[22] and that there are no "PURPA compliant options within California for small power producing facilities, like Plaintiffs."[23] Even at its most specific, the Seventh Amended Complaint offers more conclusions than factual allegations. For instance, it alleges that the CPUC "fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's [*sic*]—under 1 megawatt production capacity—who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments."[24]

In short, the Seventh Amended Complaint reads like a broad, but often turgid, critique of how small-scale renewable energy suppliers were insufficiently compensated in California in and before 2011.[25]

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18 Seventh Amended Complaint ¶¶ 6-15.

19 *Id.* at ¶¶ 16-32.

20 *Id.* at ¶¶ 43-51. The Court declines to transform allegations of collusion into a claim for relief, since Boyd and Sarvey neither assert those allegations as a claim nor invoke any supporting law, statute, or legal doctrine. *See* Fed. R. Civ. P. 7(b)(1) (requiring any motion to "state with particularity the grounds for seeking the order" and to "state the relief sought").

21 *See, e.g.*, Seventh Amended Complaint ¶¶ 4b, 52, & 53.

22 *Id.* at ¶ 60d.

23 *Id.* at ¶ 60e.

24 *Id.* at ¶ 37; *see also id.* at ¶¶ 38, 38a., & 39.

25 While the Seventh Amended Complaint never identifies the timeframe, the Court construes it to pertain only to policies or programs that existed prior to 2011. Otherwise, the Seventh Amended Complaint would directly contravene the Court's orders denying Boyd and Sarvey's motion to file a supplemental pleading. *See* Fed. R. Civ. P. 15(d).

But the Court is not the Capitol. The policy arguments that Boyd and Sarvey make in their Seventh Amended Complaint are inapt and unhelpful. A pleading's allegations must be factual and specific, and those details are missing here. At most, the Seventh Amended Complaint avers that Boyd and Sarvey produce solar energy, that PG&E does not pay Boyd and Sarvey as much as they would like, and that Boyd and Sarvey blame the CPUC for that state of affairs.[26] The Court finds those allegations too imprecise to state a claim—at least, not without relitigating the many aspects of the case that have already been decided. *See, e.g.*, *Californians*, 922 F.3d at 936–42.

The Court previously concluded that Boyd and Sarvey had not stated a claim with respect to the narrow question on remand because they failed to "allege facts with sufficient particularity that utilities are fulfilling their California RPS obligations through those utilities' use of ***Plaintiffs'*** energy." *Solutions II*, 2022 WL 1741128, at *7 (emphasis in original). Now they assert in a conclusory fashion that "Plaintiffs'—CARE, Boyd and Sarvey—respective net surplus energy supplied under the PUC approved NEM [*i.e.*, Net Energy Metering] Program has at relevant timees [*sic*] been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard*."[27] Then they repeat themselves in the very next paragraph: "Plaintiffs'—CARE, Boyd and Sarvey—respective net surplus energy supplied under the PUC approved NEM Program has been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard."[28]

Repeating a conclusory allegation does not make it plausible. Notwithstanding Boyd and Sarvey's proclamation that they "addressed" the Court's "instruction" by inserting that language into their pleading,[29] they offer no other attendant factual allegations to satisfy the pleading requirements of *Iqbal* and *Twombly*. For instance, the Seventh Amended Complaint contains no references to an interconnection agreement with any utility, no figures regarding annual kilowatt-hours or megawatt-hours produced, and no information concerning how much of that electricity was net surplusage.[30] Boyd

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26 Seventh Amended Complaint ¶¶ 55-59.

27 *Id.* at ¶ 36h. The asterisk may be a typo, as it does not refer to anything.

28 *Id.* at ¶ 36j.

29 Opposition 5:7-12.

30 At one point, the pleading asserts that CARE—not Boyd and Sarvey—"***intended and sought*** to interconnect and supply energy," but not that CARE did so. *See* Seventh Amended Complaint ¶ 40. That allegation is potentially damning, since the Ninth Circuit explained that the NEM program would not need to afford avoided capacity costs if a QF did not produce more than it consumed, as that would not allow utilities to forego spending on capacity elsewhere. *See* *Californians*, 922 F.3d at 939.

and Sarvey do not articulate the price per kilowatt-hour that they believe they should be paid, compared to what they received from PG&E or other unspecified utilities. Boyd and Sarvey also barely provide Defendants with notice of which policies or programs they believe are no longer PURPA compliant; they mention the Net Metering Program, but they neglect to identify the version with which they take umbrage.[31]

Furthermore, Defendants point out that Boyd and Sarvey do not make sufficient allegations plausibly to show that their energy resources were ***certified*** by the California Energy Commission ("CEC") as RPS-eligible.[32] It is one thing, Defendants argue, for solar to be the kind of energy that is generally eligible to satisfy a utility's RPS obligations; it is another thing for a solar provider to be RPS-certified as such, so that a utility could then claim the resulting renewable energy credits to satisfy its RPS obligations.[33] That certification is handled not by the CPUC, but by the CEC. *See* Cal. Pub. Util. Code § 399.25(a) (delegating certification of renewable energy resources to the CEC); *see also* Cal. Pub. Util. Code § 399.12(h)(1) (noting that renewable energy credits are "issued through the accounting system established by the Energy Commission").

While the Court does not mean to imply that any of the preceding information is either strictly necessary or entirely sufficient for the purpose of surviving a motion to dismiss under Rule 12(b)(6), those details would, at a minimum, begin to move Boyd and Sarvey's allegations toward the realm of plausible. *See Iqbal*, 556 U.S. at 678.

Boyd and Sarvey's Opposition does not salvage their Seventh Amended Complaint's pleading deficiencies. For the most part, the Opposition rehashes much of the extraneous material.[34] Boyd submits a 170-page declaration with the Opposition, which, on first blush, may address Defendants' argument regarding the specific issue of

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31 *See, e.g.*, Seventh Amended Complaint ¶¶ 35, 36, 36a, 36e, 36g, 36h, & 36j. The Court assumes that Boyd and Sarvey refer to NEM 1.0, since any reference to NEM 2.0 would need to be contained in a supplemental pleading because that policy came into existence well after Boyd and Sarvey initiated this lawsuit. But it should not fall on the Court—or a defendant—to deduce what act, decision, program, or policy that the plaintiff means to indict. *See generally* Fed. R. Civ. P. 8. The Seventh Amended Complaint also obliquely refers to the CHP and Re-MAT programs in one sentence, although it does not clearly explain if those programs are relevant or why. *See* Seventh Amended Complaint ¶ 33. Since the Ninth Circuit previously found those "bare-bones" allegations insufficient to state a claim, the Court will do the same here. *Californians*, 922 F.32d at 940.

32 Motion to Dismiss 16:21-28.

33 *Compare* Seventh Amended Complaint ¶ 36k (asserting that "Boyd and Sarvey have at all relevant times met RPS-eligibility requirements for QF's") *with* Motion to Dismiss 19:17-19 (noting the distinction between being eligible for certification and actually being certified).

34 *Compare* Seventh Amended Complaint *with* Opposition.

CEC certification.[35] But that declaration cannot rescue the Seventh Amended Complaint. "If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d). The information contained in Boyd's declaration and the exhibits attached thereto—concerning the CEC and certification—appears ***nowhere*** in the Seventh Amended Complaint. An opposition brief is not the mechanism to bolster allegations that should have appeared in the pleading. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir. 2002) (observing that district courts ordinarily "look only at the face of the complaint to decide a motion to dismiss"). In short, Boyd and Sarvey's pleading is too light on the facts and other key details to state a claim pertinent to the narrow issue on remand. They fail to state a claim under Rule 12(b)(6).

3. Leave to Amend

The question then becomes whether the Court should grant leave to amend. *See* Fed. R. Civ. P. 15(a). The Ninth Circuit instructs courts to consider five factors in connection with the leave-to-amend inquiry under Rule 15(a): (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) the futility of amendment; and (5) whether the plaintiff has previously amended his or her complaint. *See Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004).

Here, those factors weigh against granting leave to amend. Boyd and Sarvey concede that the Seventh Amended Complaint is "inartfully plead [*sic*]," notwithstanding the fact that they have now amended their complaint ***seven*** times.[36] Boyd and Sarvey have pondered this case for more than a decade; they have had about three years to mull over the narrow question on remand; and they have already enjoyed the benefit of leave to amend on that narrow question. Yet Boyd and Sarvey still skimp on the factual allegations necessary to comply with the strictures of *Iqbal* and *Twombly*. Boyd and Sarvey's consistent pattern of vacuous pleading suggests futility and counsels against affording further leave to amend. As the Court previously expressed, while dismissing the Sixth Amended Complaint:

> During the hearing, Plaintiffs' counsel represented that Plaintiffs could make this allegation if given an opportunity to amend. In theory, such an allegation could cure both the Article III standing issue and the Rule 12(b)(6) deficiency. But the Court is cognizant of the longevity of this litigation and the numerous opportunities already afforded to Plaintiffs to move this case

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35 *See* Decl. of Michael Boyd in Opp'n to the Motion to Dismiss [ECF No. 319-1].

36 Opposition 25:2.

out of the pleading stage. Such delay comes at a cost to the CPUC. Balancing the equities, the Court will afford Plaintiffs one final opportunity to amend their pleading to correct its deficiencies

Solutions II, 2022 WL 1741128, at *8. That final opportunity has been spent. The Court **GRANTS** Defendants' Motion to Dismiss and **DISMISSES** the Seventh Amended Complaint **without leave to amend**.

B. Article III Standing

In the alternative, Defendants move to dismiss under Rule 12(b)(1) for lack of Article III standing. That Motion is also **GRANTED**.

1. Legal Standard

A defendant may invoke Rule 12(b)(1) when the plaintiff lacks standing to bring the particular lawsuit. Because federal courts are courts of limited jurisdiction, the burden of establishing subject matter jurisdiction—including standing—rests upon the party asserting jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Furthermore, in every federal case, the basis for federal jurisdiction must appear affirmatively from the record. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006).

The lack of Article III standing compels the Court to dismiss the action for lack of subject matter jurisdiction. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). To demonstrate standing, a plaintiff (1) must have suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016). Where, as here, the case has returned to the pleading stage, the plaintiff must "clearly . . . allege facts demonstrating" each element. *Id.* To establish an injury in fact, the plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). The injury must also have a causal connection to the misconduct, rather than result from the action of a third party not before the Court. *See id.* Finally, it must be "likely"—as opposed to merely "speculative"—that the injury will be "redressed by a favorable decision." *Id.* (internal quotations and citations omitted).

2. Discussion

Defendants argue that Boyd and Sarvey fail to plead allegations that would satisfy the three-part test for Article III standing.[37] Defendants are correct.

As previously discussed, *see supra* Part II.A.2, the Seventh Amended Complaint does not allege sufficient facts to show that Boyd and Sarvey's energy would have been qualified to satisfy any utility company's RPS obligations (eligible, maybe—but certified, no). Without those allegations, among the others discussed, neither Boyd nor Sarvey has suffered an injury that gives either of them cognizable Article III standing to challenge the CPUC's programs within the narrow confines of the Ninth Circuit's remand.[38]

Moreover, the Court concludes that Boyd and Sarvey have not satisfied their burden to allege sufficient facts to show that their injury is traceable to the conduct of Defendants. For instance, in the Seventh Amended Complaint, Boyd and Sarvey repeatedly focus their ire on utilities. For example, Boyd and Sarvey assert that the CPUC failed "to compel the ***utilities*** to provide a program which includes in its pricing of avoided capacity costs for small QF's—under 1 megawatt production capacity."[39] Boyd and Sarvey also complain that PG&E offers "less than full avoided cost for only the 'surplus' above their power production."[40] While not dispositive, the very fact that PG&E and other unnamed investor-owned utilities play such a key role in the injury impedes Boyd and Sarvey's ability to satisfy the requirement that the injury not be the result of non-parties.[41] As a result, the Court is skeptical that Boyd and Sarvey have satisfied their burden. *See Spokeo*, 578 U.S. at 338 (noting that the "plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements").

Finally, the Court doubts that any relief would redress Boyd and Sarvey's injury, assuming that they pleaded it properly. The temporal implications of the procedural posture are problematic: before the Court is the Seventh Amended Complaint, ***not*** a supplemental pleading. The Court did not grant Boyd and Sarvey leave to file a

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37 Motion to Dismiss 18:3-21:9.

38 While the issue is not raised in the briefs, the fact that the Boyd and Sarvey have statutory standing does not necessarily translate into having Article III standing, as their statutory standing arose in large part from having exhausted their administrative remedies and obtaining certifications from FERC. *See Solutions II*, 2022 WL 1741128, at *5 (discussing 16 U.S.C. § 824a-3(h)(2)(B)); *see also Solutions I*, 2016 WL 7613906, at *2 (noting that the "CARE Plaintiffs had fulfilled PURPA's requirement to exhaust administrative remedies").

39 Seventh Amended Complaint ¶ 37 (emphasis added).

40 *Id.* at ¶ 42g.

41 *See id.* at ¶ 40 (explicitly noting that PG&E is not a party to the action). The Court also previously dismissed any "as applied" claims. *See Solutions II*, 2022 WL 1741128, at *6.

supplemental pleading. *See Sols. For Utilities, Inc. v. California Pub. Utilities Comm'n*, 2016 WL 7654679, at *3 (C.D. Cal. Mar. 31, 2016) (denying Plaintiffs' motion to file a fourth amended and first supplemental complaint); *Solutions IV*, 2022 WL 3575308, at *6 (denying the motion to file an eighth amended and third supplemental complaint).[42] The implication is that any claim—and therefore any relief—must be tied to policies or programs that date back to 2011 or earlier, some of which may or may not still be in force. Indeed, Boyd and Sarvey's counsel represented to the Court during the October 2021 hearing that the CPUC's policies kept changing.[43] An effort to enjoin the CPUC from enforcing a program that no longer exists is the definition of mootness.

While Boyd and Sarvey cling to the words of the Ninth Circuit—that the narrow question on remand is be determined "in the first instance," *Californians*, 922 F.3d at 938—that instruction does not grant Boyd and Sarvey free rein to ignore the Federal Rules of Civil Procedure or to pick new fights.[44] As this Court has repeatedly explained, claims or allegations arising from transactions, events, or occurrences that have arisen since the filing of the initial complaint must be set forth in a ***supplemental*** pleading, if at all. *See Keith v. Volpe*, 858 F.2d 467, 471 (9th Cir. 1988). But supplemental pleadings are not automatic; plaintiffs are not entitled to file them as of right. *See* Fed. R. Civ. P. 15(d) (requiring a motion and court order).

In sum, Boyd and Sarvey lack Article III standing because they have not sufficiently pleaded injury-in-fact. Additionally, Boyd and Sarvey have not affirmatively satisfied their burden to show that their injury is traceable to the actions of Defendants. Lastly, the Court remains skeptical that a court order would be anything other than

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[42] The Court never granted Plaintiffs leave to file a second supplemental complaint; Plaintiffs merely captioned their fifth amended complaint as such. Had Plaintiffs properly filed a motion pursuant to Rule 15(d), this entire saga of pleading issues may have been avoided. Mr. Westreich argues in his declaration, which is appended to the Renewed Motion for Leave, that the parties stipulated to a supplemental pleading. *See* Suppl. Decl. of Meir J. Westreich Re Fed. R. Civ. P. 60(b)(1) [Excusable Neglect] in Supp. of the Renewed Motion for Leave (the "Westreich Declaration") [ECF No. 322-1] ¶ 39. But therein lies the issue: Rule 15(d) does not allow for parties to stipulate (without court approval) for a plaintiff to file a supplemental pleading, whereas the text of Rule 15(a) does. *Compare* Fed. R. Civ. P. 15(a)(2) *with* Fed. R. Civ. P. 15(d).

[43] That fact may explain why some of Seventh Amended Complaint's vagueness could be intentional, fitting into a pattern of ignoble motives. *See, e.g.*, *id.* at ¶ 61 (alleging that "Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions").

[44] "Although amendment of pleadings following remand may be permitted, such amendment cannot be inconsistent with the appellate court's mandate." *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984). "On remand, a trial court cannot consider 'issues decided explicitly or by necessary implication.'" *Id.* (quoting *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982)).

advisory. Accordingly, the Court **DISMISSES** the Seventh Amended Complaint on account of Boyd and Sarvey's lack of standing.

C. Rule 41(b) Involuntary Dismissal

In their Motion to Dismiss, Defendants also ask the Court to dismiss the Seventh Amended Complaint for Boyd and Sarvey's failure to obey the Court's prior orders. Defendants' argument is persuasive; this issue provides an independent reason for the Court to dismiss the Seventh Amended Complaint.

1. Legal Standard

"If the plaintiff fails . . . to comply with . . . a court order, a defendant may move to dismiss the action or any claim against it." Fed. R. Civ. P. 41(b). "In determining whether to dismiss a case for failure to comply with a court order the district court must weigh five factors including: (1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the defendants; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic alternatives." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260–61 (9th Cir. 1992), *as amended* (May 22, 1992) (internal quotations and citation omitted). "Although it is preferred, it is not required that the district court make explicit findings in order to show that it has considered these factors." *Id*. at 1261.

2. Discussion

Defendants meticulously chronicle the various ways that Boyd and Sarvey (and their counsel) have violated the Court's orders.[45] At a high level, it appears that Boyd and Sarvey wish to return to square one, relitigating issues and claims that have already been decided. For example, they reassert claims on behalf of CARE, a dismissed party.[46] They attempt to relitigate issues that the Ninth Circuit already affirmed.[47] They ask, again, for monetary damages—even when they later backpedal to say that they are not.[48] Whether deliberate or not, Boyd and Sarvey seem incapable of following the Court's clear

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[45] *See* Motion to Dismiss 9:4-14:5; Reply 7:1-9:6.

[46] *See, e.g.*, Seventh Amended Complaint ¶¶ 4, 4a, 4b, 36b-36e, & 52-59.

[47] *See, e.g.*, *id*. at ¶ 33 (asserting identical language about the Re-MAT and CHP Programs that the Ninth Circuit already disregarded); *id*. at ¶¶ 61 & 62 (asserting that the CPUC failed to issue any PURPA-compliant programs or tariffs, despite the Ninth Circuit's holding to the contrary).

[48] *Compare Solutions II*, 2022 WL 1741128, at *7 (dismissing "[a]ll claims for monetary relief . . . with prejudice") *with* Seventh Amended Complaint ¶¶ 67-70 *and* Third Joint Scheduling Conference and Rule 26(f) Report [ECF No. 325] 4:14.

instructions, which, *inter alia*, afforded them leave to amend "only as it relate[d] to their implementation claim within the scope of the Ninth Circuit's remand." *Solutions II*, 2022 WL 1741128, at *8. The Court subsequently clarified those instructions several times and even gave Boyd and Sarvey extra time to amend their pleading. *See Sols. For Utilities, Inc. v. California Pub. Utilities Comm'n*, 2022 WL 1741126, at *2 (C.D. Cal. Mar. 29, 2022) ("*Solutions III*"); *Sols. For Utilities Inc. v. California Pub. Utilities Comm'n*, 2022 WL 3575307, at *1 (C.D. Cal. July 5, 2022); *Solutions IV*, 2022 WL 3575308, at *3. Yet the Seventh Amended Complaint continues to resurface issues and allegations that have been already decided.

Evaluating the *Frederik* factors, the Court concludes that it would be justified in dismissing the Seventh Amended Complaint under Rule 41(b), even if Boyd and Sarvey ***had*** managed to state a claim or to demonstrate Article III standing.

The first two *Frederik* factors favor dismissal. The Federal Rules of Civil Procedure impose an obligation on both the Court and the parties "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Nothing is speedy about a 12-year lawsuit. Relitigating issues—contrary to the Court's direct orders—both contravenes the public's interest in speedy litigation and further burdens the Court's already backlogged docket. *See Pagtalunan v. Galaza*, 291 F.3d 639, 642 (9th Cir. 2002) (holding that the public's interest in expeditious resolution of litigation always favors dismissal); *Minghong Inv., Inc. v. Felix Chac Chuo*, 2022 WL 2189365, at *5 (C.D. Cal. Mar. 9, 2022) (noting the extreme congestion in the Central District of California).

The third factor also heavily favors dismissal. The CPUC continues to expend resources to defend itself on issues that are firmly in the rear-view mirror. Indeed, the fact that Defendants dedicated so much of their briefs to that issue is telling.[49] Looking the other way as Boyd and Sarvey flout the Court's clear instructions here, therefore, would prejudice the CPUC by putting it on an endless treadmill of litigation. *Cf. Thomas v. Spaulding*, 2021 WL 3516474, at *5 (D. Mass. Aug. 10, 2021) (declining to afford a plaintiff leave to file a supplemental pleading for analogous reasons).

The fourth factor concerns deciding cases on the merits. While that factor would normally counsel against involuntarily dismissing the case, *see Hernandez v. City of El Monte*, 138 F.3d 393, 401 (9th Cir. 1998), this concern barely registers because the case has been decided on the merits already, save for one hanging chad. *See Californians*, 922

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49 *See generally* Motion to Dismiss; Reply.

F.3d at942 (affirming the award of summary judgment in "all other respects"). On balance, then, the Court finds this factor to be neutral.

Finally, the fifth factor regarding less drastic alternatives also weighs in favor of dismissal. The Court twice issued instructions to Boyd and Sarvey and warned them of the consequences of noncompliance. *Compare Solutions II*, 2022 WL 1741128, at *8 *with Solutions III*, 2022 WL 1741126, at *2. The consequence would be to strike any amended or supplemental pleading that contains allegations relating to claims that have been dismissed with prejudice. Striking the pleading, in this instance, would have the same effect as dismissing the Seventh Amended Complaint, since Boyd and Sarvey did not successfully file a supplemental pleading. Because the Court already provided that warning to Boyd and Sarvey, the Court has satisfied "the consideration of alternatives requirement." *Ferdik*, 963 F.2d at 1262 (internal quotations omitted); *see also Henderson v. Duncan*, 779 F.2d 1421, 1424 (9th Cir. 1986) (noting that a "district court need not exhaust every sanction short of dismissal before finally dismissing a case"); *Simon v. State of California*, 2022 WL 2987185, at *3 (C.D. Cal. July 28, 2022) (explaining that "[l]ess drastic alternatives to dismissal include warning a party that dismissal could result from failure to obey a court order") (citing *Malone v. U.S. Postal Serv.*, 833 F.2d 128, 132 n.1 (9th Cir. 1987)). Therefore, the fifth factor also weighs in favor of dismissal.

In conclusion, the Court need not rest its decision to dismiss the Seventh Amended Complaint on the failure of Boyd, Sarvey, and their counsel to comply with the Court's orders. But their actions nonetheless supply an independent basis for doing so.

III. MOTION FOR RECONSIDERATION

Boyd and Sarvey move the Court to reconsider its prior order denying their motion for leave to file an eighth amended and third supplemental complaint. *See Solutions IV*, 2022 WL 3575308, at *6. They wish to add allegations meant to cure jurisdictional defects and raise entirely new issues that have arisen since the Fifth Amended Complaint.[50] The Court already provided its reasoning why it will not afford Boyd and Sarvey leave to amend pursuant to Rule 15(a), *see supra* Part II.A.2., so the Court will treat this Renewed Motion for Leave as seeking leave to file a supplemental pleading pursuant to Rule 15(d). After careful review, the Court **DENIES** the Renewed Motion for Leave for both procedural and substantive reasons.

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[50] *See* Renewed Motion for Leave 6:4-17.

A. Legal Standard

"On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for . . . mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1).

"Reconsideration is not, however, to be used to ask the court to rethink what it has already thought." *Howze v. Orozco*, 2020 WL 6927604, at *4 (E.D. Cal. Nov. 20, 2020) (citing *United States v. Rezzonico*, 32 F. Supp. 2d 1112, 1116 (D. Ariz. 1998)). The Ninth Circuit has "cautioned against the use of provisions of Rule 60(b) to circumvent the strong public interest in [the] timeliness and finality" of judgments." *Phelps v. Alameida*, 569 F.3d 1120, 1135 (9th Cir. 2009) (quoting *Flores v. Arizona*, 516 F.3d 1140, 1163 (9th Cir. 2008)). A moving party must demonstrate that "extraordinary circumstances" exist justify the relief. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 393 (1993). Ultimately, the decision to vacate a prior ruling rests in the Court's discretion. *See Barber v. Hawaii*, 42 F.3d 1185, 1198 (9th Cir. 1994).

B. Discussion

Boyd and Sarvey justify their renewed request for leave to file a supplemental pleading by pointing the finger at their attorney, Mr. Westreich, who allegedly made mistakes by "virtue of excusable neglect."[51] But the Motion neither identifies that neglect nor demonstrates why it is excusable.[52] The brief attached to the motion is of little help. It focuses more on an argument that the CPUC continues to defy the Ninth Circuit's holding—a surprising claim, given that the Ninth Circuit overwhelmingly found in favor of the CPUC—than on explaining the supposed excusable neglect.[53] Most of the relevant discussion of excusable neglect is contained in an entirely separate declaration from counsel.[54]

In that declaration, Mr. Westreich argues that the Court erroneously denied his clients' request for leave because of "the failures of Plaintiffs' counsel to adequately refute" Defendants' submissions and the Court's "*sua sponte* assertions" "with a record that was available to do so."[55] Mr. Westreich testifies that he "mistakenly assumed that the content of the filings by which the 2020 Scheduling Order was vacated . . . [h]ad made

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51 Renewed Motion for Leave 4:3-5.

52 *See generally id.*

53 *Compare* Mem. of P. & A. in Supp. of the Renewed Motion for Leave [ECF No. 322-2] 4:1-9:27 *with id.* at 10:2-22.

54 *See generally* Westreich Declaration.

55 *Id.* at ¶ 3.

sufficiently clear that the factors specified in *Fohman* [*sic*] . . . had little or no application because . . . the genesis of the new pleading and case management delay was from Defendants, not Plaintiffs who had abandoned any further notion of filing any pleading motion in order to move the case along."[56]

1. Local Rules and Admissibility

Defendants object to the Westreich Declaration.[57] Their objection is **SUSTAINED**. "Declarations shall contain only factual, evidentiary matter and shall conform as far as possible to the requirements of F. R. Civ. P. 56(c)(4)." L.R. 7-7. "An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4).

While Mr. Westreich undoubtedly has personal knowledge of this case's long procedural history, his declaration blends factual evidentiary matter with legal argument, the latter of which more appropriately belongs in the brief.[58] Hewing closely to the text of L.R. 7-7, the Court, in its discretion, excludes Mr. Westreich's declaration, leaving the Motion unsupported by any admissible evidence. *See* L.R. 83-7 (stating that the "violation of or failure to conform to any of these Local Rules may subject the offending party or counsel" to "such other sanctions as the Court may deem appropriate under the circumstances"); *see also* L.R. 7-4 (permitting the Court to "decline to consider a motion unless it meets the requirements of L.R. 7-3 through 7-8," which, *a fortiori*, implies that exclusion is permissible as a lesser sanction). Without a declaration "setting forth . . . the new or different facts or circumstances claimed to warrant relief," the Renewed Motion for Leave must be **DENIED** on procedural grounds. L.R. 7-17.

2. Merits of Excusable Neglect

Even if the Court were to admit Mr. Westreich's declaration, his argument for excusable neglect does not merit relief from the Court's prior order under Rule 60(b)(1).

Excusable neglect "covers negligence on the part of counsel." *Bateman v. U.S. Postal Serv.*, 231 F.3d 1220, 1223 (9th Cir. 2000). The question of whether conduct constitutes "excusable neglect" under Rule 60(b)(1) "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Brandt v.*

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56 *Id.* at ¶ 4.

57 Opposition to Motion for Leave 3:9-24.

58 *See, e.g.*, Westreich Declaration ¶¶ 3-6, 29-31, 33, 37-39, 41-43, 45, 48-51, 53-56, 65, 67-69, & 73.

Am. Bankers Ins. Co. of Fla., 653 F.3d 1108, 1111 (9th Cir. 2011) (internal citations and quotations omitted).[59]

In recounting his view of the post-remand procedural history of the case, Mr. Westreich essentially accuses Defendants of leading him down the primrose path, coaxing him to vacate the trial dates and to file the Sixth Amended Complaint.[60] Mr. Westreich regrets agreeing to that course of action and failing to file a supplemental pleading earlier.[61] He also regrets his decision to withhold e-mail correspondence (to and from Defendants' counsel) from the Court, which he believes would have strengthened his argument during the briefing on Plaintiffs' prior motion for leave to file a supplemental pleading.[62]

Even taking that declaration into account, three reasons compel this Court to deny the Renewed Motion for Leave. First, it is unclear why any of the information contained in Mr. Westreich's declaration would have caused the Court to reach a different outcome under the *Foman* factors. Aside from several conclusory statements, such a counterfactual analysis is conspicuously absent from Boyd and Sarvey's briefs.[63]

It appears that Mr. Westreich is trying to argue that he and his clients are not solely responsible for the delays or length of the litigation.[64] While that may be so, it does not affect the delay or prejudice that a supplemental pleading would create now. Merely because Defendants suggested that the parties vacate a scheduling order does not mean that Defendants are responsible for the delay that yet ***another*** pleading would inflict, *see Solutions IV*, 2022 WL 3575308, at *4, nor does it change the Court's calculus regarding the prejudicial impact of reopening discovery, *see id.* at *5.

Second, even if the Court was convinced that the factors of undue delay and prejudice were a wash or that somehow they weighed in favor of granting leave to file a

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59 When a party fails to meet a deadline, the Ninth Circuit uses a four-factor test to determine if that failure constitutes excusable neglect or inadvertence under Rule 60(b)(1): "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Bank of Am., N.A. v. Los Prados Cmty. Ass'n*, 2021 WL 5984985, at *1 (9th Cir. Dec. 16, 2021). Since missed deadlines are not at issue here, that particular test is inapposite.

60 Westreich Declaration ¶¶ 13-36; *see also* Reply for Motion for Leave 2:11-5:3 & 6:1-15.

61 Westreich Declaration ¶ 12.

62 *Id.* at ¶ 72 (referring to "Exhibit 50," an unverified summary of alleged email correspondence between Mr. Westreich and Defendants' counsel).

63 *See, e.g.*, Renewed Motion for Leave 10:15-21; Reply for Motion for Leave 6:9-15.

64 *Compare* Reply for Motion for Leave 6:10-14 *with Solutions IV*, 2022 WL 3575308, at *3-*6.

supplemental pleading, the other three *Foman* factors still counsel in favor of denying leave to file a supplemental pleading. Therefore, the result would have been the same. *See id*. at *6 (finding that all five *Foman* factors weighed in favor of denying leave to file a Rule 15(d) supplemental pleading).

Third, Mr. Westreich's excuses essentially boil down to an admission of negligence. However, an attorney's errors, lapses of judgment, and unsuccessful litigation strategies generally do not qualify his or her client for relief under Rule 60(b)(1). *See Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 139 F.3d 664, 666 (9th Cir. 1997) (holding that "attorney error is insufficient grounds for relief under both Rule 60(b)(1)"). "As a general rule, parties are bound by the actions of their lawyers, and alleged attorney malpractice does not usually provide a basis to set aside a judgment pursuant to Rule 60(b)(1)." *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1260 (9th Cir. 2004). While Mr. Westreich nobly requests that any penalties for his mistakes fall on him rather than his clients,[65] "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Inv. Servs. Co.*, 507 U.S. at 396. Mr. Westreich's failure to apply the *Foman* factors correctly, to respond adequately to Defendants' opposition thereto, or to supply additional evidence to the Court that he had in his possession, do not merit a do-over. *See Solutions IV*, 2022 WL 3575308, at *4–*6.

Even if attorney error could be considered excusable neglect, the Court would, in its discretion, decline to grant relief from its prior order. Weighing the totality of the circumstances, awarding Boyd and Sarvey a fresh set of downs would be immensely prejudicial to Defendants, since Boyd and Sarvey's motivation behind a supplemental pleading was to add claims "which have arisen since the Fifth Amended and Second Supplemental Complaint." *Solutions IV*, 2022 WL 3575308, at *4 (quoting Plaintiffs' motion for leave). In other words, just as the then-11-year-old lawsuit was nearing resolution in 2022, Boyd and Sarvey said that they wanted to start afresh. The balance of equities did not motivate the Court to indulge that request in July, nor does it now.

At some point, every lawsuit must end. While Mr. Westreich's zeal and persistence are admirable, granting the Renewed Motion for Leave would only reward his sloppiness and would further protract this litigation. Boyd and Sarvey insist that they are "entitled to at least one opportunity to correct defects for which [Mr. Westreich] has received clear notice from the Court," but they already had that chance.[66] Boyd, Sarvey, and their counsel have had more than enough opportunities to plead their claims

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65 Westreich Declaration ¶ 67.

66 Reply for Motion for Leave 5:22-23.

properly. The Renewed Motion for Leave to file eighth amended and third supplemental complaint is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, the Court hereby orders as follows:

1. Defendants' Motion to Dismiss is **GRANTED**, and the Seventh Amended Complaint is **DISMISSED without leave to amend**.

2. Defendants' request to strike portions of the Seventh Amended Complaint, presented in the alternative, is **DENIED as moot**.

3. Boyd and Sarvey's Renewed Motion for Leave is **DENIED**.

4. Boyd and Sarvey's Application to Reopen is **DENIED.**

5. Judgment shall issue accordingly.

IT IS SO ORDERED.

Dated: March 13, 2023

John W. Holcomb
UNITED STATES DISTRICT JUDGE

JS-6

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California corporation, CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation, MICHAEL E. BOYD, and, ROBERT SARVEY,

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency, SOUTHERN CALIFORNIA EDISON CO., a California Corporation, MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN, GENEVIEVE SHIROMA, and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

JUDGMENT

Pursuant to the "Memorandum Opinion and Order (1) Granting Motion of Defendants California Public Utilities Commission and Commissioners to Dismiss Seventh Amended Complaint [ECF No. 316]; and (2) Denying Plaintiffs' Renewed Motion for Leave to File Eighth Amended and Third Supplemental Complaint [ECF No. 322]" entered substantially contemporaneously herewith, and in accordance with Rule 58 of the Federal Rules of Civil Procedure,

It is hereby **ORDERED**, **ADJUDGED**, and **DECREED** as follows:

1. This Court possesses subject matter jurisdiction over the above-captioned action pursuant to 28 U.S.C. § 1331 and 16 U.S.C. §§ 824a-3, *et seq*.

2. Plaintiffs Solutions for Utilities, Inc. and Californians for Renewable Energy, Inc. were previously **DISMISSED**. Defendant Southern California Edison Co. was previously **DISMISSED**.

3. The operative pleading is the Seventh Amended Complaint [ECF No. 298] filed by Plaintiffs Michael E. Boyd and Robert Sarvey (jointly, "Plaintiffs").

4. The Seventh Amended Complaint is **DISMISSED without leave to amend**. Defendants California Public Utilities Commission and the current Commissioners of the CPUC shall have **JUDGMENT** in their favor, and **AGAINST** Plaintiffs. Plaintiffs shall take nothing by way of their Seventh Amended Complaint. This action is **DISMISSED**.

5. Other than potential post-judgment remedies (including those provided in Rule 54(d) of the Federal Rules of Civil Procedure), to the extent that any party requests any other form of relief, such request is **DENIED**.

IT IS SO ORDERED.

Dated: March 13, 2023

John W. Holcomb
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **NOTICE OF APPEAL FROM JUDGMENT ENTERED MARCH 13, 2023**

Notice is given that Plaintiffs CAlifornians for Renewable Energy, Inc., ["CARE"] Michael E. Boyd and Robert Sarvey hereby appeal from the final judgment entered herein on March 13, 2023 by the United States District Court, Central District of California, Hon. John W. Holcomb, United States District Judge, presiding [Docket No. 333]; and from any and all previous orders filed and/or entered herein since date of filing on September 23, 2019, of the Ninth Circuit Mandate from a previous appeal.

Dated: March 29, 2023

/s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

PROOF OF CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2023 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

CHRISTINE JUN HAMMOND (SBN 206768)
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Honorable John W. Holcomb
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California 92701-4516
Judge of the United States District Court

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: March 29, 2023

s/ Meir J. Westreich

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California Corporation; CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation; and MICHAEL E. BOYD and ROBERT SARVEY, Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; ALICE BUSCHING REYNOLDS; CLIFFORD RECHTSCHAFFEN; GENEVIEVE SHIROMA, DARCIE L. HOUCK and JOHN REYNOLDS, their official and individual capacities as current Public Utilities Commission of California Members, Defendants.	Case No. 2:11-CV-04975-JWH-JCG **AMENDED [*ERRATA*] NOTICE OF APPEAL FROM JUDGMENT ENTERED MARCH 13, 2023**

Amended [*Errata*][1] Notice is given that Plaintiffs CAlifornians for Renewable

[1] This Amended [*Errata*] Notice corrects the Notice of Appeal **solely** to add:

Energy, Inc., ["CARE"] Michael E. Boyd and Robert Sarvey hereby appeal from the final judgment entered herein on March 13, 2023 by the United States District Court, Central District of California, Hon. John W. Holcomb, United States District Judge, presiding [Docket No. 333], in favor of California Public Utilities Commission ["CPUC"] and CPUC Commissioners Alice Busching Reynolds, Clifford Rechtschaffen, Genevieve Shiroma, Darcie L. Houck and John Reynolds; and from any and all previous orders filed and/or entered herein since date of filing, on September 23, 2019, of the Ninth Circuit Mandate from a previous appeal.

Dated: April 7, 2023

/s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

(a) in the body of the Notice the specific names of all Defendants in whose favor the latest judgment was entered [03.13.23], *i.e.* CPUC and all currently named CPUC commissioners who had replaced those against whom prior appeals were prosecuted; and (b) in the caption, providing the full caption, as contained in each of the filed and entered Memorandum Opinion and Order [03.13.23] and Judgment [03.13.23] from which this appeal is made, with the names of parties in lieu of "*et al.*" designations.

PROOF OF CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2023 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

CHRISTINE JUN HAMMOND (SBN 206768)
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Honorable John W. Holcomb
Courtroom 9D, 9th Floor
Ronald Reagan Federal Building and U.S. Courthouse
411 W. 4th Street, Santa Ana
California 92701-4516
Judge of the United States District Court

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: April 7, 2023

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

CERTIFICATION OF SERVICE

I hereby certify that on December 22, 2023 I electronically filed the foregoing Appellants Opening Brief, and concurrently filed Excerpts of Record, Volumes 1-4, with the Clerk of the Court for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: December 22, 2023

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs-Appellants

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55291

CALIFORNIANS FOR RENEWABLE ENERGY, INC., *et al.*,

Plaintiffs-Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the Central District of California, U.S.D.C. C.D.CAL. No. CV 11-04975 JWH (JCGx)

APPELLANTS' OPENING BRIEF
EXCERPTS OF RECORD
VOLUME 2

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; MICHAEL R. PEEVEY, TIMOTHY ALAN SIMON, MICHAEL PETER FLORIO, CATHERINE J. K. SANDOVAL and MARK J. FERRON, in their official and individual capacities as current Public Utilities Commission of California Members; and RACHEL CHONG, JOHN A. BOHN, DIAN M. GRUENICH and NANCY E. RYAN, in their individual capacities as former Public Utilities Commission of California Members

Defendants.

Case No. CV 11-04975 SJO (JCGx)

FIFTH AMENDED AND FIRST SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF

JURY DEMANDED

[16 U.S.C. §824, *et seq.*]

FIFTH AMENDED AND SUPPLEMENTAL COMPLAINT

Leave of Court having been granted following remand, Plaintiffs hereby file their Fifth Amended and Supplemental Complaint, per *Fed.R.Civ.P.* 15.

INTRODUCTION

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"], California based small scale energy companies, and two qualified facility ["QF"] members of CARE, are seeking equitable relief from Defendants, California Public Utilities Commission ["CPUC"] a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices, to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"].

Accordingly, Plaintiffs allege for their Fourth Amended and Supplemental Complaint [each of the Paragraphs enumerated under a heading of "Common Allegations" are incorporated by this reference into each of the numbered claims; and any cross-referenced allegation is deemed to be thereby incorporated]:

COMMON ALLEGATIONS
JURISDICTIONAL AND PARTY ALLEGATIONS

1. This is a federal question action under the Public Utility Regulatory Polices Act ["PURPA"], to redress violations of federal laws committed by Defendants, *i.e.* to *inter alia* compel the enforcement of federal laws, for Plaintiffs' and the public's interests, and to secure remedial relief for Plaintiffs for those violations.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action arising under, and for the violations of, federal laws.

3. Venue is properly located in the Central District of California pursuant to 28 U.S.C. §1391(b)(1) & (b)(2) based on the original filings; and the acts complained of herein were consummated in substantial part in this district.

4. Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE.

5. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in his official capacity [dates of appointment in parenthetical]: Michael Picker [December 23, 2014 - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]; Michael Peter Florio [January 25, 2011 - present], Catherine J. K. Sandoval [January 25, 2011 - present]; Carla J. Peterman December __ 2012 - present]; and Liane M. Randolph [January __, 2015 - present]. These Defendants are hereinafter collectively referred to as "CPUC Defendants" or "Defendant CPUC" and said references also include commissioners who served in earlier times, when earlier acts and/or omissions are alleged herein to have occurred. All of the acts and omissions as alleged herein concerning the CPUC and CPUC Defendants occur through the named commissioners in office at the time of each act or omission, and are sued in their official capacities; and any relief which

might be obtained against CPUC can only be effected by enforcement against the CPUC commissioners currently holding office and the power to act.

6. The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution.

7. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development.

8. PURPA authorizes the Federal Energy Regulatory Commission ["FERC"] to enforce the requirements of PURPA by adoption of implementing regulations and resolution of disputes about the meaning, implementation and application of the federal laws and regulations.

9. In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"] which are thereby rendered eligible for PURPA compliant contracts and/or interconnection and payment for power production to be supplied to regulated

utilities, and (c) enforcement obligations, powers and procedures. In so doing, FERC has issued interpretive rulings of PURPA provisions and its aforementioned regulations.

10. PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

11. PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development.

12. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small Facilities to be paid, at their choice, for "available capacity" or "energy" delivered.

13. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b)

any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

14. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

15. PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal interconnectivity and pricing mandates, and other mandated contract terms, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer."

16. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority.

17. Defendant CPUC has adopted regulations, orders and programs for ratemaking and interconnection standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. However, in regards to interconnectivity and pricing, and other mandated contract terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities.

18. Furthermore, Defendant CPUC has adopted other regulations, orders and programs for the utilities which enable and assist utilities in avoidance of PURPA compliant contracts and agreements.

19. For instance, CPUC has adopted the QF Program which mandates a price formula which, instead of the FERC mandated "avoided cost" requirement, mandates Short-Run Avoided Cost ["SRAC"] adjusted by the Market Index Formula ["MIF"] which is a *de facto* means of permitting payment to QFs at variable unpredictable rates less than avoided cost, while maintaining for the benefit of utilities the PURPA ceiling of avoided cost. This Program also provides for contract terms – *i.e.* interconnectivity mandate – of maximum five (5) or (10) years. These provisions separately and collectively render completely unprofitable the vast majority of small and/or non-fossil fuel power production facilities, which is to say that lent and investment capital is deterred and/or they would operate at a loss.

20. Another CPUC approved program, the Solar Photovoltaic Program ["SPVP"] for small power production facilities [less than 10MW], sets payment rates based on competitive least cost bids – *i.e.* below avoided cost – and further reducing that rate by mandating transfer from the small power facility to the utility of the former's Renewable Energy Credits ["REC's"] as hereinafter discussed; and this program was available for only a ninety (90) day period in 2010, so does not comply with the interconnectivity mandate.

21. CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources.

22. Concomitantly, Defendant CPUC has established a program involving ratemaking and interconnection standards for private energy generating individuals or companies who do so solely for their own use and hence are not governed by FPA or PURPA. Concomitant with this "own use" program, CPUC has adopted

regulations which ostensibly seeks to address minor quantities of surplus energy incidentally generated by "own use" facilities, permitting the sale of that minimal amount of surplus energy while nevertheless still treating the facility as an "own use" facility not governed by PURPA's regulatory authority ["Rule 21 Facilities"].

23. However, CPUC Defendants have misused Rule 21 to apply to small power production facilities and nontraditional electricity generating facilities who incidentally and typically use a small portion of their generated energy for their own operations / use, despite the fact that they are substantively indistinguishable from the facilities expressly subject to PURPA and its FERC promulgated regulations, thereby circumventing the entire PURPA legislative and regulatory scheme.

24. The CPUC price mandate for Rule 21 Facilities is denominated as "Market Price Referent" ["MPR"], and any interconnectivity "mandates" are nonexistent or illusory – *e.g.* unilateral utility or CPUC rights to terminate. This enables utilities seeking to circumvent PURPA avoided cost pricing and interconnectivity mandates to offer otherwise qualifying facilities more than the CPUC QF Program rates – SRAC as adjusted by MIF – but still below PURPA / FERC mandated avoided cost, while inserting CPUC approved provisions for unilateral utility rights to terminate "at will" the contract. These provisions separately and collectively render completely unprofitable the vast majority of small and/or non-fossil fuel power production facilities, which is to say that lent and investment capital is deterred and/or they would operate at a loss.

25. By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a standard offer contract based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is necessarily lower than what the legally mandated avoided cost would be. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities.

26. Acceptance of less than avoided cost pricing or less than the fully mandated interconnection, whether by bilateral contracts or otherwise, is not voluntary or even bilateral if there is no PURPA / FERC compliant alternative. Thus, the absence of PURPA / FERC compliant, CPUC enforced avoided cost pricing and truly mandatory interconnection renders illusory any so-called "voluntary" pricing and/or bi-lateral contracts for small and/or alternative [non-fossil fuel] power producing facilities.

27. The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action.

28. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

29. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

30. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions; and by politically incestuous relationships between regulator

[CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations.

31. Plaintiffs are informed and believe, and based thereon allege, that CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other.

32. Plaintiffs are informed and believe, and based thereon allege, that the IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA.

33. CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so.

34. At all times pertinent to this Amended Complaint, Defendants were each an agent of the other Defendant.

35. The Defendants herein, and each of them, have conspired to do the acts and wrongs mentioned herein; and an act in furtherance thereof has been committed.

36. At all times pertinent to this Amended Complaint, the Defendants and each of them were acting in concert with each other and others not named as parties herein.

37. At all times pertinent to this Amended Complaint, each of the Defendants authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant.

38. All of the conduct alleged against each and all of the Defendants mentioned herein was intentional, and intended to accomplish each and all of the unlawful purposes described herein.

CLAIM NO. 1
CLAIM FOR ENFORCEMENT OF PURPA
[16 U.S.C. §824a-3]

39. PUC has sanctioned use of Rule 21, for purposes that violate PURPA.

40. The use by CPUC of Rule 21 Facilities standards for small power production facilities and/or nontraditional electricity generating facilities that incidentally use their own generated energy for their own operations is a transparent device for circumventing PURPA and its FERC promulgated regulations governing ratemaking and interconnection standards, and is in fact used and exploited for that purpose.

41. Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities [‘QF”] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter’s FERC promulgated regulations. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs Boyd and Sarvey were certified with FERC as QF’s on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [Two (2) other members of CARE (Mary Hoffman and David Hoffman) are also jointly certified as a QF.]

42. CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain standard offer [“SO”] contracts or bilateral contracts from P.G. & E, by seeking contracts and/or payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. CARE Plaintiffs have been unable to obtain any contracts or obtain

payment in connection therewith, or otherwise, because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same.

a. PURPA non-compliant SO Contracts from IOU's [utilities like P.G. & E] typically pay at less than "avoided cost" as hereinafter discussed, despite payment of such "avoided cost" having been mandated by PURPA and FERC implementing regulations. There are also PURPA non-compliant bilateral contracts [*e.g.* from P.G. & E.] paying substantially less than avoided cost for the energy, and even less than SO Contracts.

b. CARE Plaintiffs have been refused either form of PURPA non-compliant contract, much less a PURPA compliant contract, and get paid northing for their surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss.

c. CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present, complaining about the inability for smaller QF's to obtain SO Contracts or bilateral contracts, and concomitant failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost contracts and payment to CARE Plaintiffs and similar small surplus producers of energy[1]. CARE Plaintiffs were then accused

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[1] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029, A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 &

of excessive filings and threatened with sanctions, some then imposed. CARE Plaintiffs have continued their administrative enforcement efforts.

43. On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170].

44. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, and prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations.

45. PURPA and its FERC adopted implementing regulations mandate the following:

a. Small power production facilities and nontraditional electricity generating facilities must be afforded means to rapidly and expeditiously interconnect with existing power grids of the major utilities.

b. Major utilities / power grid owners must purchase energy from available small power production facilities and nontraditional electricity generating facilities ["Must Take Mandate"], which *de facto* means permitting reasonable and expeditious interconnection with their grids and not imposing artificial barriers to doing so or entering into contracts with larger power facilities as a means of blocking

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R.99-11-022.

interconnection and contracts with small power production facilities and nontraditional electricity generating facilities.

c. Wholesale power rates-of-payment are mandated by FERC that the rate to be paid by major utilities / power grid owners to small power production facilities and nontraditional electricity generating facilities must be: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against small power production facilities and nontraditional electricity generating facilities; and (3) reflective of the avoided cost to the major utility / power grid owners of alternative electric energy. It also means that the major utilities / power grid owners may not favor contracts with larger power production facilities as a means of manipulating the energy market to ensure a lack of economic viability of small power production facilities and nontraditional electricity generating facilities.

d. "Avoided costs" is defined as the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility, such utility would generate itself or purchase from another source. The factors to be considered in determining avoided costs include: (1) the utility's system cost data; (2) the terms of any contract including the duration of the obligation; (3) the availability of capacity or energy from available small power production facilities or nontraditional electricity generating facilities during the system daily and seasonal peak periods; (4) the relationship of the availability of energy or capacity from a small power production facility or nontraditional electricity generating facility to the ability of the electric utility to avoid costs; and (5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the small power production facility or nontraditional electricity generating facility.

e. Calculation of avoided cost includes that cost which the major utility / power grid owner would generate itself or would have purchased from another

developer, at a technology specific and tiered sizing comparison; and, when appropriate, including the cost of creating new generating facilities.

f. Purchase power agreements between the major utility / power grid owners and small power production facilities and nontraditional electricity generating facilities must contain non-price terms which are fair and just under the totality of the circumstances, in light of the intent of PURPA and its FERC adopted implementing regulations to facilitate and promote small power production facilities and nontraditional electricity generating facilities. This also means that the major utilities / power grid owners may not impose non-price terms that effectively prevents the economic viability of small power production facilities and nontraditional electricity generating facilities.

g. Under a PURPA grant of state authority, state utility commissions are required, as a condition of such grant of authority, to implement a trading market with rates to be paid to renewable energy developers – *i.e.* small power production facilities and nontraditional electricity generating facilities – for renewable energy credits [“RECs”]. This means that such commissions may not bundle the RECs and/or assign them, without compensation therefor, to major utilities / power grid owners.

46. Plaintiffs are informed and believe, and based thereon allege, that PURPA and its implementing regulations, as set forth in Paragraphs 6-11, 15-16 & 25-46, have been repeatedly violated by CPUC and/or other local power grid providers, as follows:

a. CARE Plaintiffs, as well as other small power production facilities and nontraditional electricity generating facilities, have not been afforded means to rapidly and expeditiously interconnect with existing power grids of the IOU’s, because of the use of devices – such as Rule 21 enabled by CPUC – which enable circumvention of PURPA and its FERC adopted implementing regulations.

b. IOU's have repeatedly and generally avoided purchasing energy from available small power production facilities and nontraditional electricity generating facilities, and failed to permit reasonable and expeditious interconnection with their grids, by imposing artificial barriers to doing so and entering into contracts with larger power facilities as a means of blocking interconnection and contracts with small power production facilities and nontraditional electricity generating facilities.

c. Wholesale power rates of payment for small power production facilities and nontraditional electricity generating facilities, set by FERC as mandated by PURPA and its implementing regulations – *i.e.* avoided cost – have been ignored by CPUC, which instead set a much lower rate for use by IOU's and other major energy sellers greater in capacity than 1 MW and 20 MW, denominated as the "Market Price Referent." This unlawful rate renders economically unfeasible the operation of Plaintiffs and other small power production facilities and nontraditional electricity generating facilities. It also enables the major energy sellers greater in capacity than 1 MW and 20 MW to favor contracts with larger power production facilities as a means of manipulating the energy market to ensure a lack of economic viability of small power production facilities and nontraditional electricity generating facilities.

d. Purchase power agreements and tariffs [*see* CPUC Decision D-16-01-044] offered by the IOU's to Plaintiffs and other small power production facilities and nontraditional electricity generating facilities, with CPUC approval, contain non-price terms which are not fair and just under the totality of the circumstances, in light of the intent of PURPA and its FERC adopted implementing regulations to facilitate and promote small power production facilities and nontraditional electricity generating facilities, that effectively prevents the economic viability of Plaintiffs and other small power production facilities and nontraditional electricity generating facilities.

f. CPUC approved the IOU's schemes to bundle RECs and assign them, without just and fair compensation therefor to CARE'S QF Members in contravention to PURPA and FERC approved implementing regulations.

47. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved contracts, tariffs, activities and proposals of the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations.

48. At all relevant times herein, CPUC has failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to interconnectivity, pricing and contract terms as mandated by PURPA and its FERC implementing regulations. Plaintiffs are informed and believe that CPUC has yet to even determine avoided cost for any utility; and has failed to implement any meaningful or effective utility interconnectivity rules for small power producers.

49. Plaintiff is informed and believes that regulated utilities in California [IOU's], in turn, do not comply with interconnectivity, pricing and contract terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

50. Plaintiff is informed and believes that the net effect is that there is no available PURPA compliant option within California for small power producing facilities to freely interconnect [and remain interconnected] with utilities at avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

51. Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC

Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed cross-references to statutes, regulations and other actions. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [*See e.g.* CPUC Decision D-16-01-044].

52. Plaintiffs are informed and believe, and based thereon allege, that the actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities.

53. In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so.

CLAIM NO. 2
EQUITABLE RELIEF;
INJUNCTIVE RELIEF; DECLARATORY RELIEF

54. Plaintiffs, and each of them, are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful, in each and all of the particulars described in Paragraphs 6-11, 15-16 & 25-43.

55. Plaintiffs, and each of them, are entitled to orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein [*e.g.* Paragraphs 6-11, 15-16, 25-43 & 62-73], and consequences thereof. Plaintiffs, and each of them, are seeking and are entitled to temporary, preliminary and injunctive relief.

56. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, as described herein [*e.g.* Paragraphs 6-11, 15-16, 25-43 & 62-73], and will continue to be so harmed unless and until the requested declaratory and/or injunctive relief is granted as prayed.

57. At all times pertinent to this Amended Complaint, the Defendants CPUC, their respective principals and agents, and each of them, intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein.

58. Each of the Defendants CPUC, their respective principals and agents, and each of them, participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and its respective principals and agents, and each of them, and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs.

PRAYER

WHEREFORE, Plaintiffs seek judgment against defendants jointly and severally, except as specifically indicated, for:

1. Equitable relief, as prayed herein, and as may appear necessary and proper, including declaratory relief, and temporary, preliminary and permanent injunctive relief; and

2. For such further relief as the Court may deem necessary and proper.

Dated: April 14, 2016

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

Plaintiffs demand trial by jury.

Dated: April 14, 2016

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Frank R. Lindh
Harvey Y. Morris
James Ralph
Public Utilities Commission of the State of California
505 Van Ness Avenue
San Francisco, Ca 94102
Facsimile: (415) 703-2262
hym@cpuc.ca.gov
emm@cpuc.ca.gov

Honorable S. James Otero
United States District Court
312 North Spring Street
Los Angeles, Ca. 90012
Judge of the United States District Court

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: April 14, 2016

s/ Meir J. Westreich

By: Meir J. Westreich
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California Corporation; CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation; and MICHAEL E. BOYD and ROBERT SARVEY, Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California Members, Defendants.	Case No. 2:11-CV-04975-JWH-JCG **NOTICE OF LODGING SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES**

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Notice is hereby given that Plaintiffs are lodging herewith their Sixth Amended and Second Supplemental Complaint for Equitable Relief and Damages.

Dated: May 7, 2021

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California Members,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES

JURY DEMANDED

[16 U.S.C. §824, *et seq.*]

SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT

Leave of Court having been granted following second remand, Plaintiffs hereby file their Sixth Amended and Second Supplemental Complaint, per *Fed.R.Civ.P.* 15.

INTRODUCTION

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. [“CARE”], California based small scale energy companies, and two qualified facility [“QF”] members of CARE, are seeking equitable relief and damages from Defendants, California Public Utilities Commission [“CPUC”] a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices, to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act [“PURPA”], as prescribed by the Federal Energy Regulatory Commission [“FERC”]; and for damages incurred as a consequence of prior failures to enforce PURPA.

Accordingly, Plaintiffs allege for their Sixth Amended and Second Supplemental Complaint [each of the Paragraphs enumerated under a heading of “Common Allegations” are incorporated by this reference into each of the numbered claims; and any cross-referenced allegation is deemed to be thereby incorporated]:

COMMON ALLEGATIONS
JURISDICTIONAL AND PARTY ALLEGATIONS

1. This is a federal question action under the Public Utility Regulatory Polices Act [“PURPA”], to redress violations of federal laws committed by Defendants, *i.e.* to *inter alia* compel the enforcement of federal laws, for Plaintiffs’ and the public’s interests, and to secure remedial relief for Plaintiffs for those violations.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action arising under, and for the violations of, federal laws.

3. Venue is properly located in the Central District of California pursuant to 28 U.S.C. §1391(b)(1) & (b)(2) based on the original filings; and the acts complained of herein were consummated in substantial part in this district.

4. Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE.

5. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]: Marybel Batjer [August 16, 2019 (Commissioner) and December 30, 2020 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]: Martha Guzman Aceves [January 28, 2016 - present]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; and Darcie L. Houck [February 9, 2021 - present]. These Defendants are hereinafter collectively referred to as "CPUC Defendants" or "Defendant CPUC" and said references also include commissioners who served in earlier times, when earlier acts and/or omissions are alleged herein to have occurred. All of the acts and omissions as alleged herein concerning the CPUC and CPUC Defendants occur through the named commissioners in office at the time of each act or omission, and are sued in their official capacities; and any relief which might be obtained against CPUC can only be effected by enforcement against the CPUC commissioners currently holding office and the power to act.

6. The Federal Power Act [“FPA”], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution.

7. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development.

8. PURPA authorizes the Federal Energy Regulatory Commission [“FERC”] to enforce the requirements of PURPA by adoption of implementing regulations and resolution of disputes about the meaning, implementation and application of the federal laws and regulations.

9. In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein [“Qualifying Facility” or “QF”] which are thereby rendered eligible for PURPA compliant contracts and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. In so doing, FERC

has issued interpretive rulings of PURPA provisions and its aforementioned regulations.

10. PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

11. PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development.

12. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small Facilities to be paid, at their choice, for "available capacity" or "energy" delivered.

13. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has

exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

14. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

15. PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer."

16. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority.

17. Defendant CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. However, in regards to pricing, and other mandated contract terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs.

18. CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on

gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources.

19. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ("multi-tiered pricing").

20. If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources.

21. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory.

22. While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to the utility whose avoided costs are being determined.

23. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs.

24. California has an RPS, which necessarily changes the avoided cost calculation.

25. When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. Thus, where a state has an RPS and the utility is using a

QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.

26. If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost. But "if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity should be used.

27. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers.

28. Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.

29. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS.

30. If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so. But it may just as permissibly aggregate all sources that could satisfy its RPS obligations.

31. If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources.

32. When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA.

33. In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, i.e. there is no component for actual avoided capacity costs.

34. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS.

35. Under the CPUC approved NEM Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

37. CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

39. By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a standard offer contract based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is

necessarily lower than what the legally mandated avoided cost would be. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities.

40. The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action.

41. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

42. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

43. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions; and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations.

44. Plaintiffs are informed and believe, and based thereon allege, that CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other.

45. Plaintiffs are informed and believe, and based thereon allege, that the IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA.

46. CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so.

47. At all times pertinent to this Sixth Amended Complaint, Defendants were each an agent of the other Defendant.

48. The Defendants herein, and each of them, have conspired to do the acts and wrongs mentioned herein; and an act in furtherance thereof has been committed.

49. At all times pertinent to this Sixth Amended Complaint, the Defendants and each of them were acting in concert with each other and others not named as parties herein.

50. At all times pertinent to this Sixth Amended Complaint, each of the Defendants authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant.

51. All of the conduct alleged against each and all of the Defendants mentioned herein was intentional, and intended to accomplish each and all of the unlawful purposes described herein.

CLAIM NO. 1
CLAIM FOR ENFORCEMENT OF PURPA
[16 U.S.C. §824a-3]

52. Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities [‘QF”] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter’s FERC promulgated regulations. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs Boyd and Sarvey were certified with FERC as QF’s on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [Two (2) other members of CARE (Mary Hoffman and David Hoffman) are also jointly certified as a QF.]

53. CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain standard offer [“SO”] contracts or bilateral contracts from P.G. & E, by seeking contracts and/or payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. CARE Plaintiffs have been unable to obtain any contracts or obtain payment in connection therewith, or otherwise, because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same.

54. In seeking the aforementioned contracts, CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric

utility to forgo capital investments, which would thereby entitle Plaintiffs to avoided capacity costs.

55. In seeking the aforementioned contracts, CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs.

56. PURPA non-compliant SO Contracts and Bilateral Contracts from IOU's [utilities like P.G. & E] do not pay – and have not paid CARE Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy.

57. CARE Plaintiffs have been refused either form of PURPA compliant contract, and get paid northing for their guaranteed surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss.

58. CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present, complaining about the inability for smaller QF's to obtain PURPA Compliant SO Contracts or Bilateral Contracts, and concomitant failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost contracts and payment to

CARE Plaintiffs and similar small surplus producers of energy[1]. CARE Plaintiffs were then accused of excessive filings and threatened with sanctions, some then imposed. CARE Plaintiffs have continued their administrative enforcement efforts.

59. On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170].

60. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations; and prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs.

61. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved contracts, tariffs, activities and proposals of

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[1] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029, A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 & R.99-11-022.

the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations.

62. At all relevant times herein, CPUC has failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and contract terms as mandated by PURPA and its FERC implementing regulations. Plaintiffs are informed and believe that CPUC has yet to even determine avoided cost for any utility; and has failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers.

63. Plaintiff is informed and believes that regulated utilities in California [IOU's], in turn, do not comply with pricing and contract terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

64. Plaintiff is informed and believes that the net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

65. Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed

cross-references to statutes, regulations and other actions. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [*See e.g.* CPUC Decision D-16-01-044].

66. Plaintiffs are informed and believe, and based thereon allege, that the actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities.

67. The people of the State of California, as a whole and within the aforementioned regions served by the utilities, have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, as herein described.

68. Plaintiffs are and have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, a herein described.

69. In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so.

70. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the latter includes monetary damages as may be proved at trial herein.

CLAIM NO. 2
EQUITABLE RELIEF;
INJUNCTIVE RELIEF; DECLARATORY RELIEF

71. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the former includes equitable relief as hereinafter addressed.

72. Plaintiffs, and each of them, are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful, in each and all of the particulars described herein.

73. Plaintiffs, and each of them, are entitled to orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein, and consequences thereof. Plaintiffs, and each of them, are seeking and are entitled to temporary, preliminary and injunctive relief.

74. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, as described herein, and will continue to be so harmed unless and until the requested declaratory and/or injunctive relief is granted as prayed.

75. At all times pertinent to this Amended Complaint, the Defendants CPUC, their respective principals and agents, and each of them, intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein.

76. Each of the Defendants CPUC, their respective principals and agents, and each of them, participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and its respective principals and agents, and each of them, and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs.

PRAYER

WHEREFORE, Plaintiffs seek judgment against defendants jointly and severally, except as specifically indicated, for:

1. Equitable relief, as prayed herein, and as may appear necessary and proper, including declaratory relief, and temporary, preliminary and permanent injunctive relief; and

2. For such further appropriate relief as the Court may deem necessary and proper, including but not limited to money damages.

Dated: May 7, 2021

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

Plaintiffs demand trial by jury.

Dated: May 7, 2021

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, vs. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **[PROPOSED] ORDER GRANTING LEAVE TO FILE SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES**

Plaintiffs having lodged their proposed Sixth Amended and Second Supplemental Complaint for Equitable Relief and Damages [lodged May 7, 2021] in accordance with the parties Joint Application to Schedule Status Conference [filed December 23, 2020] and their Joint Status Report [filed May 7, 2021]; the Parties having jointly outlined and/or separately preserved their respective positions and/or objections about the scope and content of the issues on remand from the Ninth Circuit Court of Appeal and the claims and issues articulated in the

proposed Sixth Amended and Second Supplemental Complaint; the consequential need for briefing and resolving the aforementioned issues as a predicate for proceeding further being apparent; and good cause showing

IT IS HEREBY ORDERED that the lodged Sixth Amended and Second Supplemental Complaint is ordered filed and Plaintiffs shall submit same for filing within five (5) days hereof; and Defendants shall have __ days from date of its filing to file any responsive pleading motion.

Date:

The Honorable John W. Holcomb

ORDER SUBMITTED BY:

Dated: May 7, 2021

MEIR J. WESTREICH

By:/s/ *MEIR J. WESTREICH*
MEIR J. WESTREICH
Attorney for Plaintiffs

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California Members,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES

JURY DEMANDED

[16 U.S.C. §824, *et seq.*]

SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT

Leave of Court having been granted following second remand, Plaintiffs hereby file their Sixth Amended and Second Supplemental Complaint, per *Fed.R.Civ.P.* 15.

INTRODUCTION

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"], California based small scale energy companies, and two qualified facility ["QF"] members of CARE, are seeking equitable relief and damages from Defendants, California Public Utilities Commission ["CPUC"] a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices, to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"]; and for damages incurred as a consequence of prior failures to enforce PURPA.

Accordingly, Plaintiffs allege for their Sixth Amended and Second Supplemental Complaint [each of the Paragraphs enumerated under a heading of "Common Allegations" are incorporated by this reference into each of the numbered claims; and any cross-referenced allegation is deemed to be thereby incorporated]:

COMMON ALLEGATIONS
JURISDICTIONAL AND PARTY ALLEGATIONS

1. This is a federal question action under the Public Utility Regulatory Polices Act ["PURPA"], to redress violations of federal laws committed by Defendants, *i.e.* to *inter alia* compel the enforcement of federal laws, for Plaintiffs' and the public's interests, and to secure remedial relief for Plaintiffs for those violations.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action arising under, and for the violations of, federal laws.

3. Venue is properly located in the Central District of California pursuant to 28 U.S.C. §1391(b)(1) & (b)(2) based on the original filings; and the acts complained of herein were consummated in substantial part in this district.

4. Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE.

5. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]: Marybel Batjer [August 16, 2019 (Commissioner) and December 30, 2020 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]: Martha Guzman Aceves [January 28, 2016 - present]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; and Darcie L. Houck [February 9, 2021 - present]. These Defendants are hereinafter collectively referred to as "CPUC Defendants" or "Defendant CPUC" and said references also include commissioners who served in earlier times, when earlier acts and/or omissions are alleged herein to have occurred. All of the acts and omissions as alleged herein concerning the CPUC and CPUC Defendants occur through the named commissioners in office at the time of each act or omission, and are sued in their official capacities; and any relief which might be obtained against CPUC can only be effected by enforcement against the CPUC commissioners currently holding office and the power to act.

6. The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution.

7. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development.

8. PURPA authorizes the Federal Energy Regulatory Commission ["FERC"] to enforce the requirements of PURPA by adoption of implementing regulations and resolution of disputes about the meaning, implementation and application of the federal laws and regulations.

9. In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"] which are thereby rendered eligible for PURPA compliant contracts and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. In so doing, FERC

has issued interpretive rulings of PURPA provisions and its aforementioned regulations.

10. PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

11. PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development.

12. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small Facilities to be paid, at their choice, for "available capacity" or "energy" delivered.

13. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has

exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

14. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

15. PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer."

16. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority.

17. Defendant CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. However, in regards to pricing, and other mandated contract terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs.

18. CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on

gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources.

19. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ("multi-tiered pricing").

20. If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources.

21. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory.

22. While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to the utility whose avoided costs are being determined.

23. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs.

24. California has an RPS, which necessarily changes the avoided cost calculation.

25. When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. Thus, where a state has an RPS and the utility is using a

QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.

26. If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost. But "if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity should be used.

27. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers.

28. Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.

29. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS.

30. If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so. But it may just as permissibly aggregate all sources that could satisfy its RPS obligations.

31. If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources.

32. When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA.

33. In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, i.e. there is no component for actual avoided capacity costs.

34. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS.

35. Under the CPUC approved NEM Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

37. CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

39. By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a standard offer contract based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is

necessarily lower than what the legally mandated avoided cost would be. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities.

40. The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action.

41. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

42. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

43. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions; and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations.

44. Plaintiffs are informed and believe, and based thereon allege, that CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other.

45. Plaintiffs are informed and believe, and based thereon allege, that the IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA.

46. CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so.

47. At all times pertinent to this Sixth Amended Complaint, Defendants were each an agent of the other Defendant.

48. The Defendants herein, and each of them, have conspired to do the acts and wrongs mentioned herein; and an act in furtherance thereof has been committed.

49. At all times pertinent to this Sixth Amended Complaint, the Defendants and each of them were acting in concert with each other and others not named as parties herein.

50. At all times pertinent to this Sixth Amended Complaint, each of the Defendants authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant.

51. All of the conduct alleged against each and all of the Defendants mentioned herein was intentional, and intended to accomplish each and all of the unlawful purposes described herein.

CLAIM NO. 1
CLAIM FOR ENFORCEMENT OF PURPA
[16 U.S.C. §824a-3]

52. Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities [‘QF”] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter’s FERC promulgated regulations. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs Boyd and Sarvey were certified with FERC as QF’s on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [Two (2) other members of CARE (Mary Hoffman and David Hoffman) are also jointly certified as a QF.]

53. CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain standard offer [“SO”] contracts or bilateral contracts from P.G. & E, by seeking contracts and/or payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. CARE Plaintiffs have been unable to obtain any contracts or obtain payment in connection therewith, or otherwise, because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same.

54. In seeking the aforementioned contracts, CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric

utility to forgo capital investments, which would thereby entitle Plaintiffs to avoided capacity costs.

55. In seeking the aforementioned contracts, CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs.

56. PURPA non-compliant SO Contracts and Bilateral Contracts from IOU's [utilities like P.G. & E] do not pay – and have not paid CARE Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy.

57. CARE Plaintiffs have been refused either form of PURPA compliant contract, and get paid northing for their guaranteed surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss.

58. CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present, complaining about the inability for smaller QF's to obtain PURPA Compliant SO Contracts or Bilateral Contracts, and concomitant failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost contracts and payment to

CARE Plaintiffs and similar small surplus producers of energy[1]. CARE Plaintiffs were then accused of excessive filings and threatened with sanctions, some then imposed. CARE Plaintiffs have continued their administrative enforcement efforts.

59. On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170].

60. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations; and prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs.

61. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved contracts, tariffs, activities and proposals of

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[1] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029, A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 & R.99-11-022.

the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations.

62. At all relevant times herein, CPUC has failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and contract terms as mandated by PURPA and its FERC implementing regulations. Plaintiffs are informed and believe that CPUC has yet to even determine avoided cost for any utility; and has failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers.

63. Plaintiff is informed and believes that regulated utilities in California [IOU's], in turn, do not comply with pricing and contract terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

64. Plaintiff is informed and believes that the net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

65. Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed

cross-references to statutes, regulations and other actions. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [*See e.g.* CPUC Decision D-16-01-044].

66. Plaintiffs are informed and believe, and based thereon allege, that the actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities.

67. The people of the State of California, as a whole and within the aforementioned regions served by the utilities, have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, as herein described.

68. Plaintiffs are and have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, a herein described.

69. In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so.

70. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the latter includes monetary damages as may be proved at trial herein.

CLAIM NO. 2
EQUITABLE RELIEF;
INJUNCTIVE RELIEF; DECLARATORY RELIEF

71. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the former includes equitable relief as hereinafter addressed.

72. Plaintiffs, and each of them, are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful, in each and all of the particulars described herein.

73. Plaintiffs, and each of them, are entitled to orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein, and consequences thereof. Plaintiffs, and each of them, are seeking and are entitled to temporary, preliminary and injunctive relief.

74. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, as described herein, and will continue to be so harmed unless and until the requested declaratory and/or injunctive relief is granted as prayed.

75. At all times pertinent to this Amended Complaint, the Defendants CPUC, their respective principals and agents, and each of them, intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein.

76. Each of the Defendants CPUC, their respective principals and agents, and each of them, participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and its respective principals and agents, and each of them, and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs.

PRAYER

WHEREFORE, Plaintiffs seek judgment against defendants jointly and severally, except as specifically indicated, for:

1. Equitable relief, as prayed herein, and as may appear necessary and proper, including declaratory relief, and temporary, preliminary and permanent injunctive relief; and

2. For such further appropriate relief as the Court may deem necessary and proper, including but not limited to money damages.

Dated: May 7, 2021

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

Plaintiffs demand trial by jury.

Dated: May 7, 2021

s/ Meir J. Westreich

Meir J. Westreich
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California Corporation; CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation; and MICHAEL E. BOYD and ROBERT SARVEY, Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; ALICE BUSCHING REYNOLDS; CLIFFORD RECHTSCHAFFEN; GENEVIEVE SHIROMA, DARCIE L. HOUCK and JOHN REYNOLDS, their official and individual capacities as current Public Utilities Commission of California Members, Defendants.	Case No. 2:11-CV-04975-JWH-JCG **SEVENTH AMENDED COMPLAINT FOR EQUITABLE RELIEF** **JURY DEMANDED** **[16 U.S.C. §824, *et seq.*]**

SEVENTH AMENDED COMPLAINT

Leave of Court to amend having been granted, by Order on March 9, 2022, with the timing therefor amended on March 29, 2022, *i.e.* by April 5, 2022, Plaintiffs

hereby file their Seventh Amended Complaint, per *Fed.R.Civ.P.* 15.

PREFATORY PROCEDURAL COMMENT

A Complaint [Dkt 1] having been filed on June 10, 2011; a First Amended Complaint [Dkt 20] having been filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re CARE Plaintiffs' [CARE-Boyd-Sarvey] PURPA Exhaustion of Remedies; the Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, having been ordered voluntarily dismissed [Dkt 35] on September 9, 2011; the First Amended Complaint having been dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61]; a Second Amended Complaint [Dkt 64 & 64-1] having been filed pursuant to said leave to amend; remaining CARE Plaintiffs' claims having been dismissed without leave to amend [Dkt 82] from said Second Amended Complaint; the Ninth Circuit having reversed the order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61]; the court having denied leave to file a proposed Fourth Amended Complaint, but affording leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184]; CARE Plaintiffs having filed said Fourth Amended Complaint, re-branded as the Fifth Amended Complaint [Dkt 185] which remained – without further pleading practice – the operative pleading through judgment in favor of CPUC Defendants; in a second appeal, the Ninth Circuit having reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended Complaint; CPUC Defendants having stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended Complaint [Dkt 253] – and the court having ordered leave to file the Sixth Amended Complaint [Dkt 269] which was concurrently filed [Dkt 267]; the Court having dismissed the Sixth Amended Complaint, with leave for Plaintiffs Boyd-Sarvey to amend some parts thereof [Dkt 287]; and the filing of each of the aforementioned

amended pleadings having superseded the previously filed pleading, which then became a nullity [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)], thereby leaving the Sixth Amended Pleading as the operative pleading to which the March 9, 2022 Order applied – both explicitly and implicitly, and from which this hereby filed Seventh Amended Complaint now derives with leave of court.

INTRODUCTION

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"] and California based small scale renewable energy companies embodied by two qualified facility ["QF"] members of CARE, are seeking equitable relief from Defendants, California Public Utilities Commission ["CPUC"], a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policies of promoting renewable energy sources and the viability and integration of small energy generating companies, and protecting them from monopolistic practices, to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"].

Accordingly, Plaintiffs allege for their Seventh Amended Complaint [each of the Paragraphs enumerated under a heading of "Common Allegations" are incorporated by this reference into each of the numbered claims; and any cross-referenced allegation is deemed to be thereby incorporated]:

COMMON ALLEGATIONS
JURISDICTIONAL AND PARTY ALLEGATIONS

1. This is a federal question action under the Public Utility Regulatory Polices Act ["PURPA"], to redress violations of federal laws committed by Defendants, *i.e.* to *inter alia* compel the enforcement of federal laws, for Plaintiffs' and the public's interests, and to secure remedial relief for Plaintiffs for those violations.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action arising under, and for the violations of, federal laws.

3. Venue is properly located in the Central District of California pursuant to 28 U.S.C. §1391(b)(1) & (b)(2) based on the original filings; and the acts complained of herein were consummated in substantial part in this district.

4. Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE.

4a. The public policies pursued by CARE since before the filing of the Complaint herein [Dkt 1] include, as its name signifies, promotion of renewable energy and its sources, but also assisting by collective and corporate efforts the many small – less than one megawatt – QF renewable energy facilities, like Plaintiffs Boyd and Sarvey, who standing alone lack individual resources to meaningfully participate in and advance litigation, rulemaking and litigation related public policies.

4b. Plaintiff CARE has appeared throughout this litigation commencing with the Complaint [Dkt 1] in its representative capacity for its multiple member small – less than one megawatt – QF renewable energy facilities.

5. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State

Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]:Alice Busching Reynolds: December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; Genevieve Shiroma [January 22, 2019 - present]; Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. These Defendants are hereinafter collectively referred to as "CPUC Defendants" or "Defendant CPUC" and said references also include commissioners who served in earlier times, when earlier acts and/or omissions are alleged herein to have occurred. All of the acts and omissions as alleged herein concerning the CPUC and CPUC Defendants occur through the named commissioners in office at the time of each act or omission, and are sued in their official capacities; and any relief which might be obtained against CPUC can only be effected by enforcement against the CPUC commissioners currently holding office and the power to act.

6. The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution.

7. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of

traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development.

8. PURPA authorizes the Federal Energy Regulatory Commission ["FERC"] to enforce the requirements of PURPA by adoption of implementing regulations and resolution of disputes about the meaning, implementation and application of the federal laws and regulations.

9. In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"] which are thereby rendered eligible for PURPA compliant tariffs and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. In so doing, FERC has issued interpretive rulings of PURPA provisions and its aforementioned regulations.

10. PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

11. PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state

regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development.

12. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small Facilities to be paid, at their choice, for "available capacity" or "energy" delivered.

13. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

14. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

15. PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities

are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer."

16. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority.

17. Defendant CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. However, in regards to pricing, and other mandated tariff terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs.

18. CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources.

19. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ("multi-tiered pricing").

20. If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources.

21. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory.

22. While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to the utility whose avoided costs are being determined.

23. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs.

24. California has California statutorily adopted Renewable Portfolio Standard [RPS], establishing standards for gradual ultimate adoption of 100% renewable energy attributes, which necessarily changes the avoided cost calculation.

24a. Under the RPS, each utility is required to utilize renewable energy as defined by RPS as a specified percentage of their power generation, calculated on an annual basis with gradual increases toward the 100% goal.

25. When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. Thus, where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.

26. If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost. But if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity should be used.

27. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers.

28. Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.

29. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS.

30. If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so. But it may just as permissibly aggregate all sources that could satisfy its RPS obligations.

31. If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources.

32. When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA.

33. In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, i.e. there is no component for actual avoided capacity costs.

34. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS.

35. Under the CPUC approved Net Energy Metering [NEM] Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying

surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36a. Under NEM, utility customers have at all relevnt times been compensated for their power generation of net surplus energy – above their own usage – which is supplied through their utility supplied power connection, by FERC mandate.

36b. Plaintiffs CARE, Boyd and Sarvey have at all relevant times been utility customers with power generators they constructed in order to supply their net surplus energy to the utility [Power Supply Facilities].

36c. Plaintiffs CARE, Boyd and Sarvey have at all relevant times been respective Power Supply Facilities, built so as to guarantee a net surplus energy supplied to the utility on both a monthly and annual basis.

36d. Plaintiffs CARE, Boyd and Sarvey have at all relevant times operated their Power Supply Facilities to provide net surplus energy to their respective utilities via a utility supplied meter.

36e. Plaintiffs CARE, Boyd and Sarvey have at all relevant times been compensated for supplying their net surplus energy under the PUC approved NEM Program.

36f. Pursuant to PUC mandate, a utility has at all relevant times been permtted to include a customer's annual net surplus energy, generated by a renewable source, in their total calculated annual renewable energy generation to meet their annual state-mandated RPS standards.

36g. Though the net renewable energy supplied by individual cutomers has and is relatively small, the total sum deriving from all participating NEM compensated customers with reliably net energy supplies is substantial in enabling utilities to meet their annual state-mandated RPS standards.

36h. Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program has at relevant timees been included

by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard*.

36j. Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program has been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard.

36k. Plaintiffs, Boyd and Sarvey have at all relevant times met RPS-eligibility requirements for QF's, established by the California Energy Commssion [CEC], the primary energy policy and planning agency in California, *e.g.* they have used RPS-eligible sources of generation [solar energy]; and they have used utility supplied meters that report generation with an accuracy rating of two percent or higher accuracy [one per cent].*

37. CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38a. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – whose renewable energy supplies are sufficiently reliable to enable the utility to include those supplies in their total calculated renewable energy generation to meet their annual state-mandated RPS standard; and which permits the purchasing electric utility to forgo capital investments.

39. By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a tariff based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is necessarily lower than what the legally mandated avoided cost would be. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities.

40. The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action.

41. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

42. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.*

42e. The utilities do not comply with pricing and tarriff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing

regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

42f. The net effect is that there has not been – and are not – available PURPA compliant options within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

42g. In repeated communications and petitions to PG&E, FERC and CPUC, CARE Plaintiffs have sought compensation for their energy supplies to PG&E at an avoided cost that includes capital costs – *e.g.* construction and/or expansion of renewable [solar] energy facilities – for 100% of their energy production. Instead, they are offered by PG&E, with CPUC approval, less than full avoided cost for only the "surplus" above their power production, and they get little or no compensation.

42h. In short, under the claims herein, if Plaintiffs prevail, it will mean that they are entitled to full avoided cost for 100% of their power production, not some lesser amount for only the "surplus" power production, affording them a clear stake in the outcome of this action and the remedies sought herein.

43. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions; and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations.

44. Plaintiffs are informed and believe, and based thereon allege, that CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other.

45. Plaintiffs are informed and believe, and based thereon allege, that the IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA.

46. CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so.

47. At all times pertinent to this Seventh Amended Complaint, Defendants were each an agent of the other Defendant.

48. The Defendants herein, and each of them, have conspired to do the acts and wrongs mentioned herein; and an act in furtherance thereof has been committed.

49. At all times pertinent to this Seventh Amended Complaint, the Defendants and each of them were acting in concert with each other and others not named as parties herein.

50. At all times pertinent to this Seventh Amended Complaint, each of the Defendants authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant.

51. All of the conduct alleged against each and all of the Defendants mentioned herein was intentional, and intended to accomplish each and all of the unlawful purposes described herein.

CLAIM NO. 1
CLAIM FOR ENFORCEMENT OF PURPA
[16 U.S.C. §824a-3]

52. Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities [‘QF”] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter’s FERC promulgated regulations. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs Boyd and Sarvey were certified with FERC as QF’s on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [Two (2) other members of CARE (Mary Hoffman and David Hoffman) are also jointly certified as a QF.]

52a. Plaintiff Boyd has had his QF certification from FERC since 2003*.

53. CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain legally sufficient avoided cost payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby.CARE Plaintiffs have been unable to obtain aforementioned payment because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same.

54. CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of

deliverability to permit the purchasing electric utility to forgo capital investments, which would thereby entitle Plaintiffs to avoided capacity costs.

55. CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs.

56. IOU's like P.G. & E do not pay – and have not paid CARE Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy.

57. CARE Plaintiffs get paid nothing for their guaranteed surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss.

58. CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present, complaining about the failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost tariffs and payment to CARE Plaintiffs and similar small surplus producers of energy[1]. CARE Plaintiffs were then accused of excessive filings

[1] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029,

and threatened with sanctions, some then imposed. CARE Plaintiffs have continued their administrative enforcement efforts.

59. On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170].

60. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations; and prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs*.

60d. The utilities, in turn, do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

60e. The net effect is that there has not been – and are not any available PURPA compliant options within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies

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A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 & R.99-11-022.

from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations*.

61. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved tariffs, activities and proposals of the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations.

62. At all relevant times herein, CPUC has failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and tariff terms as mandated by PURPA and its FERC implementing regulations. Plaintiffs are informed and believe that CPUC has yet to even determine avoided cost for any utility; and has failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers.

63. Plaintiff is informed and believes that regulated utilities in California [IOU's], in turn, do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

64. Plaintiff is informed and believes that the net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and

with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

65. Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed cross-references to statutes, regulations and other actions. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [*See e.g.* CPUC Decision D-16-01-044].

66. Plaintiffs are informed and believe, and based thereon allege, that the actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities.

67. The people of the State of California, as a whole and within the aforementioned regions served by the utilities, have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, as herein described.

68. Plaintiffs are and have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, a herein described.

69. In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating

facilities; or worse, to affirmatively undermine the latter. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so.

70. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the latter includes monetary damages as may be proved at trial herein.

CLAIM NO. 2
EQUITABLE RELIEF;
INJUNCTIVE RELIEF; DECLARATORY RELIEF

71. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate".

72. Plaintiffs, and each of them, are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful, in each and all of the particulars described herein.

73. Plaintiffs, and each of them, are entitled to orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein, and consequences thereof. Plaintiffs, and each of them, are seeking and are entitled to temporary, preliminary and injunctive relief.

74. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, as described herein, and will continue to be so harmed unless and until the requested declaratory and/or injunctive relief is granted as prayed.

75. At all times pertinent to this Amended Complaint, the Defendants CPUC, their respective principals and agents, and each of them, intended to do the acts

described herein, and/or to fail to do the acts required of them in respect to any omissions described herein.

76. Each of the Defendants CPUC, their respective principals and agents, and each of them, participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and its respective principals and agents, and each of them, and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs.

PRAYER

WHEREFORE, Plaintiffs seek judgment against defendants jointly and severally, except as specifically indicated, for:

1. Equitable relief, as prayed herein, and as may appear necessary and proper, including declaratory relief, and temporary, preliminary and permanent injunctive relief; and

2. For such further appropriate relief as the Court may deem necessary and proper.

Dated: April 5, 2022

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

Plaintiffs demand trial by jury.

Dated: April 5, 2022

s/ Meir J. Westreich

Meir J. Westreich
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; ~~MARYBEL BATJER~~ ALICE BUSCHING REYNOLDS, ~~MARTHA GUZMAN ACEVES~~, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA, ~~and~~ DARCIE L. HOUCK and JOHN REYNOLDS, their official and individual capacities as current Public Utilities Commission of California Members,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

~~SIXTH~~ SEVENTH AMENDED AND ~~SECOND~~ THIRD SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF ~~AND DAMAGES~~

JURY DEMANDED

[16 U.S.C. §824, *et seq.*]

~~SIXTH~~ SEVENTH AMENDED ~~AND SECOND SUPPLEMENTAL~~ COMPLAINT

Leave of Court to amend having been granted ~~following second remand~~, by Order on March 9, 2022, with the timing therefor amended on March 29, 2022, *i.e.* by April 5, 2022, Plaintiffs hereby file their ~~Sixth~~ Seventh Amended and Second Supplemental Complaint, per *Fed.R.Civ.P.* 15.

PREFATORY PROCEDURAL COMMENT

A Complaint [Dkt 1] having been filed on June 10, 2011; a First Amended Complaint [Dkt 20] having been filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re CARE Plaintiffs' [CARE-Boyd-Sarvey] PURPA Exhaustion of Remedies; the Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, having been ordered voluntarily dismissed [Dkt 35] on September 9, 2011; the First Amended Complaint having been dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61]; a Second Amended Complaint [Dkt 64 & 64-1] having been filed pursuant to said leave to amend; remaining CARE Plaintiffs' claims having been dismissed without leave to amend [Dkt 82] from said Second Amended Complaint; the Ninth Circuit having reversed the order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61]; the court having denied leave to file a proposed Fourth Amended Complaint, but affording leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184]; CARE Plaintiffs having filed said Fourth Amended Complaint, re-branded as the Fifth Amended Complaint [Dkt 185] which remained – without further pleading practice – the operative pleading through judgment in favor of CPUC Defendants; in a second appeal, the Ninth Circuit having reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended Complaint; CPUC Defendants having stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended Complaint [Dkt 253] – and the court having ordered leave to file the Sixth Amended

Complaint [Dkt 269] which was concurrently filed [Dkt 267]; the Court having dismissed the Sixth Amended Complaint, with leave for Plaintiffs Boyd-Sarvey to amend some parts thereof [Dkt 287]; and the filing of each of the aforementioned amended pleadings having superseded the previously filed pleading, which then became a nullity [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)], thereby leaving the Sixth Amended Pleading as the operative pleading to which the March 9, 2022 Order applied – both explicitly and implicitly, and from which this hereby filed Seventh Amended Complaint now derives with leave of court.

INTRODUCTION

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"] and California based small scale renewable energy companies ~~and~~ embodied by two qualified facility ["QF"] members of CARE, are seeking equitable relief ~~and damages~~ from Defendants, California Public Utilities Commission ["CPUC"], a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policies of promoting renewable energy sources and the viability and integration of small energy generating companies, and protecting them from monopolistic practices~~;~~ to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"]~~; and for damages incurred as a consequence of prior failures to enforce PURPA~~.

Accordingly, Plaintiffs allege for their ~~Sixth~~ Seventh Amended ~~and Third Supplemental~~ Complaint [each of the Paragraphs enumerated under a heading of

"Common Allegations" are incorporated by this reference into each of the numbered claims; and any cross-referenced allegation is deemed to be thereby incorporated]:

COMMON ALLEGATIONS
JURISDICTIONAL AND PARTY ALLEGATIONS

1. This is a federal question action under the Public Utility Regulatory Polices Act ["PURPA"], to redress violations of federal laws committed by Defendants, *i.e.* to *inter alia* compel the enforcement of federal laws, for Plaintiffs' and the public's interests, and to secure remedial relief for Plaintiffs for those violations.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action arising under, and for the violations of, federal laws.

3. Venue is properly located in the Central District of California pursuant to 28 U.S.C. §1391(b)(1) & (b)(2) based on the original filings; and the acts complained of herein were consummated in substantial part in this district.

4. Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE.

4a. The public policies pursued by CARE since before the filing of the Complaint herein [Dkt 1] include, as its name signifies, promotion of renewable energy and its sources, but also assisting by collective and corporate efforts the many small – less than one megawatt – QF renewable energy facilities, like Plaintiffs Boyd and Sarvey, who standing alone lack individual resources to meaningfully participate in and advance litigation, rulemaking and litigation related public policies.

4b. Plaintiff CARE has appeared throughout this litigation commencing with the Complaint [Dkt 1] in its representative capacity for its multiple member small – less than one megawatt – QF renewable energy facilities.

5. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]: ~~Marybel Batjer~~ Alice Busching Reynolds: ~~[August 16, 2019 (Commissioner) and December 30, 2020~~ December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]: ~~Martha Guzman Aceves [January 28, 2016 - present]~~; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; ~~and~~ Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. These Defendants are hereinafter collectively referred to as "CPUC Defendants" or "Defendant CPUC" and said references also include commissioners who served in earlier times, when earlier acts and/or omissions are alleged herein to have occurred. All of the acts and omissions as alleged herein concerning the CPUC and CPUC Defendants occur through the named commissioners in office at the time of each act or omission, and are sued in their official capacities; and any relief which might be obtained against CPUC can only be effected by enforcement against the CPUC commissioners currently holding office and the power to act.

6. The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution.

7. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development.

8. PURPA authorizes the Federal Energy Regulatory Commission ["FERC"] to enforce the requirements of PURPA by adoption of implementing regulations and resolution of disputes about the meaning, implementation and application of the federal laws and regulations.

9. In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"] which are thereby rendered eligible for PURPA compliant ~~contracts~~ tariffs and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. In so doing, FERC has issued interpretive rulings of PURPA provisions and its aforementioned regulations.

10. PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with

production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

11. PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development.

12. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small Facilities to be paid, at their choice, for "available capacity" or "energy" delivered.

13. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

14. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company

first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

15. PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer."

16. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority.

17. Defendant CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. However, in regards to pricing, and other mandated ~~contract~~ tariff terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs.

18. CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources.

19. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ("multi-tiered pricing").

20. If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for

natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources.

21. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory.

22. While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to the utility whose avoided costs are being determined.

23. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs.

24. California has ~~an~~ a California statutorily adopted Renewable Portfolio Standard [RPS], establishing standards for gradual ultimate adoption of 100% renewable energy attributes, which necessarily changes the avoided cost calculation.

24a. Under the RPS, each utility is required to utilize renewable energy as defined by RPS as a specified percentage of their power generation, calculated on an annual basis with gradual increases toward the 100% goal.

25. When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. Thus, where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.

26. If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost. But if a

purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity should be used.

27. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers.

28. Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.

29. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS.

30. If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so. But it may just as permissibly aggregate all sources that could satisfy its RPS obligations.

31. If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources.

32. When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA.

33. In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, i.e. there is no component for actual avoided capacity costs.

34. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS.

35. Under the CPUC approved Net Energy Metering [NEM] Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying

surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36a. Under NEM, utility customers have at all relevnt times been compensated for their power generation of net surplus energy – above their own usage – which is supplied through their utility supplied power connection, by FERC mandate.

36b. Plaintiffs CARE, Boyd and Sarvey have at all relevant times been utility customers with power generators they constructed in order to supply their net surplus energy to the utility [Power Supply Facilities].

36c. Plaintiffs CARE, Boyd and Sarvey have at all relevant times been respective Power Supply Facilities, built so as to guarantee a net surplus energy supplied to the utility on both a monthly and annual basis.

36d. Plaintiffs CARE, Boyd and Sarvey have at all relevant times operated their Power Supply Facilities to provide net surplus energy to their respective utilities via a utility supplied meter.

36e. Plaintiffs CARE, Boyd and Sarvey have at all relevant times been compensated for supplying their net surplus energy under the PUC approved NEM Program.

36f. Pursuant to PUC mandate, a utility has at all relevant times been permtted to include a customer's annual net surplus energy, generated by a renewable source, in their total calculated annual renewable energy generation to meet their annual state-mandated RPS standards.

36g. Though the net renewable energy supplied by individual cutomers has and is relatively small, the total sum deriving from all participating NEM compensated customers with reliably net energy supplies is substantial in enabling utilities to meet their annual state-mandated RPS standards.

36h. Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program has at relevant timees been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard*.

36j. Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program has been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard.

36k. Plaintiffs, Boyd and Sarvey have at all relevant times met RPS-eligibility requirements for QF's, established by the California Energy Commssion [CEC], the primary energy policy and planning agency in California, *e.g.* they have used RPS-eligible sources of generation [solar energy]; and they have used utility supplied meters that report generation with an accuracy rating of two percent or higher accuracy [one per cent].*

37. CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38a. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – whose renewable energy supplies are sufficiently reliable to enable the utility to include those supplies in their total calculated renewable energy generation to meet their annual state-mandated RPS standard; and which permits the purchasing electric utility to forgo capital investments.

39. By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a ~~standard offer contract~~ tariff based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is necessarily lower than what the legally mandated avoided cost would be. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities.

40. The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action.

41. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

42. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified

enforcement, and within the following sixty (60) days FERC fails or declines to do so.*

42e. The utilities do not comply with pricing and tarriff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

42f. The net effect is that there has not been – and are not – available PURPA compliant options within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

42g. In repeated communications and petitions to PG&E, FERC and CPUC, CARE Plaintiffs have sought compensation for their energy supplies to PG&E at an avoided cost that includes capital costs – *e.g.* construction and/or expansion of renewable [solar] energy facilities – for 100% of their energy production. Instead, they are offered by PG&E, with CPUC approval, less than full avoided cost for only the "surplus" above their power production, and they get little or no compensation.

42h. In short, under the claims herein, if Plaintiffs prevail, it will mean that they are entitled to full avoided cost for 100% of their power production, not some lesser amount for only the "surplus" power production, affording them a clear stake in the outcome of this action and the remedies sought herein.

43. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations,

decisions and actions; and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations.

44. Plaintiffs are informed and believe, and based thereon allege, that CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other.

45. Plaintiffs are informed and believe, and based thereon allege, that the IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA.

46. CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so.

47. At all times pertinent to this ~~Sixth~~ Seventh Amended Complaint, Defendants were each an agent of the other Defendant.

48. The Defendants herein, and each of them, have conspired to do the acts and wrongs mentioned herein; and an act in furtherance thereof has been committed.

49. At all times pertinent to this ~~Sixth~~ Seventh Amended Complaint, the Defendants and each of them were acting in concert with each other and others not named as parties herein.

50. At all times pertinent to this ~~Sixth~~ Seventh Amended Complaint, each of the Defendants authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant.

51. All of the conduct alleged against each and all of the Defendants mentioned herein was intentional, and intended to accomplish each and all of the unlawful purposes described herein.

CLAIM NO. 1
CLAIM FOR ENFORCEMENT OF PURPA
[16 U.S.C. §824a-3]

52. Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities ['QF"] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter's FERC promulgated regulations. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs Boyd and Sarvey were certified with FERC as QF's on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [Two (2) other members of CARE (Mary Hoffman and David Hoffman) are also jointly certified as a QF.]

52a. Plaintiff Boyd has had his QF certification from FERC since 2003*.

53. CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain ~~standard offer ["SO"] contracts or bilateral contracts from P.G. & E, by seeking contracts and/or~~ legally sufficient avoided cost payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. CARE Plaintiffs have been unable to obtain ~~any contracts or obtain~~ aforementioned payment ~~in connection therewith, or otherwise,~~ because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and

its FERC implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same.

54. ~~In seeking the aforementioned contracts,~~ CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments, which would thereby entitle Plaintiffs to avoided capacity costs.

55. ~~In seeking the aforementioned contracts,~~ CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs.

56. ~~PURPA non-compliant SO Contracts and Bilateral Contracts from~~ IOU's ~~[utilities~~ like P.G. & E~~]~~ do not pay – and have not paid CARE Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy.

57. CARE Plaintiffs ~~have been refused either form of PURPA compliant contract, and~~ get paid nothing for their guaranteed surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss.

58. CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present, complaining about the ~~inability for smaller QF's to obtain PURPA Compliant SO~~

~~Contracts or Bilateral Contracts, and concomitant~~ failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost ~~contracts and~~ tariffs and payment to CARE Plaintiffs and similar small surplus producers of energy[1]. CARE Plaintiffs were then accused of excessive filings and threatened with sanctions, some then imposed. CARE Plaintiffs have continued their administrative enforcement efforts.

59. On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170].

60. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations; and prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs*.

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[1] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029, A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 & R.99-11-022.

60d. The utilities, in turn, do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

60e. The net effect is that there has not been – and are not any available PURPA compliant options within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations*.

61. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved ~~contracts,~~ tariffs, activities and proposals of the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations.

62. At all relevant times herein, CPUC has failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and ~~contract~~ tariff terms as mandated by PURPA and its FERC implementing regulations. Plaintiffs are informed and believe that CPUC has yet to even determine avoided cost for any utility; and has failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers.

63. Plaintiff is informed and believes that regulated utilities in California [IOU's], in turn, do not comply with pricing and ~~contract~~ tariff terms as mandated by

PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

64. Plaintiff is informed and believes that the net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

65. Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed cross-references to statutes, regulations and other actions. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [*See e.g.* CPUC Decision D-16-01-044].

66. Plaintiffs are informed and believe, and based thereon allege, that the actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities.

67. The people of the State of California, as a whole and within the aforementioned regions served by the utilities, have been materially harmed and

damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, as herein described.

68. Plaintiffs are and have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, a herein described.

69. In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so.

70. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the latter includes monetary damages as may be proved at trial herein.

CLAIM NO. 2
EQUITABLE RELIEF;
INJUNCTIVE RELIEF; DECLARATORY RELIEF

71. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" ~~and the former includes equitable relief as hereinafter addressed~~.

72. Plaintiffs, and each of them, are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful, in each and all of the particulars described herein.

73. Plaintiffs, and each of them, are entitled to orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein,

and consequences thereof. Plaintiffs, and each of them, are seeking and are entitled to temporary, preliminary and injunctive relief.

74. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, as described herein, and will continue to be so harmed unless and until the requested declaratory and/or injunctive relief is granted as prayed.

75. At all times pertinent to this Amended Complaint, the Defendants CPUC, their respective principals and agents, and each of them, intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein.

76. Each of the Defendants CPUC, their respective principals and agents, and each of them, participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and its respective principals and agents, and each of them, and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs.

PRAYER

WHEREFORE, Plaintiffs seek judgment against defendants jointly and severally, except as specifically indicated, for:

1. Equitable relief, as prayed herein, and as may appear necessary and proper, including declaratory relief, and temporary, preliminary and permanent injunctive relief; and

2. For such further appropriate relief as the Court may deem necessary and proper~~, including but not limited to money damages~~.

Dated: April 5, 2022

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

Plaintiffs demand trial by jury.

Dated: April 5, 2022

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s/ Meir J. Westreich

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **DECLARATION OF MEIR J. WESTREICH RE FILING OF BOYD-SARVEY SEVENTH AMENDED COMPLAINT [04.05.22] WITH LEAVE OF COURT [03.09.22]; AND INTENDED CARE PLAINTIFFS' MOTIONS FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND TO RECONSIDER ORDERS OF MARCH 9 & 29 AND APRIL 4, 2022 [04.08.22]**

DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

2. CARE Plaintiffs, by leave of Court to amend, granted by Order on March 9, 2022, with the timing therefor amended on March 29, 2022, *i.e.* by April 5, 2022, hereby file their Seventh Amended Complaint, per *Fed.R.Civ.P.* 15, and based on the following sequence.

a. A Complaint [Dkt 1] was filed on June 10, 2011.

b. A First Amended Complaint [Dkt 20] was filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re CARE Plaintiffs' [CARE-Boyd-Sarvey] PURPA Exhaustion of Remedies.

c. The Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, were ordered voluntarily dismissed [Dkt 35] on September 9, 2011.

d. The First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61].

e. A Second Amended Complaint [Dkt 64 & 64-1] was filed pursuant to said leave to amend.

f. Remaining CARE Plaintiffs' claims were dismissed without leave to amend [Dkt 82] from said Second Amended Complaint.

g. The Ninth Circuit reversed the Order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61].

h. This Court denied leave to file a proposed Fourth Amended Complaint, but also afforded leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184];.

i. CARE Plaintiffs filed said Fourth Amended Complaint, re-branded as the Fifth Amended Complaint [Dkt 185] which remained – without further pleading practice – the operative pleading through judgment in favor of CPUC Defendants.

j. In a second appeal, the Ninth Circuit reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended Complaint.

k. CPUC Defendants stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended Complaint [Dkt 253].

l. The court ordered leave to file the Sixth Amended Complaint [Dkt 269] which was concurrently filed [Dkt 267].

m. The Court then dismissed the Sixth Amended Complaint, with leave for Plaintiffs Boyd-Sarvey to amend some parts thereof [Dkt 287].

n. The filing of each of the aforementioned amended pleadings superseded the previously filed pleading, which then became a nullity [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)].

o. Thereby, the Sixth Amended Pleading was left as the operative pleading to which the March 9, 2022 Order applied – both explicitly and implicitly, and from which this hereby filed Seventh Amended Complaint now derives with leave of court.

3. In light of the Court's Orders of March 29, 2022 and April 5, 2022 clarifying its Order of March 9, 2022, Plaintiffs were hamstrung, because of the aforementioned factors and considerations, in light of the holding in [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*) – rendering as a nullity all filed complaints preceding the Sixth Amended Complaint, and now the Seventh Amended Complaint, and the necessity to preserve Plaintiffs' claims and rights in light thereof.

4. Also filed herewith is a "redline" version showing drafting differences between the Sixth Amended Complaint, and now the Seventh Amended Complaint.

5. Notwithstanding the aforementioned factors and considerations, CARE Plaintiffs did not include in their Seventh Amended Complaint allegations which require leave to "supplement" under Fed.R.Civ.P. 15(d), except for the July 2011 - September 2011 allegations re CARE Plaintiffs' PURPA mandate and efforts for exhaustion of FERC administrative remedies, in accordance with the Ninth Circuit Memorandum Decision of March 6, 2015 [Dkt 173].

6. Hence, CARE Plaintiffs will file a Motion for Leave to File a Supplemental Complaint on or before April 8, 2022, the time limit set by the Court's mot recent order thereon, for which motion counsel have already complied with their meet and confer duties under Local Rule 7-3.

7. CARE Plaintiffs are also concurrently filing a Motion to Reconsider those portions of the Court's Orders of March 29, 2022 and April 5, 2022 which previously clarified its Order of March 9, 2022, and the latter order, to the extent the Seventh

Amended Complaint varies from those orders, for which motion counsel have already complied with their meet and confer duties under Local Rule 7-3, except for the 7-day rule, and as to that defense counsel have consented to the waiver thereof.

8. Both motions will be filed concurrently, to be heard on the same date, under motion and briefing schedules on which counsel have agreed. Plaintiffs were hamstrung, because of the aforementioned factors and considerations, in light of the holding in [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*) and the necessity to reserve Plaintiffs' claims in light thereof.

I declare under penalty of perjury that the above is true and correct. Executed on April 5, 2022 at Los Angeles, California.

s/ Meir J. Westreich

Meir J. Westreich

CERTIFICATION OF SERVICE

I hereby certify that on December 22, 2023 I electronically filed the foregoing Appellants Opening Brief, and concurrently filed Excerpts of Record, Volumes 1-4, with the Clerk of the Court for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: December 22, 2023

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs-Appellants

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55291

CALIFORNIANS FOR RENEWABLE ENERGY, INC., *et al.*,

Plaintiffs-Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the Central District of California, U.S.D.C. C.D.CAL. No. CV 11-04975 JWH (JCGx)

APPELLANTS' OPENING BRIEF
EXCERPTS OF RECORD
VOLUME 3

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
(WESTERN DIVISION - LOS ANGELES)

SOLUTIONS FOR UTILITIES, INC, ET AL, Plaintiffs, vs. CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL, Defendants.	CASE NO: 2:11-CV-04975-JWH-JCG CIVIL Riverside, California Monday, October 4, 2021 (11:15 a.m. to 11:57 a.m.)

VIDEO HEARING RE:

DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS' MOTION TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT [ECF.NO.271];

AND STATUS CONFERENCE

BEFORE THE HONORABLE JOHN W. HOLCOMB,
UNITED STATES DISTRICT JUDGE

APPEARANCES:	See Next Page
Courtroom Deputy:	Irene Vazquez
Court Reporter [ECRO]:	Recorded; CourtSmart
Transcribed By:	Exceptional Reporting Services, Inc. P.O. Box 8365 Corpus Christi, TX 78468 361 949-2988

Proceedings recorded by electronic sound recording; transcript produced by transcription service.

APPEARANCES:

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CA Public Utilities Commission
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Riverside, California; Monday, October 4, 2021; 11:15 a.m.

(Remote appearances)

(Call to Order)

(Case called; in Progress)

MR. WESTREICH: ... Meir Westreich for the Plaintiff.

THE COURT: Good morning, Mr. Westreich.

MR. WESTREICH: Good morning, Your Honor.

MR. CULVER: Good morning, Your Honor, Ian Culver for Defendants California Public Utilities Commission and its current commissioners in their official capacities.

THE COURT: Good morning, Mr. Culver.

Okay. We are here -- sorry, give me a second to get organized. There we go.

We are here on a motion on the Defendants' motion to dismiss sixth amendment complaint -- sixth amended complaint and motion to strike references to the second supplement, et cetera, et cetera, and a status conference.

So I've read your papers. I have a couple of questions. And I actually want to start -- so what I'm going to do, I'm going to ask questions to each of you probably and then I'll give you some -- each some time to make any additional argument that you wish to make.

I want to start with you, Mr. Westreich. So if I understand it from the voluminous record, this case went up to the Ninth Circuit a couple times. The most recent time it came

back, the Ninth Circuit reversed Judge Otero's summary judgment decision but only with respect to the issue of further -- I'm paraphrasing it in a way -- whether Plaintiffs can make out a case that the Defendants' programs comply with PURPA in view of California's mandatory IPS Renewables Portfolio Standard.

And in particular, as I understand the motion, Defendants say that Plaintiff has not alleged that Plaintiff had sold -- Plaintiff sought to have supplied energy to utilities here in California that fulfilled the utilities' RPS obligations, that that pleading -- that specific allegation is missing.

Is that allegation in the current complaint, the Sixth Amended and Second Supplemental?

MR. WESTREICH: I believe it is, Your Honor, and if it's not, we can add it. The configuration of the landscape here is a constantly evolving state of affairs and that's one of the things that's kind of missing in the discussion that the PUC offers. The -- by the time we were on the Ninth Circuit the second time, the landscape nowhere near resembles what it was the first time and by now, it already doesn't resemble anything that was before the Ninth Circuit because the utilities and PUC keep changing the programs.

And so basically the legs get kicked out from under you and then when it's convenient for them, as it was in 2015 to allege new programs to defend against the complaint that was

remanded on the first Ninth Circuit trip by the CARE Plaintiffs, they want to do that. And when it's not convenient, then they want to say, oh, that has nothing to do with the case. Whatever we're doing now has nothing to do with the case.

Now, the bottom line is that that is already changing and they've already changed their -- or they issued in June a brand-new avoided cost program from -- by PUC to dictate. And so the question is that we have to use -- we have to look past these particulars and look at what essentially the Ninth Circuit was saying.

The Ninth Circuit was saying that to the extent that RPS plays into their picture and the provider provided the guaranteed supply, then capacity costs have to be included in the avoided costs -- simple as that. And that's why the Court said even with a couple of other programs which we didn't really brief that much in the Ninth Circuit but if it relates to those, we can litigate those as well.

Well, now we've got new programs. So we have a new avoided cost formula which we included in our request for judicial notice and so -- and I'd like to get to that at some point. But, Your Honor, the bottom line is, it is very simple. If they are -- if they're administering programs that, A) involve the utility using the alternative energy as meeting the RPS obligations and, B) the supplier is providing a guaranteed

supply, then they're in compliance.

And why they don't just do that -- they're in the middle of redoing all this stuff right now. They redid the avoided cost. They could have obviated this whole lawsuit if they had simply included in there a requirement on the utilities that if they're going to include it in the RPS and they're provided guarantees of supply, then they have to include a capacity cost. And that's all they had to do and they obviate this lawsuit, at least in large part that whole section of the lawsuit.

But you read that new avoided cost document that they generated in June that he started considering last August and I didn't understand why they did that switcheroo last fall about wanting to have an amended complaint but that's clearly what this was all about, was they wanted to change the landscape.

And the bottom line here right now when you read that avoided cost document, they don't mention the case holding in this which they felt was so important they had to take it to -- or try to get it to the Supreme Court. They don't mention the RPS playing into it. They don't mention whether or not there's guaranteed supply. They could have included in that document the rules that the Ninth Circuit issued and created as parameters. They didn't do it.

So we have the right to litigate so that it doesn't just happen for the program that happens to be here right now

so that my client doesn't have to come back to court every year or two or three or four to have to re-litigate because PUC gets together with the utilities and decides to tweak the program a little bit differently. They can even call it a new name one of these days and completely throw everything off into the works.

Why they don't do that is beyond me. It would have been so simple given what they just did in assuming this new avoided cost formula but you look through that document and you will search in vain to find any reference to the Ninth Circuit ruling or any of the principles that it enunciated. And our obligation on remand is to enunciate -- is to apply those legal principles to whatever the landscape is.

THE COURT: Well, thank you for the -- providing all the context. I appreciate that. I do want to come back to my question and I understood you to say that if it's not -- if the language is not in there now that you can certainly add it. But do you think that it is in there now, that is, language --

MR. WESTREICH: I thought I alleged that and I'm sorry I don't have that right at my fingertips, Your Honor, but I can tell you this -- is they are and they -- and let's also remember something else, Your Honor. At any given moment, if they want to, they can decide to do it which is another problem that we have dealing with the utilities.

If they're running short leaving their RPS

obligation, does anybody think honestly that they would hesitate to utilize whatever they can at that moment? Again, there is no regulation here. There is no control over this process that allows any predictability to be on this. And why should somebody in the place of the Plaintiffs have to be in this constant guessing game constantly trying to attend these hearings, figure out what they're doing, this ever -- like I said, again, Your Honor, ever evolving landscape?

They are -- right now it is set up in such a way is they can and they do when it's convenient and they aren't required each day to announce what their RPS compliance is. They have to do it every once in a while and then when they have to do it, they have to look around and if they're not in compliance, they're in trouble. So they'll do it.

And so we shouldn't be in the posture of having to play that guessing game. Let them do it. Let them establish the regulation. Let them put forward something that firmly establishes one way or the other that --

THE COURT: Mr. Westreich, the points that you're making right now -- is all that in your complaint? Because I guess I wasn't looking for it but I didn't see it.

MR. WESTREICH: Well, Your Honor, what we called the request for judicial notice is really a proffer. What we're saying is that when we wrote the complaint, we didn't have in mind all of these new programs that they were just in the

process of generating. And I have to say I was remiss in seeing that that was what was happening and even though they had sort of kick-started it last fall.

And -- but what slammed the door -- or slammed it in my face was when they adopted this new avoided cost rule which is adopted now. It's not proposed. And I believe it's June 22nd or something like that. And that is -- and you would think in that document, it would have all of this in there and then we could all put this to rest. But right now, the landscape that we have to deal with is not what existed the day before that avoided cost document was adopted. Now that is what the program is.

And so the complaint doesn't talk at all about that document or its contents or what it requires or doesn't require. And by the way, they made a motion --

THE COURT: Hold on. Mr. Westreich, hold on a second. We're having some problems with our technology. We need to make sure this is on the record. So hold on one second.

MR. WESTREICH: Okay.

THE COURT: Madame Clerk, let me know when our system is up and running again, please.

We're short on live court reporters. So we're relying on a recording system and we're having some glitches or there's some issues. So let's just wait until it's up and

running again before we resume substantively.

Very well. Okay. Mr. Westreich, thank you for that explanation. Let me ask some very specific questions.

I think you make the argument in your papers that the Ninth Circuit treated CARE and Plaintiffs Boyd and Sarvey as a unit. You said it in your opposition for the purpose of statuary standing. What are you referring to from the Ninth Circuit opinion that says that CARE and the individual Plaintiffs were treated as a unit?

MR. WESTREICH: The first Ninth Circuit opinion -- the first one.

THE COURT: Okay.

MR. WESTREICH: When the issue was whether or not they had filed their requisite petition to the FERC and had completed getting their rejection letter which we completed after the lawsuit had already been filed. And they talk in there about the CARE Plaintiff as if they're one. And so there was no distinction made there and so they made an issue. So we fixed it. I mean, this is exactly what happened in the first appeal.

THE COURT: Okay. That's --

MR. WESTREICH: We have to do it all over again.

THE COURT: -- that's good. You've answered my question. I'll give you a chance to make additional argument in a moment but I've got a few more specific questions.

Now, Defendants in their papers say that there's a certification that's dated August 13th, 2021. I think that's for CARE. And August 13th, 2021 is two months after the Sixth Amended Complaint. Did you -- did CARE need to obtain that certification to have standing?

MR. WESTREICH: Well, we didn't actually obtain a new certification. CARE is headquartered at the home of Plaintiff Boyd. And so when they raised the question, which was the first time in all these years of litigation, we just -- he just clarified with his existing certification that CARE was also in the same location. So it's not a new certification. It's an amendment of the certification to make it clear that both Boyd and CARE are at that same location, in other words, the same facility that is generating the energy.

THE COURT: So is it Plaintiffs' position that to the extent that there was a standing problem with respect to CARE, it has now been fixed?

MR. WESTREICH: Yes.

THE COURT: Okay. Yeah, I'll come back to that question.

MR. WESTREICH: It's kind of moot, Your Honor, when you really get down to it. I mean, what does it change in this lawsuit? We just have Boyd and Sarvey who are the officers of CARE. I mean, it's like -- there was an earlier claim, First Amended Retaliation. There's this enormous hostility that PUC

has had for CARE for many, many years because of their participation in all the State proceedings. I saw it with the new generation of PUC members. So maybe that might have waned but I guess not.

THE COURT: Well, I mean, if it doesn't matter, should I grant the motion with respect to CARE and --

MR. WESTREICH: No, I don't -- I'm not saying it doesn't matter. I'm saying that it makes you wonder why -- and regrettably, we were not able to keep our 1983 First Amended Claim but I guess if they keep up some of this behavior, we might start it up again one day.

THE COURT: Back to my very first point, yeah, I don't see in the complaint where Plaintiffs allege that Plaintiffs are forcing energy to utilities so the utilities can meet their RPS goals and I think that's a fatal defect. So I'm going to -- likely going to grant the motion on that ground. But what I'm hearing from you is you can easily amend and add that allegation.

MR. WESTREICH: Right. And let me add something, Your Honor. We litigated way back in the beginning of this case the distinction between with prejudice and without leave to amend. And I don't know why they forgot it but their motion actually doesn't ask that it be dismissed without leave to amend. They argue it in their briefing but their motion says with prejudice. And with prejudice, as the lead case makes it

very clear, it's a different animal although it sometimes overlaps without leave to amend.

The rules are very explicit and if the Court is going to do without leave to amend, actually the lead case says that we are entitled to -- if the Court does it sua sponte without a motion by the moving party, to be able to respond to that and I think we did to some extent already. I think we can amend to cure that. I think that we're entitled to the presumptions under a 12(b)(6) motion and not have them argue what they think the evidence is or ought to be.

THE COURT: All right. Thank you, Mr. Westreich.

Let me ask Mr. Culver some questions. Let me start with the standing issue. So it appears that this is a new issue that Defendants have now raised. Is it really Defendants' position that after litigating this case for ten years, all of a sudden, there's a lack of standing by Plaintiffs?

MR. CULVER: I think it's more accurate to say, Your Honor, that the issue was raised previously. However, the Court moved on to the next step and considered the merits of the case. But we have always maintained that the Plaintiffs lacked standing in this case. And the absence of PG&E, in addition, creates a problem because, really, Plaintiffs' claims are against PG&E that PG&E is not paying them the amount that they want. That's not something that can be remedied under a

PURPA claim.

THE COURT: It's not So Cal Edison?

MR. CULVER: No, I stand corrected, Southern California Edison, correct, Your Honor.

THE COURT: So what's your point?

MR. CULVER: The point is that because Defendants are CPUC and the commissioners, the claims that the Plaintiffs have made that the Plaintiffs are not getting the contracts that they want from their utility cannot be remedied in this case.

THE COURT: Well, is So Cal Edison no longer a party Defendant?

MR. CULVER: That's correct, Your Honor.

THE COURT: All right. I didn't appreciate your making that argument. Is that in your papers?

MR. CULVER: It is, Your Honor. It's spelled out in both the moving papers and in the reply briefs.

THE COURT: I'll confess I didn't focus on that. There is so much here. Where is that?

MR. CULVER: Just a moment, Your Honor. That argument begins on Page 11 of the Memorandum of Points and Authorities which is Page --

THE COURT: Eleven to 14?

MR. CULVER: This is in the moving papers, Your Honor.

THE COURT: Yes, Pages 11 to 14?

MR. CULVER: Oh, yes, correct.

THE COURT: Okay.

MR. CULVER: Mostly 11 and 12.

THE COURT: Got it. Okay, I see that now. All right, I understand.

So a little bit different question but is it Defendants' position that CARE, the non-profit entity, needs a QF certification itself?

MR. CULVER: Yes, Your Honor, that's our position --

THE COURT: And --

MR. CULVER: -- for statutory standing, correct.

THE COURT: So has that not been accomplished? Does the August 13th, 2021 certification -- does that do that?

MR. CULVER: I don't think so, Your Honor. I think that a subsequent event cannot cure a lack of standing that had existed previously. I think that the fact that it was done just two months ago -- I don't think that that cures it, Your Honor.

THE COURT: Well --

MR. CULVER: I think we'd also have to -- I'm sorry.

THE COURT: -- if I grant your motion -- forgive me for interrupting you. I do want to hear what you have to say but I don't want to lose this point. If I grant your motion but also grant leave to amend, can -- Plaintiffs can fix this problem; can they not?

MR. CULVER: I'm not certain of that, Your Honor, but that doesn't -- we don't lose sight of the other problems that the Plaintiffs face with their pleading. That's -- that statutory standing for CARE is just one of a handful of problems that we have with the pleading.

THE COURT: No, I understand that but on this micro-point, if Plaintiffs amended and supplemented their complaint to allege the August 13th, 2021 certification for CARE, that takes care of this particular problem, correct?

MR. CULVER: I cite a case in the reply, Your Honor, for the proposition that you can't cure standing after the fact and that the case needs to be justiciable from the outset. Otherwise --

THE COURT: But if it's a supplemental complaint, doesn't that fix it?

MR. CULVER: I think that the issue is that a supplement under Federal Rule of Civil Procedure 15(d) is a transaction that occurs after the complaint but it has to have a complaint to stand on. So it's got to stand on its own. So our position would be that it's a fatal defense, Your Honor.

THE COURT: All right. And what's the case that you're referring to?

MR. CULVER: That is *LaSalle National Bank versus 222 East Chestnut Street Corporation*. The cite is 267 F.2d at 252.

THE COURT: On Page 6 of your reply?

MR. CULVER: That's -- it's on Page 7.

THE COURT: Okay, I see it now. Thank you. A Seventh Circuit case from 1959? Is that correct? It's a Seventh Circuit case from 1959?

MR. CULVER: Your Honor, I couldn't hear you just then.

THE COURT: Is my audio working?

MR. CULVER: Try again. I don't know what happened.

THE COURT: Hold on one second. Okay. Can you hear me now? Can you hear me? Is my audio working now?

MR. WESTREICH: Yeah, I can hear you now, yes.

THE COURT: All right.

MR. WESTREICH: I don't know what happened there. Sorry.

THE COURT: It was on my end. I don't know what happened.

Okay. So for Mr. Culver, I was asking, the *LaSalle* case, is that the Seventh Circuit 1959? Can you hear me, Mr. Culver?

MR. CULVER: Sorry about that, Your Honor. Yes, Your Honor.

THE COURT: Okay, all right. Next question -- oh, well, same issue. Isn't there a zone-of-interest argument here that would overcome that defense? That is, I think the two individual Plaintiffs are proper party Plaintiffs and CARE is a

nonprofit. It's in the same zone of interest. Doesn't that cure the problem?

MR. CULVER: I don't know that it does if the requirement that the claimants be QFs exist in the statute. I think that each individual claimant must itself be a QF and as CARE is an association, which until recently had no interest in the property, it was not a QF.

THE COURT: Right.

MR. CULVER: But, also, we've objected to all of those documents that were requested for judicial notice.

THE COURT: Right, I saw that. Okay. Those are my specific questions.

Mr. Culver, this is your motion. So what additional argument did you want to make?

MR. CULVER: I don't have anything beyond what's set forth in the briefs, Your Honor, but I would like to go back to your initial point -- was that the allegation hasn't been made. Plaintiff has been on notice that the allegation -- this key allegation identified by the Ninth Circuit needed to be made two years ago and I question why it wasn't there. And I question the Plaintiffs' statement that they will add the allegation.

I wonder whether there might be a Rule 11 issue there. And if they do make the allegation, I suppose we'd just have to be prepared to move for summary judgment on that

allegation.

THE COURT: So you're arguing that I should grant this motion and I should grant it without leave to amend even though Mr. Westreich says that he could easily add that, I presume, one sentence to his complaint which will take care of this problem?

MR. CULVER: I'm sure that he could, Your Honor. I just don't know whether there are facts to support that allegation and I question why he is waiting until now to say that he was going to do that when this has been front and center for the Plaintiffs all this time that this was an issue. And I'm only hearing now that he's going to make the allegation. It wasn't even set forth in the opposition. It was never mentioned.

THE COURT: Well, is there any prejudice for the Plaintiffs if -- other than the obvious that you all win the case, is there really any prejudice to Plaintiffs -- I'm sorry -- to Defendants if I grant your motion but with leave to amend and we'll see what Mr. Westreich does?

MR. CULVER: Nothing other than time and effort and expenses and turning to other business, continuing a case that should have been dismissed many years ago, frankly.

THE COURT: Well, right, and I don't think that's the type of prejudice that the Courts look to on leave-to-amend issues but I understand. Any other argument that you care to

make? I'll give you a chance to have the final word as well since it's your motion.

MR. CULVER: I would just say that I would expect that any amended pleading would be met with either a motion to dismiss and a motion for summary judgment so that -- I think that utility if probably a very good argument for you not to grant leave to amend, Your Honor.

THE COURT: Yeah, it's hard for me to judge that at this point. I'm more likely to want to adjudicate the case on the merits either on another 12(b)(6) motion or a motion -- more likely a motion for summary judgment.

MR. CULVER: Right.

THE COURT: I'll -- we'll save that for another day. Thank you, Mr. Culver.

MR. CULVER: Thank you, Your Honor.

THE COURT: Mr. Westreich --

MR. WESTREICH: Yes, Your Honor.

THE COURT: -- anything else you wish to argue?

MR. WESTREICH: Yeah, a couple points and, of course, there's things in their reply I need to respond to.

Your Honor, it's extraordinary to me that a gigantic State agency can plead, leave us alone against an entity that is just a tiny little nonprofit struggling. Can you imagine what they've gone through ten years of litigation and having to go to the Ninth Circuit twice just to get this point? But,

nevertheless, they see themselves as a victim and even though there's a gorilla in the room.

One of the things that needs to be understood, he -- and by the way, it is PG&E and not Southern Cal Edison. Southern Cal Edison was the utility with the previously adjudicated Plaintiff SFUI. And the reason Edison was dismissed is the reason why there's the utility in this case and that is very simple.

It's that the PURPA created this interesting kind of federalism formula that said, if you have an unregulated utility, you can sue them but if it's a regulated utility, i.e., in a state where they regulate utilities, then you can't sue the utility. You have to sue the regulating entity to make sure that they then do their do their duty to compel the utility to do what they're supposed to do.

Now, it's true, to do an individual collection of dollars and sense, which is what the Ninth Circuit said about our complaint that we were trying to provide a fixed amount of energy and they wouldn't let us, that the Court said, well, that individual might go collect money. So you have to do -- it's in a -- and that is an applied claim that you have to take into State court.

But when we're trying to get the PUC to adopt regulations that compel the utilities to do it right in the first place so you don't have to have each individual provider

have to chase after all these big shots and try to get the justice that they're entitled to. And the PUC can do it very easily.

They're reluctant to do it just being the perception that it's ongoing throughout this litigation and before that PUC serves the utilities. And at the request of the utilities, they're redoing this whole program right now. It says it right in those papers.

By the way, we're not requesting judicial notice to have the Court evaluate the papers on the merits. What we are doing is a proffer saying that there is this body of information out there for which we can draw additional allegations to -- for a supplemental or an amended complaint in light of these new and changing circumstances.

Now, I could have done it purely as a declaration. I could have done it as just an argument in a portion of the brief. I do it that way just to add a little more oomph to it that we're not just making it up out of whole cloth. And by the way, the Ninth Circuit opinion wasn't all that clear that we absolutely had to establish that the utility relies on the NEM programs, alternative energy and needing its RPS programs and so on and so forth.

If we had -- it had been clear to us, we would have done it but now that it's being argued, we can do it. And I don't think they're going to be able to honestly oppose it and

I'll be welcomed to see when they do their summary judgment motion one of these days or maybe they'll give us the discovery they have that gives them the ability to say that they know what these utilities are doing and what they're not doing in terms of their compliance paperwork for RPS.

I'm not sure where PUC exactly is privy to what the utilities are doing on that score but great, we'd love to have that discovery and take a look at it. Meanwhile, we can make the amendment. They've got a problem. They made a motion that says, "with prejudice." They didn't say, "without leave to amend." And the *Lee* case is very clear that you have to make that distinction.

The point is this, is that the way the Ninth Circuit applies the rule is that you have to have an order that specifies the defect and then one opportunity for the Plaintiff to correct that specified defect. It's not a numbers game and -- except once that happens -- once there is a clear enunciation -- okay. Here's the defect. You get one shot to fix it. Generally speaking, they don't have to give you two or three after that is enunciated. That has not been enunciated in a previous order.

So for the Court to do it now, it would be an enunciation of that. We're entitled to that. But you know what? They didn't even make a motion for a leave to amend -- to that being a leave to amend. They didn't bother to follow

the rules properly in filing their notice motion. So they want to be excused when they do their little slipups.

And let me also say this. To listen to them say you can't fix it after the fact, that is exactly the argument they made in the first remand -- that resulted in the first remand. They argued exactly the same thing, that we could not fix jurisdictionally the failure to have actually gotten the first denial. We had submitted the request but we had not gotten the denial back yet and they said, you can't fix it retroactively. And the Ninth Circuit said, yes, we could.

And so we're exactly in the same position, exactly the same argument and they're exactly making this -- they're not chastised at all. They cited Seventh Circuit opinion. Instead of, why not doesn't the law of the case apply to them when it applies to them? But, again, that's another convenience that they apply.

And their own authorities, by the way, the law of the case specifically say that if the facts change by the time the case gets back, the Court doesn't have to ignore that reality.

Now, I would like to make a couple of other points, Judge, I guess, in respect to their reply which obviously we didn't have a chance to respond to yet. This is minor but they made it. When we submitted our opposition and we submitted the request for judicial notice, the actual documents got rejected by the ECF system and it did because I had utilized -- some of

the documents I utilized in there I had downloaded from the website, from the PUC website itself, and apparently you can't do that because it has links in it and the ECF system rejected it.

So what I did was is when it rejected, I didn't know that -- why it was rejecting at that point. It had some strange computer language that I didn't understand but I served it to PUC directly by email so there wouldn't be any prejudice in them not having adequate notice of what it was that was being submitted. And the next day, I found out what I needed to do which is print it out, copy it black and white, scan it back in again and then resubmit it again. And that gets rid of those links. So I learned a hard lesson. You can't just download documents and include it in an ECF filing.

But they didn't lose anything by that. And so they're making an argument -- talk about wasting time. They wasted six months of this time in this case when they fought tooth and nail a year ago -- year and a half ago against me filing an amended pleading after coming down from the Ninth Circuit and then six, seven months later, they decide, oh, that's a good idea after all and insisted that it could not be handled in any other way. You couldn't do it in the Rule 16 process. You couldn't do it in discovery.

It had to be done that way and I eventually relented even though I didn't really like setting the clock back from

the beginning. And now they get to say, oh, but we're tired of this and we're in a hurry now. And I said, this is a bit disingenuous for them to play that card because it's in the record that they opposed doing this back in May of 2020. And it was their choice then.

So let's get down to it and do it. I think the point -- the bottom line is this -- is the Ninth Circuit ruled that if they have programs which contribute to the RPS and which do -- there is a guaranteed supply provided by the provider, then they have to include capacity costs. This is a policy matter, not just the dollars and cents of each of the Plaintiffs.

Let's get this finalized once and for all where the PUC adopts that so that the utilities don't have the option to play around with the providers who don't have the ability to fight with them. And since PURPA created this weird structure that you can't sue the party that is really ripping you off, you have to go to the State regulating agency and have them take care of the problem, well, that's the way it is.

Now, they don't like it. Go to Congress and get them to change PURPA. But right now, we're all in the same bed together. The only way this problem gets solved is if they'll do it. Now, it would be really nice if they actually had adopted and avoided Care -- avoided cost policy that A) -- and by the way, this is something we haven't mentioned yet.

The Ninth Circuit also adopted in its ruling in this

second opinion the phrase, "full avoided costs." That is meant to mean that avoided costs is both a floor and a ceiling. The original PURPA statute, it was just a ceiling but FERC regulations made it a floor as well. The Supreme Court approved that.

The utilities have been fighting tooth and nail against that ever since. You look through this new avoided cost regulation by PUC. Page after page after page, the phrase "full avoided cost" doesn't appear there. They are simply resistant to accepting that doctrine. So if we -- what we're just trying to do right now is get finally once and for all that there is full avoided cost with the exceptions that the Ninth Circuit inserted in the opinion in this case which is a reported decision and a binding on the entire country.

So let's just get that and let's have the exceptions, the way to define. We can fight about the exact contours of those exceptions. Get this thing adjudicated on the merits, truly on the merits and make an end to this litigation.

THE COURT: All right. Mr. Westreich, thank you very much.

Mr. Culver, any final reply, argument?

MR. CULVER: I would just state that I believe that Mr. Westreich has mischaracterized motivations and conduct of the CPC. Otherwise, I have no response.

THE COURT: All right. Counsel, thank you very much.

I'm going to take this motion under submission. I'll try to get a ruling out as soon as I can.

Anything else we need to accomplish? Mr. Westreich?

MR. WESTREICH: Your Honor, we also had the status conference and scheduling conference on calendar today. Do we want to either do that or put it off to another day or how do we want to address that? That is on calendar today.

THE COURT: Yeah, I'm going to put that off to another day because I need to rule on this motion.

MR. WESTREICH: Okay.

THE COURT: So I will reset a scheduling conference after I rule on this motion. Perhaps -- I mean, if I grant the motion but with leave to amend, I may wait to have the scheduling conference until after we get past that hurdle, either an answer from Defendants or final adjudication on a 12(b)(6)-type motion -- 12(b) motion, I should say, because it may be 12(b)(1).

In any event, thank you, Mr. Westreich, for reminding me.

MR. WESTREICH: Your Honor, one other thing then. By the time we do this again -- if you'll remember, we're the only ones who proposed any dates. CPUC announced they preferred to not strike on that proviso. But even the dates that we proposed would obviously have to be adjusted by the time we have the new conference. So maybe the order could specify that

counsel -- I don't want to have to file an entirely new status report. So maybe we could file a supplemental report that only addresses matters that have either changed or added to or -- from the previous report so we're not starting from scratch but at least updating what else is in there at the present time.

THE COURT: Well, let's -- I appreciate that perspective but let's just see where we are when the case is finally at issue.

MR. WESTREICH: Okay. Thank you.

THE COURT: Mr. Culver, anything else?

MR. CULVER: No, thank you, Your Honor.

THE COURT: All right. Thank you.

MR. WESTREICH: Thank you, Your Honor.

(Proceeding adjourned at 11:57 a.m.)

CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

March 29, 2022

TONI HUDSON, TRANSCRIBER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE JOHN W. HOLCOMB, U.S. DISTRICT JUDGE PRESIDING

SOLUTIONS FOR UTILITIES, INC.,

Plaintiffs,

Vs. No. CV11-04975-JWH

CALIFORNIA PUBLIC UTILITIES COMMISSION, ET AL.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

RIVERSIDE, CALIFORNIA

MONDAY, MAY 17, 2021

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RIVERSIDE, CALIFORNIA; MONDAY, MAY 17, 2021; 2:00 P.M.

THE CLERK: Case Number CV11-49475.

MR. WEISTREICH: Good afternoon, Your Honor. Meir Westreich for the plaintiff.

02:00PM

THE COURT: Good afternoon, Mr. Westreich.

MS. HAMMOND: Good afternoon, Your Honor. Christine Hammond for defendants, Commissioners for the California Public Utilities Commission.

THE COURT: Good afternoon, Ms. Hammond.

02:00PM

MS. HOEHN: Stephanie Hoehn also for the defendants.

THE COURT: Good afternoon, Ms. Hoehn.

MR. LEMEI: Galen Lemei, also for the defendants.

THE COURT: Good afternoon, Mr. Lemei.

02:01PM

We're here on a status conference. I think the parties had asked me to set the status conference. I think the request came back in December. Then for various reasons, it's been continued until now. I asked for a status report, which the parties kindly provided to me. I also have a notice of lodging of the proposed 6th amended and second supplemental complaint.

02:01PM

So I think what we need to do is to talk about the schedule moving forward. Let me just give you my preliminary thoughts. I think it makes sense for -- defendants appear to

02:01PM

be consenting to the filing of the proposed amended pleading, as I understand it, but they would like to file a 12(b) motion and, perhaps, other motions in response to that. What seems to me makes the most sense is to allow that process to take place. Let's figure out what claims are actually in the case or not in the case and then move on to next step, whether it be discovery or dispositive motions.

Mr. Westreich, let me hear, please, your thoughts in response to my musings.

MR. WEISTREICH: I concur completely, Your Honor, with that. I thought that a year ago and I'm glad everybody now agrees with me.

THE COURT: Nice how that works out that way sometimes.

MR. WEISTREICH: Once in a while. Not very often in 44 years.

THE COURT: Well, let me hear from defendants' counsel with respect to my proposal, which is, essentially, I think, the parties' proposal. Who is going to speak, Ms. Hammond?

MS. HAMMOND: I will, Your Honor. Thank you. I'd like to put more nuance in how you characterize the filing, because we did put it in the pleading. It is a bit complicated because this case is long. It's back on remand. We are talking about a process to move forward --

02:03PM 02:03PM 02:04PM 02:04PM 02:05PM

THE COURT: Ms. Hammond, let me interrupt you. Forgive me. It's a little hard to hear for you. It's hard for the court reporter to pick up what you're saying. There seems to be a little bit of a reverb from your microphone.

MS. HAMMOND: Is this better? I had some papers on my computer, unfortunately.

THE COURT: It might be a bit better. Speak loudly as well, if you could, please.

MS. HAMMOND: Thank you. Your Honor, we submit that the case on remand should entertain only some very narrow issues within the scope of the remand. When the case was remanded back to the Court, it was unclear how to proceed. Now, defendants had initially opposed the lodging of an amended complaint, but there was a case schedule that had gone forward with some discovery dates and some trial dates, and we had some reservations there.

Now, as we went through the dates, and the discovery deadlines, it wasn't at all clear to us what the claims were. So as we were looking at those deadlines, we had reached out to plaintiffs. In summary, what was determined was we thought it was clean for plaintiffs to articulate their claims in an amended complaint, but only for the purposes of articulating their claims on remand.

Now, we submit that the scope of remand is narrow to consider the one holding that the Ninth Circuit issued and

for the Court to review the summary judgment order to take into consideration that ultimately we oppose any new claims or any supplementation of the complaint to entertain new claims because -- and the plaintiffs have agreed in pleadings to the Court -- that the scope of the remand is very narrow.

02:05PM

Now, we -- there is some talk about some additional claims and we can -- we can discuss those further, but we thought the cleanest way to get an articulation of the claims -- because that has been challenging in this case, if you read the District Court's 2016 summary judgment order -- was to get a clear articulation of the claims.

02:05PM

So we would agree to an amended complaint for this limited purpose, but if -- if there is supplementation of claims allowed, then we would oppose the amended -- the sixth and second amended complaint. We would submit that the fifth amended and first supplemental complaint should be the operative complaint going forward.

02:06PM

THE COURT: Well, so, Ms. Hammond, let me ask, you have undoubtedly reviewed Mr. Westreich's proposed sixth amended and second supplemental complaint; correct?

02:06PM

MS. HAMMOND: Correct.

THE COURT: So it appears to me from the status report that your clients do not oppose the filing of this pleading, but, of course, you reserve your right to file appropriate motions in response attacking it, whether it's

02:06PM

under 12(b) or otherwise; correct?

MS. HAMMOND: That's correct.

THE COURT: So should -- you are -- your clients are on board then with what I suggested, which is leave for plaintiffs to file this pleading, and then defendants file whatever motions they deem appropriate in response thereto; correct?

MS. HAMMOND: Yes, Your Honor.

THE COURT: All we need to do is talk about a briefing schedule. I assume Mr. Weistreich, you can file this pleading within 48 hours from an order asking you to do so; correct?

MR. WEISTREICH: Yes, Your Honor. I can do it the same date.

THE COURT: That is what I would expect you to do.

MR. WEISTREICH: I won't change a period on it.

THE COURT: Very well.

Ms. Hammond, how much time would your clients like to file whatever motion they wish to file in response?

MS. HAMMOND: Your Honor, we're thinking address a threshold question, which is would the Court require the standard initial disclosures and answer that accompany a new complaint, or should we move straight towards, say, dispositive motions?

THE COURT: Well, my thought -- I did see a

reference to initial disclosures in your joint status report. I can't say I understood fully what was going on there. But to answer your question directly, my thought would be whatever motions defendants wish to file in response to the pleadings.

02:08PM

Now, it may be the defendants are all ready to go what a summary judgement. I don't know. It may be they're not and thinking of a 12(b)(6) type motion or a jurisdictional motion. I don't know precisely what defendants contemplate. If you're asking will there be a subsequent opportunity for defendants to file a summary judgment motion, my thought is yes. My thought is that if plaintiffs survive whatever attack defendants are going to make on the pleading, on this pleading, then we'll move to discovery and that may involve initial disclosures. It may involve, you know, responding to discovery that is propounded by the other side and then move to summary judgment motions. I believe plaintiff was even contemplating a summary judgment motion. If that doesn't resolve the case, then we'll proceed to trial.

02:08PM

02:09PM

02:09PM

Does that answer your question, Ms. Hammond?

MS. HAMMOND: It does. Thank you.

THE COURT: So --

MR. WEISTREICH: If I may?

THE COURT: Mr. Westreich, go ahead.

02:09PM

MR. WEISTREICH: I think we should -- it should be specifically scheduled the way the Court just suggested. If we start doing a summary judgment motion right now, we would end up doing a Rule 56(d) declaration. The parties did agree in the previous status report and in this one that any discovery would only be for the purpose of dating the discovery that was previously done before the previous summary judgment.

02:10PM So the discovery would be fairly limited in any event, but it would be necessary and there are some changing circumstances that have occurred in the intervening years in terms of policies and various things going on in this area of the law and, you know, power generation in the State of California.

02:10PM So I think my expectation is we only put in the initial disclosures and those other things if the Court was disposed to set case management dates right now. If the Court is going to defer setting case management dates, as the defendant suggested, until after we finish the pleading process, then none of that would occur right now. The only thing that would occur right now is whatever pleading motions they would wish to file. We get a resolution of what claims remain. Then do the rest of the things that Your Honor suggested a moment ago.

02:11PM THE COURT: My thought is defendants can file

whatever motions -- the motion they wish to file. If it happens to be a motion for summary judgment, then plaintiff may very well respond by invoking Rule 56(d). That would be messy, but I'm kind of hesitant to tell defendants how to respond. I would think that they might want, as it were, two bites of the apple, an opportunity to attack the pleading and an opportunity to attack the underlying claims through Rule 56. I think they can file whatever they wish to file.

02:11PM

It will be messy, you're right, Mr. Westreich, if they file a motion for summary judgment now and you respond by invoking Rule 56(d). Let's deal with that if that happens. I think the parties do need to comply with Local Rule 7-3, which requires a thorough meet-and-confer before filing any motion. I probably shouldn't say I don't hold up much hope that we'll resolve things, but at least you'll know the scope of what is being filed.

02:12PM

02:12PM

Mr. Westreich, if they insist on filing a summary judgment motion, you can make your 56(d) argument to them at that time. Anyway, Mr. Westreich, if you're asking am I going to hold off ordering discovery or opening up discovery until we get through this phase, my inclination is yes, I'd like to -- I think the parties should hold off doing that until we figure out what claims are i the case.

02:12PM

MR. WEISTREICH: That sort of puts me in -- one of the things that I was a little bit concerned about when we

02:13PM

first started discussing this last fall was that I felt like all right, we're going back to square one again where I would have liked to have been when we first came down. Now we go all of the way to the end. My actual initial preference was let them file a motion summary judgment motion under the existing pleading. Let us go through the Rule 16 process and duke it out in pretrial and motions before the Court and do it in what was left in front of us.

02:13PM

They eventually convinced me that because they were not sure what scope of discovery that they would want until they knew what my claims were, they convinced me that I should agree to go back to where we were before. So now it would be kind of flipping it completely around. If it turned around, and now okay, we freeze discovery and we're not doing any discovery. They can go do a summary judgment motion, and now I'm in the posture of having to say I want to do discovery when we didn't have to be -- I didn't have to put myself in this posture in the first place.

02:13PM

02:14PM

So I think I did this with the expectation that we were going to do something with the pleading first. Then look at the possibility of discovery and then look at dispositive motion. So I think that I'm losing the benefit of the bargain I made, so to speak, last fall if they can suddenly turn around now and just put the whole case on my shoulders right now and say go prove everything without the

02:14PM

02:14PM

benefit of discovery and without even allowing discovery to occur in the interim.

So I think that -- and without even really knowing fully what exactly are some of these PUC policies as they stand today. These things evolve constantly. Even by the time we did the summary judgment in 2016, the landscape had so hugely changed even in the five years. As the Court may know, we didn't -- these plaintiffs didn't even participate in the first, because we were thrown out on a motion to dismiss and it was a different plaintiff that I was representing that went to summary judgment. They didn't appeal. These plaintiffs appealed and got remanded. This is actually a second remand for these plaintiffs.

So I think that -- that I would be kind of concerned if they could now file a summary judgment motion right now when they could have done that back last fall. We would have then done whatever we had to do with discovery and whatever.

THE COURT: I understand what you're saying. You have made it clear that if they do that, you will be seeking to invoke Rule 56(d). Let's cross that bridge when we come to it.

I will note that under my standing order, parties get one motion for summary judgment. So if they use it now, they cannot use it later. So that --

MR. WEISTREICH: That helps a little bit. Most people don't want to roll that dice.

THE COURT: Ms. Hammond, back to you. Defendants on board with what I'm contemplating?

02:16PM MS. HAMMOND: Yes.

THE COURT: So what is the date by which defendants would like to file their motion in response to the amended pleading that is contemplated here?

MS. HAMMOND: Is 60 days fair, Your Honor?

02:16PM THE COURT: 6, 0?

MS. HAMMOND: Yes.

THE COURT: That seems kind of long.

Mr. Westreich?

MR. WEISTREICH: Well, I would say my reaction was sort of the same. It's kind of long. I'm not asking for 60 days to respond. So usually what I would like to do is have a comparable amount of time to respond, especially with something really complex like this. Even if they do use 60 days, I will not ask for 60 days. I would like to have four weeks to respond, let's put it that way.

02:17PM (15) 02:17PM (20)

THE COURT: I'm generally fine with however much time the parties want to file these motions. I understand they're going to be substantial. Mr. Westreich, I'm not hearing strenuous opposition to a 60-day sort of time frame.

02:17PM So how about, Ms. Hammond, July 9th as the deadline

to file whatever motion defendants contemplate filing?

MR. WEISTREICH: Then that would be a hearing date of -- to give me four weeks to respond, that would mean seven-week hearing date -- seven weeks later.

02:18PM THE COURT: Well, so let me hear from Ms. Hammond first. July 9th?

MS. HAMMOND: That is fine. Thank you.

THE COURT: Okay. So four weeks from July 9th, by my accounting, will be August 6th.

02:18PM MR. WEISTREICH: What day of the week is that?

THE COURT: That's a Friday. I hear motions on Fridays.

MR. WEISTREICH: I see. Okay.

THE COURT: So I typically set dates on Fridays.

02:18PM MR. WEISTREICH: Correct.

THE COURT: There's no magic in terms -- since we're not talking about the standard local rules time frames here. The day of the week is kind of irrelevant.

MR. WEISTREICH: Okay.

02:18PM THE COURT: Just because I work off of Fridays, I'm picking Fridays. So I'm thinking August 6th.

MR. WEISTREICH: That's fine with me, Your Honor.

THE COURT: Ms. Hammond, a reply?

MS. HAMMOND: Yes, Your Honor. Two weeks.

02:19PM THE COURT: Two weeks would be August 20th.

Probably going to take me some time to work this up and prepare for a hearing. So I'd like more than the standard two weeks. Maybe at this point we say September 10th. That would give me three weeks. If we need more time, I'll continue the hearing.

MR. WEISTREICH: That's fine with the plaintiff, Your Honor.

MS. HAMMOND: And with the defendant.

THE COURT: Very well. Let's do that. At the hearing or thereafter, we'll have a status conference and talk about the remaining schedule. We'll talk about it on the 10th. How about that? I don't know how close I'll be to resolving the motion at that time. If I need oral argument, we'll obviously do that and then I will take it under submission and rule as promptly as I can.

We'll see where we are on the 10th.

MR. WEISTREICH: That's fine for the plaintiffs, Your Honor. Thank you. Thank you also for the accomodation that I personally received in the last few months.

THE COURT: Certainly.

We've touched on this, but in the status report, Mr. Westreich, you noted the defendant has propounded or maybe defendants noted -- defendants have propounded where there are outstanding interrogatories and requests for admission. I think the issue is what do we do with those?

My thought is plaintiffs need not respond to those until we get through this briefing period.

MR. WEISTREICH: I agree, Your Honor. Counsel served those. When we were first submitting our proposals, we were getting to the potential deadlines. They didn't want to get caught with their pants around their knees, so to speak. They served those with the understanding that they at least got inside the door. We put it on hold. I think we should follow now since we're not doing initial disclosures or anything like that, just put that on hold as well with all of the other discovery.

So there will not be permission to do discovery right now by anybody until we get through this motion process.

THE COURT: That's my thought.

Ms. Hammond, you're on board with that? I think I have made that clear. I just want to make sure. Everybody is nodding. So I think my minute order memorializing this hearing will also affirmatively say that discovery is stayed until the Court resolves this anticipated motion that defendants are going to file.

Ms. Hammond, are you on board with that?

MS. HAMMOND: I am, Your Honor.

THE COURT: Mr. Westreich, I assume you are?

MR. WEISTREICH: Yes, Your Honor. I think we agree

to meet with all of the plaintiffs to know what the scope of discovery is.

THE COURT: Finally, I have on my agenda here, I know, Mr. Westreich, you wanted the Court to set a -- some deadline and/or parameters regarding ADR proceeding. Defendants point out that it is the California -- defendant is the California Public Utilities Commission and there are issues with that entity settling. There are probably -- I don't want to use the word prohibitions but parameters under which the defendant can settle.

So once again, my thought is let's get through this process of defining the pleadings and return to whether it would make any sense for the Court to set an ADR proceeding.

Mr. Westreich?

MR. WEISTREICH: One comment. I may be dating myself now. I remember a day when it looked like the Brown Act made it impossible for any municipal entity in the State of California to have a settlement conference, because they couldn't convene the majority of the counsel; therefore, couldn't send anybody who had authority to settle. Everybody was ringing their hands as if it wasn't possible to resolve it. Somehow or another, they figured out a way to do it. We have settlement conferences with public entities all of the time. They still have to comply with the Brown Act, which means they can't send the kind of settlement authority that

you usually have at these mediations and settlement conferences. It's just an impossibility. Somehow we muddle through it. Sometimes it talks a little bit longer for a decision to be made at the conference itself.

02:23PM The conference itself oftentimes sets the stage, even if it doesn't reach a settlement for possible resolution at a later date with the various bodies involved finding their ways through the processes they have to follow in order to do it.

02:24PM So I think it can't possibly hurt other than to waste a little bit of time. If we did it through the process of the Court, we wouldn't even involve the expense of hiring an outside mediator, which can be expensive. So I would think that we should not create an exception that says the 02:24PM State of California and its agency now are exempt from the settlement process from hereafter. I just think that's not a good concept in general. The worst case scenario is they show up and everybody hears what the other side's positions are about, what they might be willing to do, and then proceed 02:24PM forward and see whether or not that helps resolving it before you go to trial.

THE COURT: I understand what you're saying. The Court generally agrees that parties discussing resolutions is almost always a good thing. That having been said, I think 02:25PM we're -- again, we need to figure out what the claims are

before I think it makes sense for the parties potentially to engage in an ADR proceeding.

So once again, let's talk about that on September 10th. See where we are. Maybe it will make sense. Maybe it won't. Maybe I'll need some briefing on that. Let's just see where we are at that time.

Ms. Hammond, are you on board with that?

MS. HAMMOND: I am, Your Honor. Thank you, Your Honor. I'll hold my comments until then.

THE COURT: Say that again?

MS. HAMMOND: I'll hold my comments on the propriety of ADR until that date knowing that we'll address it then.

THE COURT: Very well. Okay. That covers everything I had on my agenda. Just to review, my minute order will direct plaintiff to file its proposed -- it will be an actual sixth amended and second supplemental complaint within 48 hours. Defendants' responsive motion or pleading will be due July 9th. Opposition, assuming it's a motion, August 6th. Reply August 20th. Hearing set presently for September 10th. That will be a hearing and a status conference. We'll discuss all these other issues at that time.

MR. WEISTREICH: That will be at 2:00 p.m., Your Honor, again?

THE COURT: That's the 10th. That will be at 9:00 a.m. Presently it will be at 9:00 a.m. Heads up, what I sometimes do -- that's my regular motion calendar. If this motion is as complex as I think it may be in terms of the arguments on both sides, I may pick a different day and allot more time for it. For now, it will be set for my regular civil motion calendar 9:00 a.m. on September 10th.

MR. WEISTREICH: One ancillary question, Your Honor, since I already had somebody ask me about this. If somebody wanted to file an amicus brief in support of the plaintiffs' position, would I tell them that they would have to do it at the same time as when my response is due? Would that be the normal procedure?

THE COURT: Well, I think the best -- the best practice would be for that proposed amicus to obtain the consent of all parties --

MR. WEISTREICH: Correct.

THE COURT: -- by stipulation to file the brief. Absent agreement of the parties, I think a potential amicus would file an ex parte application for leave to file amicus brief. In terms of timing, obviously, the more time I have to deal with it and read it and digest it, the better.

MR. WEISTREICH: On the appellate level, normally, because they've done it when we've been on appeal. Normally, they have to file on the day of the party that they agree

with. That's why I was -- somebody asked me that question and I said I would broach it. Regardless of whether we agree to consent or do an ex parte application, should I let them know that the standard assumption should be they would file it on the day of the party that they're supporting? That's basically the question.

THE COURT: There's no hard-and-fast rule --

MR. WEISTREICH: Okay.

THE COURT: -- that I'm aware of in terms of local rules of this Court.

MR. WEISTREICH: Right.

THE COURT: But what concerns me more is the all parties' view of the propriety of whoever the amicus is filing an amicus brief.

So, again, absent consent of all parties, that non-party amicus would file an ex parte application for leave to file an amicus brief. Then I would wait to see if there is any opposition to that. Perhaps there would be opposition, I don't know. We're in speculation land here.

I would deal with the request, the opposition, and I would decide to allow it or not allow it.

MR. WEISTREICH: Okay.

THE COURT: So, again, that covers everything I wanted to cover.

Mr. Westreich, anything else we need to accomplish

here today?

MR. WEISTREICH: Nothing else, Your Honor. Thank you for covering all that we did cover and appreciate the Court willing to do this special process.

02:30PM THE COURT: Certainly.

Ms. Hammond, or your team, anything else from defendants?

MS. HAMMOND: No. We are good. Thank you, Your Honor.

02:30PM THE COURT: Thank you. Everybody have a great rest of the day.

THE CLERK: Court is adjourned.

(Proceedings concluded at 2:30 p.m.)

CERTIFICATE

I HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE STENOGRAPHICALLY RECORDED PROCEEDINGS IN THE ABOVE MATTER.

FEES CHARGED FOR THIS TRANSCRIPT, LESS ANY CIRCUIT FEE REDUCTION AND/OR DEPOSIT, ARE IN CONFORMANCE WITH THE REGULATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES.

/s/ Miriam V. Baird 05/11/2023

MIRIAM V. BAIRD DATE
OFFICIAL REPORTER

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CERTIFICATION OF SERVICE

I hereby certify that on December 22, 2023 I electronically filed the foregoing Appellants Opening Brief, and concurrently filed Excerpts of Record, Volumes 1-4, with the Clerk of the Court for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: December 22, 2023

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs-Appellants

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-55291

CALIFORNIANS FOR RENEWABLE ENERGY, INC., *et al.*,

Plaintiffs-Appellants,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants-Appellees.

On Appeal from the Judgment of the United States District Court for the Central District of California, U.S.D.C. C.D.CAL. No. CV 11-04975 JWH (JCGx)

APPELLANTS' OPENING BRIEF
EXCERPTS OF RECORD
VOLUME 3

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

NOTICE OF MOTION AND MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT

Date: September 10, 2021
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that at 9:00 a.m. on Friday, September 10, 2021, or as soon thereafter as counsel may be heard by the Court, Defendants, California Public Utilities Commission ("CPUC") and current Commissioners of the CPUC in their official capacities will hereby and do move that the Court, pursuant to Federal Rules of Civil Procedure, Rules 12(b)(1) and 12(b)(6), for dismissal of the Sixth Amended and Second Supplemental Complaint with prejudice. The briefing schedule for this Motion was set by the Court's May 19, 2021, Minute Order (ECF 269).

NOTICE IS FURTHER GIVEN that, in the alternative if the Motion to Dismiss is denied or leave to amend is given, Defendants also seek to strike all references to a Second Supplement to the Sixth Amended Complaint pursuant to Rule 12(f) in that there is no supplemental material contained in the pleading.

These Motions, joined pursuant to Rule 12(g), are made on the grounds that (1) Plaintiffs lack Article III standing, (2) CAlifornians for Renewable Energy lacks statutory standing, (3) this Court lacks jurisdiction over as-applied claims under the Public Utilities Regulatory Policies Act of 1978, (4) the pleading is an improper motion for reconsideration and violates the law of the case, (5) the claims made are outside the scope of remand, (6) the pleading fails otherwise to state a claim upon which relief can be granted, and (7) the pleading is not properly construed as a supplement, all of which are set forth more fully in the Memorandum of Points and Authorities.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which occurred telephonically between Ian P. Culver and Meir Westreich on June 18 and July 2, 2021.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, all other papers and pleadings on file in this

/ / /

matter and especially the purported May 17, 2021, Plaintiffs' Sixth Amended and Second Supplemental Complaint, and the oral arguments of counsel.

Dated: July 9, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

Hon. John W. Holcomb, District Judge

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT; AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT

Date: September 10, 2021
Time: 9:00 a.m.
Place: Via Zoom

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GLOSSARY[1]

Avoided Cost	The incremental cost to an electric utility of electric energy, capacity, or both, which, but for the purchase from a qualifying facility, the utility would generate itself or purchase from another source. *CARE v. CPUC* at 932 (citing 18 C.F.R. § 292.101(6)).
Capacity costs	"The costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities." *CARE v. CPUC* at 934 (cleaned up). "The CPUC is not required to take capacity costs into account in the NEM program." *Id.* at 939.
CARE	Plaintiff CAlifornians for Renewable Energy, a non-profit corporation.
CPUC	Defendant California Public Utilities Commission, a state regulatory agency allowed "to determine exactly how [it] will comply with PURPA and FERC's regulations." *CARE v. CPUC* at 931.
DLAP	Default Load Aggregation Point. "DLAP is an hourly day-ahead electricity market price, in other words, what the utility is paying one day out in the marketplace. DLAP does not include capacity costs." *CARE v. CPUC* at 934.
FERC	Federal Energy Regulatory Commission.
NEM	Net Energy Metering. A retail billing program for public utility consumers with solar power generation facilities installed at the site of the consumer's consumption, *e.g.*, their home, which offsets the retail rate for the volume of electricity consumed by the volume of electricity generated from the on-site solar facility. "The NEM Program calculates how much electricity a consumer uses and how much electricity a consumer generates over a twelve-month period. If the consumer generates more electricity than it uses, then the excess electricity goes back into the electrical grid. The utility pays the consumer for this electricity based on the default load aggregation point price." *CARE v. CPUC* at 934. The price paid is called the Net Surplus Compensation Rate, which the CPUC has determined should be the utility's DLAP. Plaintiffs Boyd and Sarvey participate in the NEM program. *Id.* at 946 (Nguyen, J., dissenting).

[1] *CARE v. CPUC* references in this glossary are all to *CAlifornians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929 (9th Cir. 2019) (*CARE v. CPUC*), *cert. denied sub nom.*, *Boyd et al. v. Cal. Pub. Utils. Comm'n*, 140 S. Ct. 2645 (2020).

PURPA	Public Utility Regulatory Policies Act of 1978.
QF	Qualifying Facility. A QF is either a "small power production facility" or "cogeneration facility." *CARE v. CPUC* at 932 (citing 18 C.F.R. §§ 292.201 & 292.203).
RPS	A Renewables Portfolio Standard is a state program that sets targets by which utilities must source specific amounts of electricity from eligible renewable resources. "CPUC-regulated utilities have met their 2020 targets and are on track to reach their 2030 targets. Most of these goals have been met by purchasing energy from producers with capacity over 20 [megawatts]." *CARE v. CPUC* at 934-35. California's Renewable Portfolio Standard Program is codified at Article 16 (commencing with § 399.11) of the Cal. Pub. Util. Code.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By the time the Court awarded summary judgment to the Defendants on the Fifth Amended and First Supplemental Complaint (Fifth Complaint), it had afforded Plaintiffs numerous opportunities to articulate a claim for which relief could be granted and given Plaintiffs every benefit of the doubt as to each allegation, however vaguely worded. This Court's Order Granting Defendant CPUC's Motion for Summary Judgment scrutinized the challenged Defendants' programs implemented pursuant to the Public Utility Regulatory Policies Act of 1978 (PURPA) in light of Plaintiffs' claims and determined that "CARE Plaintiffs have failed to meet their summary judgment burden of identifying violations of PURPA…" Order Granting Summ. J., at 10, December 28, 2016 (ECF 217).

The Ninth Circuit similarly reviewed the CPUC's PURPA programs and Plaintiffs' claims, affirmed all aspects of the Summary Judgment Order *save one*, and remanded the case for this Court to consider Plaintiffs' claims consistent with its holding: "where a utility uses energy from a QF [Qualifying Facility] to meet a state RPS [Renewables Portfolio Standard], the avoided cost must be based on the sources that the utility could rely upon to meet the RPS." *CAlifornians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929, 937 (9th Cir. 2019), *cert. denied sub nom.*, *Boyd et al. v. Cal. Pub. Utils. Comm'n*, 140 S. Ct. 2645 (2020) (*CARE v. CPUC*). Plaintiffs plainly admit, "If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." Sixth Am. 2d Supplemental Compl., ¶ 31 (6AC, ECF 267). Plaintiffs never once allege that their resources aid a utility in meeting its RPS obligation, or that they are certified as RPS resources; they allege only that their resources are renewable energy sources. Instead, Plaintiffs hope that the Court will not discern the legal distinction between RPS-certified resources and non-RPS-certified renewable resources – a distinction that the Ninth Circuit underscored.

Because Plaintiffs do not allege this threshold question in the Ninth Circuit's remand order – whether a utility is in fact using Plaintiffs' energy to meet the utility's RPS – Plaintiffs' challenges to the avoided-cost rates in the CPUC's PURPA programs are contrary to the Ninth Circuit's holding, are non-justiciable, and are beyond the scope of the Ninth Circuit's limited remand. As discussed at the status conference on May 17, 2021, the Defendants agreed that the Plaintiffs should amend their complaint in order for the CPUC to know what it is defending itself against after the narrow remand from the Ninth Circuit, yet this Sixth Complaint does not state a claim within the scope of remand. The Sixth Complaint fails to heed the law of the case, instead continuing to make the prior unsupported allegations that this Court and the Ninth Circuit have previously rejected.

Even more fundamentally, this Court lacks subject matter jurisdiction and is obliged to dismiss this case over which it lacks the power to adjudicate. Plaintiffs fail to meet the fundamental Article III requirement of standing and CARE lacks statutory standing in federal court under PURPA.

The Defendants therefore respectfully request that the Sixth Complaint be dismissed with prejudice. Alternatively, the Defendants request that references to supplementation be stricken from the title of the Sixth Complaint for failure to meet the Rule 15(d) standard.

II. BACKGROUND

A. The CPUC

The CPUC is a constitutionally established agency consisting of five members[1], and it may fix retail rates and establish rules for California utilities. Cal. Const., art. XII, §§ 1-6; Cal. Pub. Util. Code § 701. The CPUC acts through the

[1] Per Fed.R.Civ.P. 25(d) current Commissioners are automatically substituted in their official capacity for former Commissioners who have completed their term of service.

issuance of formal decisions voted upon at public meetings, after notice and an opportunity for hearing. Cal. Pub. Util. Code §§ 306 and 311. CPUC decisions are subject to judicial review. *See id.* §§ 1756-1768. The Eleventh Amendment bars federal actions against state agencies like the CPUC, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02 (1984), and precludes an award of damages such as CARE is seeking, *CARE v. CPUC*, 922 F.3d at 941. CPUC Commissioners have absolute immunity in suits for damages against them when acting in their legislative capacity. *CARE v. CPUC*, 922 F.3d at 941.

B. Public Utility Regulatory Policies Act of 1978 (PURPA)

Congress enacted PURPA in the wake of the national energy crisis to encourage cogeneration and small power production facilities and to reduce the reliance of electric utilities on oil and gas. *FERC v. Mississippi,* 456 U.S. 742, 745, & 750-51 (1982); *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.,* 461 U.S. 402, 404-05 (1983). Congress authorized the Federal Energy Regulatory Commission (FERC), in consultation with the States, to adopt rules requiring utilities[2] to purchase electric energy from qualifying facilities (QFs)[3], and requiring State regulatory authorities to implement FERC's rules.[4] PURPA is codified generally at 16 U.S.C. §§ 2601, *et seq.*, with definitions in 16 U.S.C. § 796, and other requirements at 16 U.S.C. § 824a-3.

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[2] Under PURPA, an electric utility is defined as an individual, corporation, or federal or state agency that sells electric energy. 16 U.S.C. § 796(4), (22)(A).

[3] 16 U.S.C. § 824a-3(a)(2). "Qualifying facility" is an "eligible" cogeneration or small power production facility. 18 C.F.R. § 292.101(b)(1) (2020). "Qualifying small power production facility" and "qualifying cogenerator facility" are facilities that apply for an order from FERC or self-certify that the facility meets FERC's requirements. 16 U.S.C. § 796(17)(C), (18)(B); 18 C.F.R. § 292.207 (2020).

[4] *See* 16 U.S.C. § 824a-3(f). State regulatory authority and State commission are defined in 16 U.S.C. § 796(15), (21).

FERC's regulations governing the utility obligation to purchase from QFs are set forth in 18 C.F.R. § 292.303 (1980). Section 210(f) of PURPA delegates to States the authority to establish rules, including rates, for these purchases. 16 U.S.C. § 824a-3(f); 18 C.F.R. §§ 292.101(b)(1), 292.304 (2020). The rates paid to QFs must be just and reasonable, in the public interest, and may not exceed the *utility's* incremental cost of alternative electric energy, or "avoided" cost. *See* 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1), (b)(2), (e) (2020). Avoided cost is the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (2020). PURPA was never intended to "subsidize" QFs or assure that a QF would never operate at a loss. *Swecker v. Midland Power Co.*, 807 F.3d 883, 884 (8th Cir. 2015) (cleaned up); *see also Exelon Wind 1 L.L.C. v. Nelson*, 766 F.3d 380, 384 (5th Cir. 2014) ("While Congress sought to promote energy generation by Qualifying Facilities, it did not intend to do so at the expense of the American consumer."). The focus of avoided-cost rates is on costs that the *utility* avoids in purchasing from the QF.

PURPA does not require that every CPUC procurement program involving renewable energy be implemented pursuant to PURPA. Even under PURPA, States have considerable discretion over the manner in which FERC's regulations are implemented. *FERC v. Mississippi*, 465 U.S. at 750; *see also Cal. Pub. Utils. Comm'n*, 133 FERC ¶ 61,059, at ¶ 24 (Oct. 21, 2010).

FERC's regulations afford States "latitude" in implementing PURPA. *FERC v. Mississippi*, 456 U.S. at 751; *see also Indep. Energy Producers Ass'n v. Cal. Pub. Utils. Comm'n,* 36 F. 3d 848, 856 (9th Cir. 1994) ("PURPA delegates to the states broad authority to implement section 210."). States are not required to adopt a specific rate or rate scheme, and may comply through the issuance of regulations, by resolving disputes on a case-by-case basis, or any other means reasonably designed

to give effect to FERC's regulations. *FERC v. Mississippi,* 456 U.S. at 749-51. The factors to be considered by State commissions, "to the extent practicable," in setting avoided cost rates are: (1) utility system cost data; (2) the terms of any contract, including contract duration; (3) the availability of power from a QF during the system and seasonal periods; (4) the relationship of the availability of power from the QF to the ability of the utility to avoid costs; and (5) the costs or savings resulting from variations in line losses. *Id.*; 18 C.F.R. § 292.304(e) (2020). Finally, the utility purchase obligation has never been absolute, as a utility need not pay for electricity that exceeds what is needed to serve its customers. *See City of Ketchikan, Alaska,* 94 FERC ¶ 61,293, 2001 WL 275023, at *6 (2001) ("the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load").

PURPA has a specific enforcement scheme. *Indus. Cogenerators v. FERC,* 47 F.3d 1231, 1234 (D.C. Cir. 1995); *see* 16 U.S.C. § 824a-3(g), (h). Section 210(g) of PURPA authorizes "as applied" challenges in state court to enforce requirements established by a State regulatory authority under PURPA. 16 U.S.C. § 824a-3(g). Section 210(h) of PURPA authorizes petitions by an electric utility or a QF to enforce the implementation of FERC's rules by a State regulatory authority ("implementation" challenges). 16 U.S.C. § 824a-3(h)(2)(B). If FERC does not initiate an enforcement action within sixty (60) days of filing the section 210(h) petition, the petitioner may bring an action in district court against the State regulatory authority to enforce compliance. *Id.* The court may only "issue such injunctive or other relief as may be appropriate." *Id.* PURPA does not authorize damages or other equitable relief. *CARE v. CPUC*, 922 F.3d at 941-943 (including that a § 1983 claim cannot be brought for PURPA violations because PURPA has a comprehensive remedial scheme that provides fewer remedies than § 1983); *see also* Order Mot. Dismiss, 6-9, March 14, 2012 (ECF 82); *aff'd Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. 571 (9th Cir. 2015) *rehg. denied*.

C. California's Renewables Portfolio Standard Program

California's Renewables Portfolio Standard (RPS) Program[5] generally requires electric utilities to procure specified quantities of "renewable" electricity, meaning it was generated using a technology specified in California Public Resources Code section 25741. *See* Pub. Util. Code §§ 399.11(a) & (b), 399.12(e), (h) & (j), and 399.25. More specifically, electric utilities are required to procure "renewable energy credits" (RECs) from facilities certified as eligible by the California Energy Commission. *See* Cal. Pub. Util. Code § 399.12(h). A REC represents "a certificate of proof associated with the generation of electricity from an eligible renewable energy resource, issued through the accounting system established by the [California] Energy Commission pursuant to Section 399.25, that one unit of electricity was generated and delivered by an eligible renewable energy resource." *Id.*

Therefore, not every renewable energy resource is a facility that can help a utility meets its RPS obligations. Rather, only generators that have been certified by the California Energy Commission as meeting all statutory and regulatory criteria can produce RECs that may then be procured by a utility to meet its RPS obligation.

Additionally, the Ninth Circuit observed that "[a]s CARE acknowledged in its brief, RECs are not covered under PURPA; rather, they are considered state programs and do not factor into the avoided cost determination." *CARE v. CPUC*, 922 F.3d at 940; *see also Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub. Util. Control,* 531 F.3d 183, 189-90 (2nd Cir. 2008) (RECs are a matter of state law, not governed by PURPA).

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[5] California Public Utilities Code, Division 1, Part 1, Chapter 2.3, Article 16 (§§ 399.11 through 399.33).

D. Allegations of the Sixth Complaint

Plaintiffs are the nonprofit corporation CARE and two individually named members of CARE. 6AC ¶ 4. The introduction to the Sixth Complaint states that CARE, as well as unnamed "California based small scale energy companies" and two individuals, seek various relief and damages from the CPUC and its official members who allegedly have acted "to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices." *Id.* at 2.

The Sixth Complaint is substantially similar to the Fifth Complaint and consists of assertions fashioned from legal conclusions, some of which are incorrect, and others merely parrot or distort the adjudicated conclusions from the most recent Ninth Circuit opinion. Plaintiffs generally claim that a utility is "required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources" and that the CPUC may "just as permissibly aggregate all sources that could satisfy its RPS obligation." *Id.* ¶¶ 21, 30. Plaintiffs admit that "[i]f a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." *Id.* ¶ 31. Additionally, Plaintiffs state that the CPUC and utilities are "generally indistinguishable" so as to "render the actions of one the actions of the other." *Id.* ¶ 44.

The Sixth Complaint alleges two claims. The first claim is for the enforcement of PURPA, where Plaintiffs appear to claim that the two individual CARE members' rooftop solar installations that "have operated at a loss" under the NEM program offer "guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forego capital investments, which would thereby entitle Plaintiffs to avoided capacity costs." *Id.* ¶¶ 35-38, 52, 54-57. Plaintiffs write that the Defendants "have generally failed to perform regulatory functions" and state

incomprehensibly that the Plaintiffs have been "prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs." *Id.* ¶ 60-61. Plaintiffs seek monetary damages, in an amount to be determined, for the CPUC's alleged failure to enforce PURPA. *Id.* ¶¶ 67, 68, 70. The second claim is for equitable, injunctive, and declaratory relief. *Id.* ¶¶ 71-76.

III. PROCEDURAL HISTORY

In 2011, CARE and Solutions for Utilities Inc. (SFUI) brought suit against the CPUC and Southern California Edison Company alleging violations of PURPA and 42 U.S.C. § 1983. Compl. June 10, 2011 (ECF 1). The Court dismissed the § 1983 claims and CARE's PURPA claims and entered summary judgment for Defendants, finding that SFUI did not have standing to bring its PURPA claim. Order Granting Summ. J., January 3, 2013 (ECF 147). Only CARE appealed. The Ninth Circuit's 2015 Memorandum Opinion determined with finality that the Court correctly dismissed the following claims: CARE's § 1983 claim for First Amendment violations; CARE's claim for fees under the CPUC's intervenor compensation program; CARE's § 1983 claim for PURPA violations because "Congress did not intend to permit a PURPA claim to be brought under § 1983," and CARE's takings claims. *Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. at 571-73. The Ninth Circuit did, however, determine that the Court erred in dismissing CARE's PURPA enforcement claims because CARE had fulfilled the requirement to exhaust its administrative remedies. *Id.* at 572.

On the first remand, and in its Fifth Complaint, CARE alleged generally that the CPUC regulations and orders do not provide for PURPA-compliant interconnection and pricing and enable utilities to avoid offering PURPA-compliant contracts to QFs. Fifth Am. 1st Supplemental Compl., ¶¶ 17-18 (5AC, ECF 185). In its ensuing motion for summary judgment, the CPUC defended its implementation of PURPA by describing its PURPA programs including those that CARE raised in its petitions at FERC: the 2010 Qualifying Facility and Combined Heat and Power

Program Settlement (QF Settlement) with its standard offer contract for QFs with capacity of 20 megawatts or less with a Short-Run Avoided Cost rate using a Market Index Formula; the Renewable Market Adjusting Tariff (Re-MAT) Program; the NEM program's net surplus compensation rate for sales of electricity that exceed the customer's consumption of electricity where the solar generator is installed; and the AB 1613 Combined Heat and Power Facilities (CHP) program. Def.'s Mot. Summ. J. (ECF 113).

The Court's order on summary judgment meticulously combed Plaintiffs' complaint and responded to every conceivable claim and argument. Order Granting Summ. J. at 10 (ECF 217). Giving Plaintiffs every benefit of the doubt, the Court extracted,

> As far as the Court can ascertain from CARE Plaintiffs' pleadings and papers, their core allegation is that none of the programs CPUC has authorized require PG&E or its fellow IOUs to purchase electric energy from small power production facilities—such as those operated by Boyd and Sarvey—at the IOUs' "full avoided cost," as the term is defined under federal law.

And:

> In their opposition papers, CARE Plaintiffs for the first time argue that the CPUC-approved NEM net surplus compensation rate ("NSCR") violates PURPA because it (1) does not provide for a separate "capacity payment;" (2) does not reflect long-run avoided costs ("LRAC"); and (3) is not based only on renewable generators.

Id. at 10. The Court determined that CARE Plaintiffs failed to identify any violations of PURPA or its implementing regulations and entered summary judgment for CPUC Defendants on the remaining causes of action. *Id.* at 20. This Order was the subject of CARE's second appeal to the Ninth Circuit.

The Ninth Circuit similarly scrutinized the CPUC's implementation of PURPA, including its QF Settlement Standard Offer Contract, the NEM program with net surplus compensation, and the Re-MAT and AB 1613 CHP programs. *CARE v. CPUC,* 922 F.3d at 933-36 (quoting from Order Granting Summ. J.). On April 24, 2019, the Ninth Circuit upheld the Court's summary judgment order in all respects save one: whether the avoided-cost prices for RPS facilities that a utility actually uses to meet a state RPS are based on prices from resources for which utilities receive RPS credit. *CARE v. CPUC*, 922 F.3d at 936-38. The Ninth Circuit considered CARE's argument that the CPUC "impermissibly base[s] avoided cost on the cost of natural gas benchmark, rather than a renewables benchmark." *Id.* at 936. The Ninth Circuit did not hold that the avoided cost for any renewable resource is to be based on renewable resources. Rather, the Ninth Circuit held that "where a state has an RPS and the utility is using a QF's energy to meet the RPS … the avoided cost must be based on the sources that the utility could rely upon to meet the RPS." *Id.* at 937. The Ninth Circuit was explicit in its narrow holding and underscored the threshold requirement that a QF actually helps a utility in meeting the utility's RPS obligations: "And if a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." *Id.* at 938. The Ninth Circuit remanded this case back to the Court on this single issue.

With the exception of this single matter that was remanded, the Ninth Circuit found no fault in the CPUC's implementation of PURPA in all other alleged respects. The Ninth Circuit upheld the Court's order on summary judgment that NEM customers such as Plaintiffs do not provide capacity to the utility and thus are not entitled to compensation for capacity under PURPA, that QFs are not, under PURPA, entitled to compensation for RECs, that CARE Plaintiffs are in fact interconnected to the utility, and held *for the second time* that CARE is not entitled to equitable damages and attorney's fees under PURPA. *Id.* at 938, 940-41.

IV. THE COURT SHOULD DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

A. Standard of Review under FRCP 12(b)(1)

As federal courts have limited jurisdiction, this Court is obliged to dismiss this case "for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000); *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).

B. Plaintiffs Lack Article III Standing

The Plaintiffs lack Article III standing because the Sixth Complaint fails to demonstrate a concrete injury caused by the CPUC that is likely to be remedied by the requested relief. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (a Plaintiff must allege suffering an actual, concrete, and particularized injury-in-fact, that the defendant caused the injury, and that judicial intervention is likely to redress the injury). Plaintiffs fail to meet the constitutional requirement for standing on remand.[6]

First, as discussed above, the remand considers only the relevance of the California RPS Program to PURPA. But the Plaintiffs' Sixth Complaint does not even allege that the electrical energy produced by Plaintiffs has ever been used by a utility to meet its RPS obligation or that any of their resources actually participate in the California RPS Program. *See* Cal. Pub. Util. Code §§ 399.12(e), (h), and (i) (defining foundational terms for the California RPS Program), and § 399.25 (requiring the California Energy Commission to certify facilities producing

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[6] Note that this Court did not rule in response to Defendants' consistently raised arguments that Plaintiffs lack standing; rather, the Court expressly avoided the issue at summary judgment and disposed of the case in the Defendants' favor on other grounds. Order Granting Summ. J., 20 (ECF 217).

renewable energy claimed for RPS purposes as eligible resources). Plaintiffs' Sixth Complaint implies that the existence of the California RPS must change the calculation of avoided-cost rates for non-RPS QFs, 6AC at ¶¶ 56, 57, & 62, when in fact, and Plaintiffs admit, the existence of an RPS changes the calculation of avoided-cost rates only for QFs that are RPS-certified and where the utility uses that QF's energy to meet its RPS requirements. *See* 6AC ¶ 31 ("If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources."). In sum, Plaintiffs have not shown they have any injury or interest whatsoever in the sole issue for which this case was remanded.

In addition, only declaratory or prospective injunctive relief is available to the Plaintiffs.[7] "To satisfy the redressability requirement of Article III standing, the plaintiff must show that 'it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."' *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 (2d Cir. 2017) (citing *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs., Inc.*, 528 U.S. 167, 180–81 (2000)). The individual Plaintiffs' desire to operate their rooftop solar facilities for more money and not "at a loss" is not a particularized injury caused by the CPUC that can be redressed by this lawsuit. 6AC ¶ 57.

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[7] CPUC Commissioners have absolute immunity in suits for damages against them in their official capacity. *See Supreme Court of Va. v. Consumers Union,* 446 U.S. 719, 731-34, (1980) (rulemaking is a legislative function accorded absolute immunity), *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (a claim of an unworthy motive or intent does not destroy the immunity.) The Eleventh Amendment bars CARE's claim for equitable relief and money damages leaving CARE the possibility of only prospective injunctive relief under the *Ex Parte Young* exception to the Eleventh Amendment. *CARE v.* CPUC, 922 F.3d at 941. It is the law of the case that PURPA does not authorize damages or other equitable relief. *Id.* at 941-943 (including that a § 1983 claim cannot be brought for PURPA violations because PURPA has a comprehensive remedial scheme that provides fewer remedies than § 1983); *see also* Order Mot. Dismiss, 6-9, March 14, 2012, *aff'd Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. 571.

C. CARE Lacks Statutory Standing

A claim must be dismissed where a party lacks statutory standing. *See Vaughn v. Bay Envt'l. Mgmt., Inc.*, 567 F.3d 1021, 1024 (9th Cir. 2009). CARE lacks statutory standing under PURPA, as the federal statute limits standing expressly to electric utilities, qualifying cogenerators, and qualifying small power producers. *See* 16 U.S.C. § 824a-3(h)(2)(B). CARE is not alleged to be a QF. Instead, the Sixth Complaint alleges that CARE is "an organization representing electric utilities which are Qualified Facilities." 6AC ¶ 52. It is irrelevant that any members of CARE self-certified as QFs because that does not confer standing on CARE, a separate corporate entity. *See Sausalito v. O'Neill*, 383 F.3d 1186, 1199-1200 (9th Cir. 2004) ("would-be plaintiffs" have no standing if not conferred by statute).

D. This Court Lacks Jurisdiction to Hear Any Claim as to How PURPA Is Applied to CARE or Its Members.

This court lacks jurisdiction over complaints that the Plaintiffs have been materially harmed and damaged by California's application of PURPA to the Plaintiffs. PURPA has a specific enforcement scheme. *Indus. Cogenerators v. FERC*, 47 F.3d at 1234; *see* 16 U.S.C. § 824a-3(g) and (h). Federal courts only have subject matter jurisdiction to hear claims that a state is not implementing PURPA because PURPA delegates to States the authority to establish rules, including rates, for purchases made under PURPA. 16 U.S.C. § 824a-3(f) and (h); 18 C.F.R. § 292.304 (2020). However, in the Sixth Complaint, the Plaintiffs allege an as-applied claim, namely that [P.G.& E.] does not pay the Plaintiffs what the Plaintiffs would like. 6AC ¶¶ 53-58. The Ninth Circuit in fact forewarned that such arguments "veer[] into the category of an as-applied challenge that can only be brought in state court." *CARE v. CPUC*, 922 F.3d at 939, n. 4 (cleaned up). As the Ninth Circuit affirmed, the CPUC is implementing PURPA. *Id.* at 942 (affirming as specified Order Granting Summ. J). To the extent Plaintiffs have a claim about the

CPUC's rules implementing PURPA as applied to the Plaintiffs, Plaintiffs could initiate a complaint at the CPUC or challenge CPUC decisions in state court. 16 U.S.C. § 824a–3(g)(1); *see* Order Granting Summ. J., 19-20 (ECF 217) (finding Plaintiffs' arguments about being denied contracts as not properly before the federal district court); *see also Portland Gen. Elect. Co. v. FERC*, 854 F.3d 692, 697 (D.C. Cir. 2017) (explaining that PURPA relies on state adjudications for enforcing PURPA rights).

The California RPS Program—central to the issue on remand—is a matter of state, not federal jurisdiction. *See New York v. FERC*, 535 U.S. 1, 24 (2002) (state jurisdiction over utility resource portfolios); *Wheelabrator Lisbon, Inc. v. Connecticut Dep't of Pub.Util. Control*, 531 F.3d at 189 (state law controls credits that track compliance with RPS obligations, not PURPA).

Thus, to the extent Plaintiffs' bald conclusions state any claim (and as explained below they do not), such a claim is only proper in state court pursuant to 16 U.S.C. § 824a-3(g).

V. PLAINTIFFS' SIXTH COMPLAINT SHOULD BE DISMISSED WITHOUT LEAVE TO AMEND FOR FAILURE TO STATE A CLAIM

A. Standard of Review under FRCP 12(b)(6)

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order to give the defendant "fair notice of what the… claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While a complaint need not contain detailed factual allegations, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (cleaned up). The allegations in the complaint "must be enough to raise a right to relief above the speculative level," and allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 555 & 570;

Ashcroft v. Iqbal, 556 U.S. 662 (2009). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 663.

B. The Sixth Complaint Fails to Meet the Pleading Standard of Rule 8.

The Sixth Complaint lacks a "cognizable legal theory" or "sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). As noted by the Court in examining prior complaints, this complaint continues to contain "highly confusing allegations" without citation about various supposed requirements of PURPA and purported failures of the CPUC. 6AC ¶¶ 17-39 & 56-64; Order Den. Mot. Leave File 4th Am. Compl. 1st Suppl. Compl., 5-6, March 16, 2016 (ECF 184). The Sixth Complaint does not identify any specific federal statutory provision or implementing regulation the CPUC's programs allegedly violate.[8]

In weighing this Motion, this Court cannot "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide*, 328 F.3d 1136, 1139 (9th Cir. 2003). To allow conclusory resuscitations to stand as a proper pleading providing the grounds for entitlement to relief would unfairly require defendants to continue to be subjected to the expense of discovery and litigation. This Sixth Complaint does not contain

[8] Instead, Plaintiffs broadly and conclusively allege that CPUC Defendants "have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations...." and make unsupported and sweeping conclusions that the CPUC has "harmed the public interest by undermining the public policy purposes of PURPA" and "conspired and colluded" to cause some unexplained harm contrary to Congressional wishes. 6AC ¶¶ 61, 66, and 69.

sufficient underlying facts so as "to enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).[9]

C. The Sixth Complaint Impermissibly Seeks Reconsideration of Issues Already Decided in This Case.

Contrary to the law of the case, the Plaintiffs' Sixth Complaint fails to state a claim because it seeks reconsideration of matters already decided in this single, continuing lawsuit. Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Plainly this Court has no jurisdiction to review an appellate court's decision. *Fine v. Bellefonte Underwriters Ins. Co.*, 758 F.2d 50, 52 (2d Cir. 1985). Any claims aside from the specific issue on remand are barred by the law of this case. *See Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984) ("[o]n remand, a trial court cannot consider issues decided explicitly or by necessary implication"). Upon remand of the case for further proceedings after decision by an appellate court, the trial court must proceed in accordance with mandate and the law of case as established on appeal. *United States v. Van Pelt*, 938 F.Supp. 697 (D.Kan. 1996).

Plaintiffs' Sixth Complaint is wholly without merit, as it is substantially similar to its Fifth Complaint, merely reiterating and repackaging the same assertions explicitly previously rejected by this Court and the Ninth Circuit. This Court is "not required to accept as true conclusory allegations which are

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[9] Plaintiffs' counsel indicated during the meet and confer process preceding the filing of this Motion that Plaintiffs intend to argue that some unspecified new state implementation of PURPA is now inconsistent with federal law. Not only does the complaint not give Defendants fair notice of such claims, PURPA requires a petition to enforce with FERC before challenging state implementation of PURPA in court. 16 USC § 824a-3(h)(2).

contradicted by documents referred to in the complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

The law of this case clearly contradicts the broad allegations that the CPUC is generally violating the purposes or provisions of PURPA. In fact, this Court dismissed all claims in Plaintiffs Fifth Complaint, finding that "CARE Plaintiffs have failed to allege a violation of PURPA or its implementing regulations" in granting summary judgment to the defendants after an analysis of California's PURPA implementation. Order Granting Summ. J., 20 (ECF 217). The Ninth Circuit affirmed this decision in all respects, reversing and remanding it only on "whether an RPS changed the calculation of avoided cost." *CARE v. CPUC*, 922 F.3d at 942.

This Court should not entertain relitigating the Plaintiffs assertions previously rejected by this Court and the Ninth Circuit. For example, despite the Ninth Circuit clearly stating "[w]e do not hold that the avoided cost must be calculated for each individual *type* of energy," the Plaintiffs allege in paragraph 20 of the Sixth Complaint that avoided cost must be calculated for each type of generating resource, the very position the Ninth Circuit rejected. *CARE v. CPUC*, 922 F.3d at 937 (emphasis in original). Similarly, the Sixth Complaint mentions capacity payments numerous times (*see* paragraphs 18, 26, 34-38, 62, and 64), but the Ninth Circuit disposed of the Plaintiffs' same capacity payment arguments in finding that a QF is not entitled to capacity costs unless it actually displaced the utility's need to construct or purchase generation, and such is not the case under the NEM program. *Id.* at 938-39. This court should not entertain the capacity allegation in paragraph 33 of the Sixth Complaint as it remains "perfunctory" and fails to bring a challenge to the specified programs within the scope of the Ninth Circuit's instruction. *CARE v. CPUC*, 922 F.3d at 939-40. Further, the Ninth Circuit affirmed that the Plaintiffs NEM resources are not eligible for capacity payments under federal law and that

California does offer a PURPA program that includes capacity costs, as CARE previously acknowledged. *Id.* at 939.

The law of the case doctrine is founded upon the sound public policy that litigation must come to an end because no court could "efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Coleman v. Calderon*, 210 F.3d 1047, 1052 (9th Cir. 2000); *see also Disimone v. Browner*, 121 F.3d 1262 (9th Cir. 1997) ("No litigant deserves an opportunity to go over the same ground twice") (cleaned up). This Court should not reconsider questions previously decided in this proceeding by allowing Plaintiffs to reassert the same arguments and to subject the defendants and the courts to the burdens of this decade-long litigation.[10]

D. Plaintiffs Fail to State a Claim Within the Scope of Remand.

The issues specifically remanded from the Ninth Circuit were "whether utilities are fulfilling any of their RPS obligations through the challenged CPUC programs" and "[t]o the extent, however, that CARE challenges either the Re-MAT or CHP Programs] for basing capacity costs on a new natural gas facility, rather than renewable energy facilities, the district court should consider such a challenge on

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[10] To the extent Plaintiffs base their renewed claim for damages on *Tanzin v. Tanvir,* 141 S. Ct. 486, 208 L. Ed. 2d 295 (2020), which postdated the Ninth Circuit's opinion, all the cases that have construed its effect have limited its holding to the context of claims brought under the Religious Freedom Restoration Act. *E.g.*, *McDaniel v. Diaz*, No. 120CV00856NONESAB, 2021 WL 147125, at *14 (E.D. Cal. Jan. 15, 2021), report and recommendation adopted, No. 120CV00856NONESAB, 2021 WL 806346 (E.D. Cal. Mar. 3, 2021) ("The Court is inclined to agree with CDCR Defendants the case was specific to the Religious Freedom Restoration Act and the right to obtain damages for a violation of that Act[.]").

remand." *CARE v. CPUC*, 922 F.3d at 938 and 940. Plaintiffs fail to state facts and law that would support either of these potential claims in their Sixth Complaint.

The Sixth Complaint's claim about the enforcement of PURPA is devoid of any mention of utilities fulfilling an RPS obligation through a California PURPA program. Nothing in the Sixth Complaint pleads facts that give rise to a reasonable inference that the Defendants violate federal law on the specific issue of "whether an RPS changed the calculation of avoided cost." *Id.* at 942. Further the Sixth Complaint is silent as to whether any CARE member's small rooftop solar generating resources have ever aided a utility in meeting its RPS obligation.[11] Indeed, as Plaintiffs correctly note, "[i]f a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." 6AC ¶ 31.

E. Additional Pleading by the Plaintiffs Is Futile and Will Not Cure the Deficiencies in the Sixth Complaint.

This case would be further delayed and drag on at significant burden to the CPUC if the Plaintiffs were allowed to further amend or supplement their pleading, particularly when prior pleadings failed to cure deficiencies. *See*, *e.g.*, *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (liberal amendment standard does not justify amendments that prejudice the opposing party, create undue delay, are sought in bad faith, or constitute an exercise in futility). As this case already had a summary judgment ruling in the CPUC's favor and multiple periods of discovery, permitting any amendment or supplementation of claims is not only futile and long delayed but unduly prejudicial. *See Williams v. California*, 764

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[11] Sixth Complaint paragraph 55 alleges that Plaintiffs Boyd and Sarvey offer "guaranteed energy supplies from renewable energy resources" but this falls far short of alleging that any Plaintiff provides eligible renewable energy resources to a California Utility for RPS compliance within the meaning of the California RPS program, Article 16 (commencing with § 399.11) of the Cal. Pub. Util. Code. Only certified and eligible generation counts toward a utility's RPS obligation.

F.3d 1002, 1027 (9th Cir. 2014) (denying leave to amend where Plaintiffs failed in only two chances to sufficiently plead claims); *see also Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980) (a party may not respond to an adverse ruling by claiming that another theory not previously advanced provides possible grounds for relief and should be considered).

With the Sixth Complaint the Plaintiffs had an opportunity to clarify how their claims relate to the one issue for which this case was remanded, specifically the proper calculation of avoided cost of generation used for RPS purposes. Plaintiffs' claims do not in fact relate to the issue on remand. Therefore, Plaintiffs' claim to enforce PURPA should be dismissed without leave to amend.[12]

VI. ALTERNATIVELY, THIS COURT SHOULD STRIKE "AND SECOND SUPPLEMENTAL" FROM CAPTION OF SIXTH COMPLAINT

Should this Court decline to grant Defendant's Motion to Dismiss, Defendants move to strike "and Second Supplemental" from the title of the Sixth Complaint, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, because it is immaterial and mischaracterizes the pleading. Federal Rule of Civil Procedure 15(d) describes a "supplemental pleading" as "setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented" (emphasis added); *see e.g. Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) ("Rule 15(d) provides a mechanism for parties to file additional causes of action based on facts that didn't exist when the original complaint was filed.").

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[12] Indeed, in the Local Rule 7-3 meet and confer process preceding the filing of this Motion, which took place on July 2, 2021, Plaintiffs' attorney was unable to identify how Plaintiffs might amend if given leave, indicating that it would depend on the nature of the Court's order.

The Sixth Complaint identifies no transaction, occurrence, or event that happened after April 14, 2016, the date the Fifth Complaint was filed, nor does it add a new cause of action based on facts that did not exist when the prior complaint was filed. At best, the Sixth Complaint restates Plaintiffs' existing claims and legal arguments, expands on the request for relief by adding a request for damages (which as discussed above is improper), and substitutes the names of the current CPUC Commissioners as Defendants for those that were in office when the Fifth Complaint was filed.[13] None of this constitutes a "supplement" to the Fifth Complaint. Because the Sixth Complaint does not supplement Plaintiffs' claims, and Defendants would object to any supplement, the Defendants request that the reference to supplementation be stricken from the title of the Sixth Complaint.

VII. CONCLUSION

For all the reasons above, the Sixth Complaint and its claims should be dismissed consistent with Federal Rule of Civil Procedure 41(b) and, if pursuant to

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[13] Over the course of this protracted action, the identities of the CPUC commissioners have changed multiple times, but Federal Rule of Civil Procedure 25(d) takes care of that issue by automatic substitution of parties.

Rule 12(b)(6), without leave to amend. In the alternative, the words "and Second Supplemental" should be stricken from the caption of the Sixth Complaint.

Dated: July 9, 2021

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California Members,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

OPPOSITION TO MOTION TO DISMISS SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES

Date: October 1, 2021
Time: 9:00 a.m.

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INTRODUCTION

Following the second remand in this action, *see CAlifornians for Renewable Energy ["CARE"] v. California Public Utilities Commission,* 922 F.3d 929 (9th Cir. 2019), with leave of Court pursuant to Fed.R,Cv.P. 15, Plaintiffs filed their Sixth Amended and Second Supplemental Complaint.

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"], California based small scale energy companies, and two qualified facility ["QF"] members of CARE, are seeking equitable relief and damages from Defendants, California Public Utilities Commission ["CPUC"] a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices, to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"]; and for damages incurred as a consequence of prior failures to enforce PURPA.

I.
THE ALLEGATIONS IN PLAINTIFFS' COMPLAINT MUST BE DEEMED TRUE, VIEWED TOGETHER, AND LIBERALLY CONSTRUED IN A LIGHT MOST FAVORABLE TO PLAINTIFFS

All material allegations of fact in Plaintiff's Complaint ["TAC"] at pages ["PP"], and plausible inferences therefrom, are presumed to be true, and must be construed in a light most favorable to plaintiff, including matters to which judicial notice is proper, *see Daniels-Hall v. National Education Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010), no matter how improbable – *i.e.* the Court cannot elect to disbelieve them,

see Ashcroft v. Iqbal, 562 U.S. 662, 679 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Conclusions are appropriate, if "supported by factual allegations." *Ashcroft*, 562 U.S. at 679. No particularity is required when "allegations describe non-fraudulent conduct." *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp, U.S.A.,* 317 F.3d 1097, 1104 (9th Cir. 2003). Federal pleading is notice pleading, requiring "sufficient factual matter, accepted as true, to state a claim of relief." *Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012).

> "[A Court] may take judicial notice of undisputed matters of public record, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.2001), including documents on file in federal or state courts. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n. 2 (9th Cir.2002)."

Harris, 682 F.3d at 1132.

Even if the allegations are deficient, "dismissal with prejudice and without leave to amend is not appropriate" – *i.e.* the entire action "should not be [dismissed] unless it is clear that the complaint could not be saved by any amendment,"*Harris*, 682 F.3d at 1132; *Eminence Capital, LLC v. Aspen, Inc.*, 315 F.3d 1048, 1052 (9th Cir. 2003); *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Kelson v. City of Springfield*, 776 F.2d 651, 656 (9th Cir. 1985); or amendment would be futile given conclusions the Court reaches with all facts presumed in favor of plaintiff, *see F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1313-14, 1317-18 (9th Cir. 1989).

OBJECTION: Plaintiff objects to Defendants' reliance on matters extraneous to the TAC to urge its contentions in the pending Motions to Dismiss, in particular declarations filed therewith, which should be stricken in their entirety. Plaintiff also objects to consideration of the truth of the contents of judicially noticed documents.

Ordinarily, an order granting a motion to dismiss a complaint pursuant to a motion to dismiss under *Fed.R.Civ.P.* 12(b)(6) carries with it a right to amend under *Fed.R.Civ.P.* 15(a), unless the order unmistakably indicates that no possible

amendment could save the complaint, either by so stating or by submission of written findings which unmistakably establish same. *See State of California v. Harvier*, 700 F.2d 1217, 1218-19 (9th Cir. 1983). Plaintiff is entitled to at least one opportunity to correct defects for which he has received clear notice from the Court. *See Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 732, 738 (9th Cir. 1987); *Vess,* 317 F.3d at 1107. *Accord, Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983) (denial of leave to amend only based on undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant).

The Ninth Circuit Ruling clearly identified certain claims of Plaintiffs in the FAC which are now precluded from further claims on remand. In the current pleading, the SAC, Plaintiff has amended the prior pleading to leave only the remaining avoided cost claims, as modified to reflect the Ninth Circuit Ruling, except to the extent that changes in the law permit assertion of claims now legally permitted.

II.
GENERAL ELEMENTS OF PLAINTIFFS' CLAIMS

The elements of a private claim under 16 U.S.C. §824, *et seq*. are (1) failure of a state utilities commission to perform its implementation duty, and (2) failure of FERC to petition in district court for enforcement after sixty days following petition by a qualified facility. *See FERC v. Mississippi*, 456 U.S. 742, 751 (1982). The Opinion provides an excellent discussion of the statutory background of PURPA. *See CARE,* 922 F.3d at 932-33.

III.
THE FACTS WHICH MUST BE DEEMED TRUE

A. JURISDICTION AND GENERAL MATTERS

Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor.

References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE. [SAC.P.4]. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]: Marybel Batjer [August 16, 2019 (Commissioner) and December 30, 2020 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]: Martha Guzman Aceves [January 28, 2016 - present]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; and Darcie L. Houck [February 9, 2021 - present]. [SAC.P.5].

The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution. [SAC.P.6]. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development. [SAC.P.7].

In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power

production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"] which are thereby rendered eligible for PURPA compliant contracts and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. [SAC.P.9]. In so doing, FERC has issued interpretive rulings of PURPA provisions and its aforementioned regulations. [SAC.P.9].

PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. [SAC.P.10]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold. [SAC.P.10].

PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development. [SAC.P.11]. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations

adopted in connection therewith. [SAC.P.12]. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small [SAC.P.12]. Facilities to be paid, at their choice, for "available capacity" or "energy" delivered. [SAC.P.12].

PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards. [SAC.P.13]. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so. [SAC.P.14].

PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer." [SAC.P.15]. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority. [SAC.P.16].

Defendant CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. [SAC.P.17]. However, in regards to pricing, and other mandated contract terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs. [SAC.P.17].

CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources. [SAC.P.18]. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating avoided cost for each type of power ("multi-tiered pricing"). [SAC.P.19]. *See CARE*, 922 F.3d at 936.

If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources. [SAC.P.20]. *See CARE*, 922 F.3d at 936. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. [SAC.P.21]. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory. [SAC.P.21]. *See CARE*, 922 F.3d at 937.

While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to utility whose avoided costs are being determined. [SAC.P.22]. *See CARE*, 922 F.3d at 936-37. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10% of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would

not be relevant to determining avoided costs for that segment of the utility's energy needs. [SAC.P.23]. *See CARE*, 922 F.3d at 936-38.

California has an RPS, which necessarily changes the avoided cost calculation. [SAC.P.24]. *See CARE*, 922 F.3d at 937-38. When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. [SAC.P.25]. Thus, where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS. [SAC.P.25]. *See CARE*, 922 F.3d at 937-38.

If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost; but "if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity," then the avoided cost of the new capacity should be used. [SAC.P.26]. *See CARE*, 922 F.3d at 938-39. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers. [SAC.P.27]. *See CARE*, 922 F.3d at 937-38.

Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from. [SAC.P.28]. *See CARE*, 922 F.3d at 936-38. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS. [SAC.P.29]. *See CARE*, 922 F.3d at 936-38.

If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so; but it may just as permissibly aggregate all sources that could satisfy its RPS obligations. [SAC.P.30]. *See CARE*, 922 F.3d at 936-38. If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources. [SAC.P.31]. *See CARE*, 922 F.3d at 937-38.

When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA. [SAC.P.32]. *See CARE*, 922 F.3d at 936-38.

In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, *i.e.* there is no component for actual avoided capacity costs. [SAC.P.33]. *See CARE*, 922 F.3d at 939-40. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS. [SAC.P.34]. *See CARE*, 922 F.3d at 939-40.

Under the CPUC approved NEM Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.35]. *See CARE*, 922 F.3d at 939. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.36]. *See CARE*, 922 F.3d at 939.

CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.37]. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable

energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.38].

By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a standard offer contract based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is necessarily lower than what the legally mandated avoided cost would be. [SAC.P.39]. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities. [SAC.P.39].

The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action. [SAC.P.40]. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards. [SAC.P.41]. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so. [SAC.P.42].

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CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions [SAC.P.43], and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations [SAC.P.43]. CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other. [SAC.P.44]. The IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA. [SAC.P.45].

CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so; were each an agent of the other Defendant; conspired to do the acts and wrongs mentioned herein and an act in furtherance thereof has been committed; were acting in concert with each other and others not named as parties herein; authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant; and all of the conduct mentioned herein was intentional and intended to accomplish each and all of the unlawful purposes described herein. [SAC.PP.46-51].

B. FACTS ALLEGED SPECIFIC TO CLAIM NO. 1: CLAIM FOR ENFORCEMENT OF PURPA [16 U.S.C. §824a-3]

Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities [‘QF”] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter’s FERC promulgated regulations. [SAC.P.52]. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs Boyd and Sarvey were certified with FERC as QF’s on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [SAC.P.52]. The SAC, like previous complaints herein, alleges that two (2) other members of CARE (Mary Hoffman and David Hoffman*) are also jointly certified as a QF [SAC.P.52]; and Plaintiffs can now amend to make that six (6) members are QF’s. In the first appellate opinion herein, the Court reversed and remanded herein after determining that these Plaintiffs – expressly citing and including CARE as a representative of QF’s – had in fact adequately met FERC exhaustion requirements. Moreover, Plaintiffs can allege that CARE’s company domicile is at the address of Plaintiff Michael Boyd, and Boyd’s QF certification includes CARE.

CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain standard offer [“SO”] contracts or bilateral contracts from P.G. & E, by seeking contracts and/or payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. [SAC.P.53]. CARE Plaintiffs have been unable to obtain any contracts or obtain payment in connection therewith, or otherwise, because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC

implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same[1]. [SAC.P.53].

In seeking the aforementioned contracts, CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs. [SAC.PP.54-55]. PURPA non-compliant SO Contracts and Bilateral Contracts from IOU's [utilities like P.G. & E] do not pay – and have not paid CARE Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy. [SAC.P.56].

CARE Plaintiffs have been refused either form of PURPA compliant contract, and get paid northing for their guaranteed surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. [SAC.P.57]. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss. [SAC.P.57][2].

CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present,

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[1] The Court of Appeal ruled that Plaintiffs were herewith making an "as applied" PURPA challenge which requires therm to seek a state court remedy; but it did not hold that these allegations are irrelevant as evidence that in fact NEM suppliers can provide requisite guaranteed deliverability with a QF contract. *See CARE,* 922 F.3d at 939, n.4.

[2] *See* n.1, *supra.*

complaining about the inability for smaller QF's to obtain PURPA Compliant SO Contracts or Bilateral Contracts, and concomitant failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost contracts and payment to CARE Plaintiffs and similar small surplus producers of energy[3]. [SAC.P.58]. CARE Plaintiffs were then accused of excessive filings and threatened with sanctions, some then imposed. [SAC.P.58]. CARE Plaintiffs have continued their administrative enforcement efforts. [SAC.P.58].

On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. [SAC.P.59]. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. [SAC.P.59]. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170]. [SAC.P.59].

As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations; and

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[3] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029, A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 & R.99-11-022.

prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs. [SAC.P.60].

Until recently, as alleged in the SAC, CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved contracts, tariffs, activities and proposals of the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations; [SAC.P.61]; failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and contract terms as mandated by PURPA and its FERC implementing regulations [SAC.P.62]; failed to even determine avoided cost for any utility; and failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers [SAC.P.62].

Most recently, CPUC has been engaged – at the behest of the IOU's – in a complete revamping effort for the NEM programs under which Plaintiffs have been compelled by their IOU to operate. [RJN Exhibits 101-107]. Concomitant to that CPUC has been studying – and just now implemented – a new avoided cost protocol, effective June 28, 2021. [RJN Exhibit 108]. Incredibly, in utter defiance of the Ninth Circuit holdings herein, that protocol not only fails to mention that published opinion, but totally ignores – fails to mention – three central holdings: (1) that avoided cost means "full avoided" cost, *i.e.* not less than the avoided cost, as mandated by FERC rules, *see CARE*, 922 F.3d at 936-38; (2) that whether an IOU must include capacity costs in calculating and paying full avoided cost can be made dependant on whether the QF is guaranteeing its energy supply to the IOU, *i.e.* if there is such a guarantee, then capacity costs must be included, *see CARE*, 922 F.3d at 938-39[4]; and (3) given

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[4] The Court took at face value Defendants' representation that capacity costs were only being denied when the QF was not providing a guaranteed supply, ruling

the state's commitment via its RPS program – under which IOU's must and do in fact meet standards of ever-increasing reliance on renewable energy – avoided cost must be tiered so that avoided costs is calculated by reference to the same energy source, i.e. renewable for renewable, fossil for fossil, *see CARE*, 922 F.3d at 936-38. If in fact Defendants were / are complying with PURPA and FERC regulations, as defined in *CARE*, 922 F.3d at 936-39, this protocol would have been the perfect vehicle for demonstrating same; and by failing to do so, they prove that they do not mean to enforce these PURPA / FERC standards with the IOU's, and will not do so unless compelled by this Court.

The IOU's, in turn, do not comply with pricing and contract terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC. [SAC.P.63]. The net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations. [SAC.P.64].

Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC Defendants, and

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that Plaintiffs' allegations that they were being prevented from affording the requisite guarantee should be litigated in a state court "as applied" claim. *See* n.1, *supra*. CPUC's failure to include provision therefor in what is ostensibly provided as a comprehensive protocol on the subject puts the lie to their previous assurances, and frees the IOU's to ignore this distinction.

each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed cross-references to statutes, regulations and other actions. [SAC.P.65]. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays, s*ee e.g.* CPUC Decision D-16-01-044 [SAC.P.65]; and now by adopting a new, formal published protocol on avoided cost calculations that studiously omits, in form and substance, to do what could have been done with the simplest effort: including express or even implicit mention of these requirements, thereby almost daring this Court to provide corrective findings and orders.

The actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling with capacity costs small power production facilities and nontraditional electricity generating facilities. [SAC.P.66]. The people of the State of California and Plaintiffs are and have been materially harmed and damaged by the CPUC failure to enforce PURPA. [SAC.PP.67-68].

In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. [SAC.P.69]. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so. [SAC.P.69].

C. FACTS ALLEGED SPECIFIC TO CLAIM NO. 2: EQUITABLE INJUNCTIVE AND DECLARATORY RELIEF

Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the latter now includes monetary damages as may be proved at trial herein. [SAC.PP.70-71]. *See Tanzin v. Tanvir,* 141 S.Ct. 486, 208 L.Ed.2d 295 (2020).

Plaintiffs are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful; orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein, and consequences thereof; and temporary, preliminary and injunctive relief. [SAC.PP.72-73]. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, and will continue to be so harmed unless and until the requested declaratory and injunctive relief is granted. [SAC.P.73].

At all times the Defendants CPUC intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein; participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and other persons whose identities and extent of involvement are not yet known. [SAC.PP.74-76].

IV.
CLAIMS ON REMAND FROM NINTH CIRCUIT

A.
APPELLATE COURT RULINGS IN LIGHT OF OPERATIVE PLEADING: THE FIFTH AMENDED COMPLAINT

To assess what was ordered by the Ninth Circuit in *CARE, supra*, the starting point of the analysis is the operative pleading on which the district court issued its summary judgment and the Ninth Circuit reversed, in part, and affirmed, in part, the Fifth Amended & Supplemental Complaint [FAC]. [RJN Exhibit 114].

In the FAC, Plaintiffs sought enforcement by CPUC of PURPA requirements in connection with guaranteed IOU (a) avoided cost payments and (b) connectivity. In respect to the former, there were three issues posited in the claims: (1) avoided cost payments by IOU to QF must be exactly that, *i.e.* not more nor less; (2) avoided cost must include capacity costs; and (3) avoided costs must be tier calculated, *i,e.* by like energy source. There is no reference in the FAC to any of the CPUC approved IOU programs – *e.g.* NEM, RPS, RE-MAT, CHP or QF Settlement. All of the latter were injected into the case by CPUC as defenses. On appeal herein, the judgments on all of the damages claims, and the connectivity claims, were affirmed. The appellate court, however, issued nuanced rulings on the defenses to the PURPA avoided cost claims. It did not rule against the avoided costs claims without reference to the CPUC asserted defenses.

Hence, the Court ruled on those affirmative defenses, s*ee CARE,* 922 F.3d at 933-35, as follows: While CPUC has broad discretion to implement "avoided cost" under PURPA, courts must not abdicate responsibility to ensure PURPA compliance. *See CARE,* 922 F.3d at 936. PURPA requires that when avoided cost is calculated, it is the "full avoided cost" standard, *i.e.* a floor as well as a ceiling. *See CARE,* 922 F.3d at 936-37.

In assessing full avoided cost, the Court struck a middle ground between Plaintiffs' position that avoided cost should always be multi-tiered re energy source and the CPUC position that mixed sources are always acceptable. *See CARE,* 922 F.3d at 936-38.

> "Where a state has an RPS [renewable energy requirements] and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided cost based on energy sources that would not also meet the RPS. . . . [This is a fact based] examination of the costs that a utility is *actually avoiding* . . . ."

CARE, 922 F.3d at 937 (emphasis in original). Likewise, whether the re-MAT and CHP programs can rely on natural gas sources instead of renewable energy is a fact-based inquiry in connection with whether the utility is using the supplier for meeting RSP requirements. *See CARE,* 922 F.3d at 940.

Again, in assessing full avoided cost, capacity costs must be included where the supplier affords "sufficient legally enforceable guarantees of deliverability" or when the utility knows how much energy the supplier will provide, but not otherwise. *See CARE,* 922 F.3d at 938-39. NEM programs are not "categorically exempt from PURPA." *See CARE,* 922 F.3d at 939. Though previously Plaintiffs did not make a requisite showing on NEM decreasing utilities' spending on capacity, *see CARE,* 922 F.3d at 939, Plaintiffs did argue that they were barred by the IOU from affording the requisite guarantee by denying Plaintiffs the contract which would include that guarantee, *see CARE,* 922 F.3d at 939 n.4. The Court ruled that it is an "as applied" state court claim; hence it did not reach that issue, though the rule remains that inclusion of capacity costs turns on whether the QF is guaranteeing supply, and this assertion of proved would be evidence thereof. Hence, this does not preclude Plaintiffs from doing so on remand, especially given that a new NEM program is being adopted, with a new CPUC avoided cost standard, [RJN Exhibit 108], and the ruling that the prior NEM program did not violate PURPA is now inapposite.

Hence, on remand Plaintiffs are entitled to litigate these last remaining claims based on IOU avoided cost calculations and CPUC failure to enforce correct calculations in the three mentioned IOU avoided cost calculations. For this motion, the Court must accept as true that CPUC is failing to enforce avoided cost formulae as mandated by law, in the three mentioned particulars.

B. LAW OF THE CASE IN LIGHT OF CHANGING LEGAL AND FACTUAL PREDICATES

First, to the extent that the doctrine of the "law of the case" governs on remand, it applies with equal force to both sides. Second, the impact of the doctrine varies if

on remand there is new or different evidence. *See Stacy v. Colvin*, 825 F.3d 563, ___ (9th Cir. 2016) (holding).

> "A court may have discretion to reopen a previously resolved question only where (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993)."

Disimone v. Browner, 121 F.3d 1262, 1266 (9th Cir. 1997)."

C.
DEVELOPMENTS IN CPUC AVOIDED COST ENFORCEMENT SINCE THE APPELLATE REMAND IN THIS CASE

CPUC – at the urging of the three main IOU's – has reviewed its avoided cost rules and adopted new formulae, in connection with a review of its NEM rulings. [RJN Exhibit 101-107]. In a decision / protocol just adopted on June 28, 2021 [RJN Exhibit 108], CPUC does not mention *CARE, supra*, nor its rulings; nor does it prescribe that inclusion of capacity costs be included when QF supply is guaranteed; nor does it prescribe that avoided costs for renewable energy supplying QF's, or with utilities using QF's for that RPS purpose, be calculated by reference only to like-tiered energy sources; nor does it prescribe that avoided cost payments must be neither less not more than actual avoided cost, instead retaining market based formulae with protections only against payments exceeding actual avoided cost. These developments certainly entail supplementing the complaint.

V.
REMEDIES FOR PURPA CLAIMS

A.
DECLARATORY AND INJUNCTIVE RELIEF

CPUC Defendants are not contending that a PURPA enforcement petition is barred by 11th Amendment sovereign immunity. Under the 11th Amendment, absent clear statutory restrictions not present in this case, Plaintiffs are entitled to sue

individual CPUC commissioners in their official capacity for prospective relief – *i.e.* injunctive or declaratory relief. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645, 647-48 (2002). On defense motion, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc.*, 535 U.S. at 645. The "inquiry . . . does not include an analysis of the merits of the claim [citation omitted]. ('An allegation of a ongoing violation of federal law . . . is ordinarily sufficient.')'" *Verizon Maryland, Inc.*, 535 U.S. at 646. Declaratory relief sought for both "*past*, as well as *future*" conduct satisfies the latter criterion. *See Verizon Maryland, Inc.*, 535 U.S. at 646 (emphasis in original). Clearly, Plaintiffs herein have made the requisite allegations.

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. [Citations]. . . . . The defendant is free to return to his old ways. [There is] a public interest in having the legality of the practices settled, ..."

United States v. Grant Co, 345 U.S. 629, 632 (1953). *Accord, City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). "The purpose of an injunction is to prevent future violations, [citation] . . . . The necessary determination is that there exists some cognizable danger of recurrent violation, something more than **the mere possibility which serves to keep the case alive**." *United States v. Grant Co*, 345 U.S. at 632 (emphasis added). *Accord, City of Mesquite*, 455 U.S. at 289 & n.10. Alternatively, "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974). Individual CPUC Defendants are sued solely in their official capacities, in connection with equitable relief. Any remedial order would necessarily be directed to them.

B.
ECONOMIC RELIEF AND SOVEREIGN IMMUNITY IN LIGHT OF NEW LEGAL DEVELOPMENT

Given 16 U.S. Code § 824a–3 (PURPA) ("injunctive or other relief as may be appropriate") and the new holding in *Tanzin, supra* (statutory provision for "appropriate relief" includes money damages), and tortured efforts to limit it in the cited cases by CPUC, it would seem advisable to permit these claims for the time being as the case and the law evolve. On its face, it is hard to make a meaningful distinction, and easier to later narrow than broaden.

VI.
NINTH CIRCUIT HAS RULED THAT PLAINTIFFS HAVE STANDING UNDER PURPA TO FILE THIS ENFORCEMENT ACTION

It is undisputed that Plaintiff Boyd has had his QF certification from FERC since 2003, and he has now amended his QF certification to include CARE, which is located at the same address. [RJN Exhibit 115]. In *Solutions for Utilities, Inc. v. CPUC*, Case No. 13-55206 (March 6, 2015), the Court treated Plaintiff CARE and its co-Plaintiff members Boyd and Sarvey as a unit, *see Solutions for Utilities, Inc.,* p.2; *CARE,* 922 F.3d at 935; and held that "CARE fulfilled the requirement to exhaust administrative remedies," *see Solutions for Utilities, Inc.,* p.3; *CARE,* 922 F.3d at 935. Plaintiffs can amend to add all of its members, four more now. [RJN Exhibit 116].

In repeated communications and petitions to PG&E, FERC and CPUC, CARE Plaintiffs have sought compensation for their energy supplies to PG&E at an avoided cost that includes capital costs – *e.g.* construction and/or expansion of renewable [solar] energy facilities – for 100% of their energy production. Instead, they are offered by PG&E, with CPUC approval, less than full avoided cost for only the "surplus" above their power production, and they get little or no compensation. The difference between these positions is what affords clear standing to Plaintiffs.

In short, under the claims herein, if Plaintiffs prevail, it will mean that they are entitled to full avoided cost for 100% of their power production, not some lesser

amount for only the "surplus" power production. So, clearly, they have a stake in the outcome of this action and the remedies sought herein.

CONCLUSION

The Motion to Dismiss should be denied. However, even if the allegations are in any way deficient, the entire action "should not be [dismissed] unless it is clear that the complaint could not be saved by any amendment," *Kelson,* 767 F.2d at 656, or amendment would be futile given the conclusions this Court reaches with all facts presumed in favor of plaintiff, *see Las Vegas v. Clark County*,755 F.2d 697, 701 (9th Cir. 1985).

This is so even though Plaintiffs already filed an amended pleading. *See Rutman Wine Co.,* 829 F.2d at 732, 738 (third amendment denied after clear indication from court on pleading deficiencies)*; Vess,* 317 F.3d at 1107 (same); *Keniston,* 717 F.2d at 1300 (denial based on repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant). The issue is not the number of amended complaints, but the number of times Plaintiffs have had to amend as to the matters at issue in this motion.

Dated: September 10, 2021

Respectfully submitted,

s/ Meir J. Westreich

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **PLAINTIFFS' APPLICATION TO MODIFY SEQUENCE OF NEW PLEADING FILINGS AND EXTEND TIME TO DO SO; DECLARATION OF MEIR J. WESTREICH. APPENDIX A**

Plaintiffs hereby submit the following applications to: (1) extend the time for filing their (a) amended pleadings by Plaintiffs Michael Boyd and Robert Sarvey [with redline], and (b) motion for leave to file supplemental complaint by Plaintiff CARE [with blueline]; and (2) re-order and stagger the sequential steps therefor to avoid pleading chaos with concurrent amended pleadings:

(a) That the time for filing the Plaintiff CARE Motion for Leave to Supplement the Sixth Amended and Second Supplemental Complaint ["CARE Motion"], along with a lodged combined redline-blueline version [containing "CARE Blueline Text"], be extended to April 1, 2022; and

(b) That the time for Plaintiffs Michael Boyd and Robert Sarvey to file their

amendments to the Sixth Amended Complaint and Second Supplemental Complaint ["Boyd-Sarvey Motion"] be extended as follows: (1) a combined redline-blueline version [containing "Boyd-Sarvey Redline Text"] shall be lodged with the CARE Motion on April 1, 2022 ["Combined Redline-Blueline Version"], and (2) the final clean amended version ["Boyd-Sarvey Clean Text"] or final combined amended and supplemental version ["Final Amended Version"], as applicable, shall be filed within five court days of the Court's Order on the CARE Motion.

This application is submitted on the following grounds:

1. The current concurrent schedule for filing the Boyd-Sarvey amended pleading and CARE Motion is a recipe for confusion and chaos:

a. The concurrent schedule will mean either two different pleadings modifying the Sixth Amended Complaint, i.e. both numbered the "seventh" or one numbered "seventh" and the other numbered "eighth" and in any event potentially a different numbered pleading once the CARE Motion is decided.

b. Presumably, a Boyd-Sarvey amended pleading would need to delete and alter the extremely numerous CARE references throughout the Sixth Amended Complaint, only to then be retained or added in the lodged and possible filed supplemental pleading to the Sixth Amended Complaint.

c. For all of the reasons that Plaintiffs Boyd-Sarvey need to amend the Sixth Amended Pleading, CARE also needs to offer like amendments, in addition to the supplemental allegations.

d. There is nothing gained by having the clock running on the amended pleading generated by the Plaintiffs Boyd-Sarvey amendments to the Sixth Amended Pleading while the status and role of Plaintiff CARE remains undecided, rather than having Defendants respond to a single unified amended pleading.

2. Plaintiffs have generated and lodged herewith a Combined Redline-Blueline Version of the prospective combined next pleading, provisionally named the Seventh Amended and Third Supplemental Complaint, containing a Plaintiffs Boyd-Sarvey

Version showing redline text and Plaintiff CARE Version showing blueline text, bearing in mind that some of the distinctions are arbitrary and there is some overlap between the two text versions.

3. With the suggested reordering of the process and sequence of filings, the parties can adjudicate, and the Court can decide, the CARE Motion based on the lodged Combined Redline-Blueline Version, without burdening the court file with a pleading which is likely to be dated and superseded in short order, and even if not will not generate any delay in responsive pleading.

4. Plaintiffs and counsel have been working diligently since the Court's March 9, 2022 Order, as can be seen in part by the Combined Redline-Blueline Version whose contents reveal often complex technical concepts requiring time-consuming mastery by counsel; and the calendar of undersigned has been extremely heavy during the intervening period, as further described in Declaration of Meir J. Westreich.

5. Defendants are not unfairly prejudiced by either the brief extension or the reordering process; in fact, they benefit, as it would be pointless to require them to file a responsive pleading to a Boyd-Sarvey amended complaint within fourteen (14) days while it remains as yet undecided whether CARE will remain a plaintiff, with attendant pleading.

6. In this vein, it should be noted that the simple number of complaints herein is in fact deceiving, *i.e.* neither the Court nor the Defendants have been as burdened as might appear to be the case, as indeed these Plaintiffs have never before even once been afforded the opportunity to amend for any current dismissal grounds, as shown in an appended Pleading Chart [Appendix A] and discussed in more detail in the Declaration of Meir J. Westreich.

7. Conversely, enormous delay was occasioned by defense counsel initially successfully opposing Plaintiffs' suggestion for an updated pleading on latest remand and insisting on prompt case management dates, then more than six months later

upending all case management dates with their belated recognition of the need for updated pleadings and their pleading motion practice[1].

8. Furthermore, the issue over how the CARE Plaintiffs have been treated as a unit was not adequately explained, in fact or in its importance, given the actual sequence of Plaintiffs' appearances herein, which resulted in their dismissal in 2012 and reinstatement in the first appeal in 2016, wherein the Plaintiffs were referenced as "CARE" even though CARE was not the Plaintiff who had prematurely filed without first exhausting administrative remedies, and the representative function CARE has since served for all of its QF members, as more fully discussed in the Declaration of Meir J. Westreich.

9. Ignored in all of this – and central to the role CARE has occupied herein – is how CPUC keeps changing the litigation terrain, and using it to obstruct, such as challenging the right to supplement the then operative complaint on remand, as a guise for forcing Plaintiffs to have to initiate new Petitions for Enforcement to FERC, and new lawsuits, every time they change a program, even when – as now – they adopt new avoided cost standards flagrantly violating Ninth Circuit decisions herein, as more fully discussed in the Declaration of Meir J. Westreich.

This application is based on the following Declaration of Meir J. Westreich; the concurrently lodged Combined Redline-Blueline Version of the prospective combined next pleading, provisionally named the Seventh Amended and Third Supplemental Complaint; and the Pleading Chart [Appendix A].

NOTICE TO DEFENDANTS

Notice was given by e-mail to defense counsel of this intended application on March 21, 2022, with explanation of all grounds; and on March 23, 2022 counsel conducted both discussion of this application and a meet and confer on the CARE Motion.

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[1] Then defense counsel invoked local rules to compel joinder in the application pressing for the recent court ruling herein.

Defendants oppose this requested extension.

Dated: March 25, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

2. Plaintiffs hereby submit the following applications to: (1) extend the time for filing their (a) amended pleadings by Plaintiffs Michael Boyd and Robert Sarvey [with redline], and (b) motion for leave to file supplemental complaint by Plaintiff CARE [with blueline]; and (2) re-order and stagger the sequential steps therefor to avoid pleading chaos with concurrent amended pleadings:

(a) That the time for filing the Plaintiff CARE Motion for Leave to Supplement the Sixth Amended and Second Supplemental Complaint ["CARE Motion"], along with a lodged combined redline-blueline version [containing "CARE Blueline Text"], be extended to April 1, 2022; and

(b) That the time for Plaintiffs Michael Boyd and Robert Sarvey to file their amendments to the Sixth Amended Complaint and Second Supplemental Complaint ["Boyd-Sarvey Motion"] be extended as follows: (1) a combined redline-blueline version [containing "Boyd-Sarvey Redline Text"] shall be lodged with the CARE Motion on April 1, 2022 ["Combined Redline-Blueline Version"], and (2) the final clean amended version ["Boyd-Sarvey Clean Text"] or final combined amended and supplemental version ["Final Amended Version"], as applicable, shall be filed within five court days of the Court's Order on the CARE Motion.

3. The current concurrent schedule for filing the Boyd-Sarvey amended pleading and CARE Motion is a recipe for confusion and chaos:

a. The concurrent schedule will mean either two different pleadings modifying the Sixth Amended Complaint, i.e. both numbered the "seventh" or one

numbered "seventh" and the other numbered "eighth" and in any event potentially a different numbered pleading once the CARE Motion is decided.

b. Presumably, a Boyd-Sarvey amended pleading would need to delete and alter the extremely numerous CARE references throughout the Sixth Amended Complaint, only to then be retained or added in the lodged and possible filed supplemental pleading to the Sixth Amended Complaint.

c. For all of the reasons that Plaintiffs Boyd-Sarvey need to amend the Sixth Amended Pleading, CARE also needs to offer like amendments, in addition to the supplemental allegations.

d. There is nothing gained by having the clock running on the amended pleading generated by the Plaintiffs Boyd-Sarvey amendments to the Sixth Amended Pleading while the status and role of Plaintiff CARE remains undecided, rather than having Defendants respond to a single unified amended pleading.

4. Plaintiffs have generated and lodged herewith a Combined Redline-Blueline Version of the prospective combined next pleading, provisionally named the Seventh Amended and Third Supplemental Complaint, containing a Plaintiffs Boyd-Sarvey Version showing redline text and Plaintiff CARE Version showing blueline text, bearing in mind that some of the distinctions are arbitrary and there is some overlap between the two text versions.

5. With the suggested reordering of the process and sequence of filings, the parties can adjudicate, and the Court can decide, the CARE Motion based on the lodged Combined Redline-Blueline Version, without burdening the court file with a pleading which is likely to be dated and superseded in short order, and even if not will not generate any delay in responsive pleading.

6. Plaintiffs and I have been working diligently since the Court's March 9, 2022 Order, as can be seen in part by the Combined Redline-Blueline Version whose contents reveal often complex technical concepts requiring mastery by counsel; and my calendar undersigned has been extremely heavy during the intervening period,

during which time I was engaged in *inter alia* two days of court ordered depositions [March 10-11, 2022], was meeting an appellate writ petition filing deadline on March 13, 2022, was in a court ordered mediation setting [with Magistrate Judge] on March 15, 2022, and meeting a multiplicity of emergency filings in another case in both district court and the Ninth Circuit throughout the past two weeks.

7. Defendants are not unfairly prejudiced by either the brief extension or the reordering process; in fact, they benefit, as it would be pointless to require them to file a responsive pleading to a Boyd-Sarvey amended complaint within fourteen (14) days while it remains as yet undecided whether CARE will remain a plaintiff, with attendant pleading.

8. In this vein, it should be noted that the simple number of complaints herein is in fact deceiving, *i.e.* neither the Court nor the Defendants have been as burdened as might appear to be the case, and these Plaintiffs have never been afforded the opportunity to amend for the current dismissal grounds, as shown in an appended Pleading Chart [Appendix A] and summarized as follows:

a. The Court's recent order for dismissal with leave to amend is only the second time that this has occurred in this case, and the first time this has occurred with the CARE-Boyd-Sarvey Plaintffs, with the only other time being a Motion to Dismiss the First Amended Complaint from which amendments produced the Second Amended Complaint, the operative pleading when this matter was before the Ninth Circuit the first time.

b. One amended pleading – the First Amended Complaint – was filed without leave and by meet and confer agreement of counsel, in which in pertinent part Plaintiffs Boyd-Sarvey were added to Plaintiff CARE to rectify an earlier standing challenge to CARE, which seemed to resolve that issue at the time.

c. Two amended pleadings were merely lodged, one entitled the Third Amended Complaint lodged with a Motion to Reconsider the Order Dismissing the First Amended Complaint, as an alternative to the Second Amended Complaint,

which motion was denied; and the other one entitled the Fourth Amended Complaint, was lodged with a Motion to Amend following the first remand, and when granted in part was followed by instead filing a Fifth Amended Complaint, with supplemental allegations for events transpiring on appeal and in the intervening years.

d. One amended pleading, entitled the Sixth Amended Complaint was filed following Remand #2, at the instance of Defendants, who decided that it would be a beneficial means of defining the remand proceedings, after previously successfully opposing Plaintiffs' suggestion to do so.

9. Conversely, enormous delay was occasioned by defense counsel initially successfully opposing Plaintiffs' suggestion for an updated pleading on latest remand and insisting on prompt case management dates, then more than six months later upending all case management dates with their belated recognition of the need for updated pleadings and their pleading motion practice[2].

10. Furthermore, the issue over how the CARE Plaintiffs have been treated as a unit was not adequately explained, in fact or in its importance, given the actual sequence of Plaintiffs' appearances herein, which resulted in their dismissal in 2012 and reinstatement in the first appeal in 2016, wherein the Plaintiffs were referenced as "CARE" even though CARE was not the Plaintiff who had prematurely filed without first exhausting administrative remedies, and the representative function CARE has since served for all of its QF members [all of whom could theoretically be added as party plaintiffs]:

a. In the first Complaint, only CARE appeared, as a non-profit tax exempt [public interest] corporation doing so as a representative of its QF members.

b. CARE had fully complied with the PURPA requirement for a Petition for Enforcement to FERC, and required 60-day lapse had occurred.

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[2] Then defense counsel invoked local rules to compel joinder in the application pressing for the recent court ruling herein.

c. When CARE standing was questioned by defense counsel, Plaintiffs Boyd and Sarvey submitted Petitions for Enforcement to FERC.

d. Without waiting for the required 60-day lapse, Plaintiffs filed the First Amended Complaint, adding Boyd and Sarvey as Plaintiffs.

e. While a Motion to Dismiss Boyd and Sarvey, for failure to exhaust administrative remedies, was pending, the 60-day period lapsed.

f. Nevertheless, the Court dismissed Boyd and Sarvey, for failure to exhaust administrative remedies.

g. On Appeal, the Ninth Circuit reversed this ruling and remanded, and in so doing only referenced CARE and the propriety of "activating" a prematurely filed complaint once the administrative exhaustion occurred. [Memorandum, p.3], even though there was never an issue with CARE, only with Boyd and Sarvey

h. CARE then fully litigated with Boyd-Sarvey through the entire second phase of litigation, and on appeal, based on its representative status on behalf of numerous small CARE member QF facilities, including but not limited to Boyd-Sarvey, who have limited resources to be making a fight such as this.

11. Ignored in all of this is how CPUC keeps changing the litigation terrain, and using it to obstruct, such as challenging the right to supplement the then operative complaint on remand, which is actually a guise for a hidden agenda, to attempt and compel new litigation every time they make a change, as the following demonstrates:

a. It would seem to go without saying that after years of litigation, appeal, and remand, the operative complaint needs to be updated with events since its filing because it is plainly no longer accurate, not least because of the changing membership of CPUCV.

b. The PURPA programs at issue have gone through ever-changing generations, each time completely altering the issues being litigated, and that has continued rought through this latest remand period

c. CPUC is doing so because they want this Court to force Plaintiffs to have to initiate new Petitions for Enforcement to FERC, and new lawsuits, everytime they change a program, even when – a now – they adopt new avoided cost standards which flagrantly violate the Ninth Circuit decisions herein.

d. And now, there is no damage or attorney fee remedies under PURPA, but because PURPA is now defined as providing comprehensive remedies, 42 U.S.C 1983 does not afford any remedies either.

12. The factual matters averred in the concurrently lodged Combined Redline-Blueline Version of the prospective combined next pleading, provisionally named the Seventh Amended and Third Supplemental Complaint, and the Pleading Chart [Appendix A] are incorporated herein by this reference.

NOTICE TO DEFENDANTS

13. Notice was given by e-mail to defense counsel of this intended application on March 21, 2022, with explanation of all grounds; and on March 23, 2022 counsel conducted both discussion of this application and a meet and confer on the CARE Motion.

14. Defendants oppose this requested extension.

15. Counsel did agree on an expanded briefing schedule on any CARE Motion to Supplement, and have completed as of March 23, 2022 the required local Rule 7-3 Meet and Confer process.

I declare under penalty of perjury that the above is true and correct. Executed on March 25, 2022 at Los Angeles, California.

S/ Meir J. Westreich

Meir J. Westreich

PLEADING TABLE

PLEADING	**CARE**	**SFUI**
Complaint [06.10.11]	Plaintiff CARE Only. Completed FERC Petition for Enforcement Plus 60 Days	
1st Amended Complaint [w/o Leave] [08.10.11]	Added Plaintiffs' Boyd & Sarvey, CARE Member QF's with Post-Complaint FERC Petitions for Enforcement. 60 Days Passed During Motion to Dismiss which Was Granted w/o Leave to Amend	Motion to Dismiss Granted with Leave to Amend
2nd Amended Complaint [Leave to Amend] [01.09.12]	Dismissed CARE Plaintiffs Deleted	Claims Amended with Leave
3rd Amended Complaint [lodged] [01.09.12]		Motion to Reconsider Denied. Third
4th Amended and 1st Supplemental Complaint [lodged] [03.08.16]	On Remand #1. Motion for Leave to File Amendment to Second Amended Complaint. Granted / Denied in Part	
5th Amended 1st Supplemental Complaint [04.16.16]	Filed with Leave to File Amendment to Second Amended Complaint.	
6th Amended and 2nd Supplemental Complaint [05.07.21]	On Remand #2. Filed with Stipulated Leave to Amend	

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **MEMORANDUM OF POINTS AND AUTHORITIES RE PLAINTIFFS' APPLICATION TO MODIFY SEQUENCE OF NEW PLEADING FILINGS AND EXTEND TIME TO DO SO**

PLAINTIFFS ARE ENTITLED TO THIS FIRST OPPORTUNITY TO CURE THE ARTICLE III STANDING AND PLEADING DEFECTS WHETHER BY AMENDMENT OR BY SUPPLEMENT OF THE LATEST COMPLAINT

A.
AMENDMENT STANDARD

As applied by this Court in its Order of March 9, 2022, "Courts are free to grant a party leave to amend whenever 'justice so requires,' Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with 'extreme liberality.' *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001) (*quoting Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). In the absence of any case management

order specifying a deadline for pleading motions, whether to grant a motion for leave to amend is governed by "the liberal standard" of Fed.R.Civ.P. 15(a).

> "Rule 15(a)'s liberal amendment policy . . . focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party . . . [citation omitted]."

See In re W. States Wholesale Natural Gas Antitrust Litigation, 715 F.3d 716, 737 (9th Cir. 2013). "The court should freely give leave when justice so requires." *In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d at 737 n.16.

A Plaintiff is entitled to at least one opportunity to correct defects for which he has received clear notice from the Court. *See Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 732, 738 (9th Cir. 1987); *Vess,* 317 F.3d at 1107. *Accord, Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983) (denial of leave to amend only based on undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant).

B.
SUPPLEMENT STANDARD

Hence, under Fed.R.Civ.P. 15(d), a plaintiff may cure an Article III standing defect by filing a supplemental complaint alleging facts that arose after the filing of the original complaint, and should also include changes in circumstances based on actions of the Defendant. *See Northstar Financial Advisors Inc. v. Schwab Investors*, 779 F.3d 1036, 1044 (9th Cir. 2015). *See generally Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018) (describing split in circuits, and joining 9th Circuit and others in applying this permissive standard). Hence, "a party [may] serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed.R.Civ.P. 15(d).

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C. AMENDMENT AND SUPPLEMENT STANDARDS APPLIED HEREIN

The Ninth Circuit's first reverse and remand order – on grounds *inter alia* of standing and jurisdiction re CARE Plaintiffs' PURPA claims – applied to a First Amended Complaint that was later superseded by a Second Amended Complaint, and later became the court-approved basis for a Fifth Amended and First Supplemental Complaint implementing the first remand order. The Ninth Circuit's second reverse and remand order applied to the Fifth Amended and First Supplemental Complaint, later superseded by the stipulated and ordered Sixth Amended and Second Supplemental Complaint seeking to implement the second remand order, soon to be at last a Seventh Amended Complaint. [There were no Third or Fourth Amended Complaints filed herein]. [See Combined Redline-Blueline Version lodged herewith].

Plaintiff CARE now seeks to supplement the current pleading to correct any standing defects to the extent it is based on events occurring since the filing of the Sixth Amended and Second Supplemental Complaint. All Plaintiffs seek to amend Sixth Amended and Second Supplemental Complaint to also address the standing and other issues addressed in this Court's Order of March 9, 2022, and correcting the changing personnel on the CPUC for equitable relief issues. [See Combined Redline-Blueline Version lodged herewith]. This Plaintiffs first opportunity to make these pleading corrections following clear notice of the purported defects.

To avoid the confusion over the current two track concurrent process ordered on March 9, 2022, which puts the amended pleading ahead of the supplemental pleading issue, this application seeks to modify the sequence and timing to avoid needless duplication, confusion and wasted efforts.

Dated: March 25, 2022

Respectfully submitted,

s/ Meir J. Westreich

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; ~~MARYBEL BATJER~~ ALICE BUSCHING REYNOLDS, ~~MARTHA GUZMAN ACEVES~~, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA, ~~and~~ DARCIE L. HOUCK and JOHN REYNOLDS, their official and individual capacities as current Public Utilities Commission of California Members,

Defendants.

Case No. 2:11-CV-04975-JWH-JCG

LODGING OF COMBINED REDLINE-BLUELINE OF INTENDED PROPOSED:

~~SIXTH~~ SEVENTH AMENDED AND ~~SECOND~~ THIRD SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF ~~AND DAMAGES~~

JURY DEMANDED

[16 U.S.C. §824, *et seq.*]

~~SIXTH~~ SEVENTH AMENDED AND ~~SECOND~~ THIRD SUPPLEMENTAL COMPLAINT

Leave of Court to amend having been granted ~~following second remand~~, Plaintiffs hereby file their ~~Sixth~~ Seventh Amended and ~~Second~~ Third Supplemental Complaint, per *Fed.R.Civ.P.* 15.

INTRODUCTION

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"] and California based small scale renewable energy companies ~~and~~ embodied by two qualified facility ["QF"] members of CARE, are seeking equitable relief ~~and damages~~ from Defendants, California Public Utilities Commission ["CPUC"], a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policies of promoting renewable energy sources and the viability and integration of small energy generating companies, and protecting them from monopolistic practices~~;~~ to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"]~~; and for damages incurred as a consequence of prior failures to enforce PURPA~~.

Accordingly, Plaintiffs allege for their ~~Sixth~~ Seventh Amended and ~~Second~~ Third Supplemental Complaint [each of the Paragraphs enumerated under a heading of "Common Allegations" are incorporated by this reference into each of the numbered claims; and any cross-referenced allegation is deemed to be thereby incorporated]:

COMMON ALLEGATIONS
JURISDICTIONAL AND PARTY ALLEGATIONS

1. This is a federal question action under the Public Utility Regulatory Polices Act ["PURPA"], to redress violations of federal laws committed by Defendants, *i.e.* to *inter alia* compel the enforcement of federal laws, for Plaintiffs' and the public's interests, and to secure remedial relief for Plaintiffs for those violations.

2. The jurisdiction of this Court is invoked under 28 U.S.C. §1331, this being an action arising under, and for the violations of, federal laws.

3. Venue is properly located in the Central District of California pursuant to 28 U.S.C. §1391(b)(1) & (b)(2) based on the original filings; and the acts complained of herein were consummated in substantial part in this district.

4. Plaintiffs are CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"] formed in 1999; and Michael E. Boyd and Robert Sarvey, qualified facility ["QF"] members of CARE, and certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd and Sarvey, officers of CARE.

4a. The public policies pursued by CARE include, as its name signifies, promotion of renewable energy and its sources, but also assisting by collective and corporate efforts the many small – less than one megawatt – QF renewable energy facilities, like Plaintiffs Boyd and Sarvey, who standing alone lack individual resources to meaningfully participate in and advance litigation, rulemaking and litigation related public policies, as well as efforts behalf of their own particular interests.

4b. Plaintiff CARE has appeared throughout this litigation in its representative capacity for its multiple member small – less than one megawatt – QF renewable energy facilities, but can also appear under the Boyd QF certificate to which it has now been appended with FERC, as hereinafter explained.

5. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]: ~~Marybel Batjer~~ Alice Busching Reynolds: ~~[August 16, 2019 (Commissioner) and December 30, 2020~~ December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]: ~~Martha Guzman Aceves [January 28, 2016 - present]; Clifford Rechtschaffen [January __ 2017 - present]~~; Genevieve Shiroma [January 22, 2019 - present]; ~~and~~ Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. These Defendants are hereinafter collectively referred to as "CPUC Defendants" or "Defendant CPUC" and said references also include commissioners who served in earlier times, when earlier acts and/or omissions are alleged herein to have occurred. All of the acts and omissions as alleged herein concerning the CPUC and CPUC Defendants occur through the named commissioners in office at the time of each act or omission, and are sued in their official capacities; and any relief which might be obtained against CPUC can only be effected by enforcement against the CPUC commissioners currently holding office and the power to act.

6. The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution.

7. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development.

8. PURPA authorizes the Federal Energy Regulatory Commission ["FERC"] to enforce the requirements of PURPA by adoption of implementing regulations and resolution of disputes about the meaning, implementation and application of the federal laws and regulations.

9. In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"] which are thereby rendered eligible for PURPA compliant ~~contracts~~ tariffs and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. In so doing, FERC has issued interpretive rulings of PURPA provisions and its aforementioned regulations.

10. PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with

production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold.

11. PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development.

12. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the alternative options, under FERC regulations, for Small Facilities to be paid, at their choice, for "available capacity" or "energy" delivered.

13. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

14. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said

company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

15. PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer."

16. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority.

17. Defendant CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. However, in regards to pricing, and other mandated ~~contract~~ tariff terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs.

18. CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources.

19. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating the avoided cost for each type of electricity ("multi-tiered pricing").

20. If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for

natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources.

21. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory.

22. While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to the utility whose avoided costs are being determined.

23. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs.

24. California has ~~an~~ a California statutorily adopted Renewable Portfolio Standard [RPS], establishing standards for gradual ultimate adoption of 100% renewable energy attributes, which necessarily changes the avoided cost calculation.

24a. Under the RPS, each utility is required to utilize renewable energy as defined by RPS as a specified percentage of their power generation, calculated on an annual basis with gradual increases toward the 100% goal.

25. When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. Thus, where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS.

26. If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost. But if a

purchase from a qualifying facility permits the utility to avoid the addition of new capacity, then the avoided cost of the new capacity should be used.

27. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers.

28. Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from.

29. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS.

30. If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so. But it may just as permissibly aggregate all sources that could satisfy its RPS obligations.

31. If a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources.

32. When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA.

33. In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, i.e. there is no component for actual avoided capacity costs.

34. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS.

35. Under the CPUC approved Net Energy Metering [NEM] Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

36. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

CARE.

36a. Under NEM, utility customers are compensated for their power generation of net surplus energy – above their own usage – which is supplied through their utility supplied power connection, by FERC mandate.

36b. Plaintiffs CARE, Boyd and Sarvey are utility customers with power generators they constructed in order to supply their net surplus energy to the utility [Power Supply Facilities].

36c. Plaintiffs' – CARE, Boyd and Sarvey – respective Power Supply Facilities are built so as to guarantee a net surplus energy supplied to the utility on both a monthly and annual basis.

36d. Plaintiffs CARE, Boyd and Sarvey operate their Power Supply Facilities and provide net surplus energy to their respective utilities via a utility supplied meter.

36e. Plaintiffs CARE, Boyd and Sarvey are compensated for supplying their net surplus energy under the PUC approved NEM Program.

36f. Pursuant to PUC mandate, a utility can include customer's annual net surplus energy, generated by a renewable source, in their total calculated annual renewable energy generation to meet their annual state-mandated RPS standards.

36g. Though the net renewable energy supplied by individual cutomers is relatively small, the total sum deriving from all participating NEM compensated customers with reliably net energy supplies is substantial in enabling utilities to meet their annual state-mandated RPS standards.

36h. Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program is included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard.

36i. Under a pending proposed PUC guideline, if adopted, utilities will be permitted to include customer's monthly net surplus energy, generated by a renewable source, in their total calculated renewable energy generation to meet their annual state-mandated RPS standard.

36j. Either way, *i.e.* whether calculated on a monthly or annual basis, Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program is and will be included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard.

36k. Plaintiffs CARE, Boyd and Sarvey meet RPS-eligibility requirements for QF's, established by the California Energy Commssion [CEC], the primary energy policy and planning agency in California, *e.g.* they use RPS-eligible sources of generation [solar energy]; and they use utility supplied meters that report generation with an accuracy rating of two percent or higher accuracy [one per cent] .

36l. Western Renewable Energy Information System [WREGIS] is part of the Western Electric Coordinating Council [WECC] [is a non-profit corporation] which has been approved by FERC as the Regional Entity for the Western Interconnection, which promotes bulk power system reliability and security in the Western Interconnection.

36m. The North American Electric Reliability Corporation [NERC] delegated some of its authority to create, monitor and enforce reliability standards to the WECC through a Delegation Agreement.

36n. WREGIS consists of representative entities like Plaintiff CARE which include generating units that are RPS-eligible, like Plaintiffs Boyd and Sarvey and other QF members of CARE.

36o. Plaintiff CARE's membership application in WREGIS is pending.

36p. Commencing with the Complaint herein, and throughout this litigation, Plaintiff CARE has acted in the capacity of a representative entity acting on behalf of its QF and QF-qualified members.

36q. In the initial Complaint, CARE had previously submitted to FERC a Petition for Enforcement and the 60-day period for response had lapsed, entitling CARE to file this action.

36r. When CARE's standing was challenged, Plaintiffs filed the First Amended Complaint, alleging that Plaintiffs Boyd and Sarvey had submitted a FERC a Petition for Enforcement and the 60-day period for response had not yet lapsed, technically not yet entitling them to join in this action.

36s. By the time that the subsequent motion to dismiss was pending, the latter 60–day period had finally lapsed, but leave to amend to add the latter allegation was denied, resulting in dismissal for lack of jurisdiction.

36t. On appeal, in *Solutions for Utilities, Inc. v. CPUC*, Case No. 13-55206 (March 6, 2015), the Ninth Circuit addressed this issue as if there was one collective Petition for Enforcement whose 60-day period for response had finally lapsed, *i.e.* "CARE fulfilled the requirement to exhaust administrative remedies," and reversed and remanded on grounds that leave to amend should have been afforded [implicitly referring to the later petitions].

36u. Plaintiffs can amend to add all of its QF members, *i.e.* four more now.

36v. On the subsequent remand and second appeal, CARE continued to appear in this action in its representative capacity for its QF members, including but not limited to Plaintiffs Boyd and Sarvey.

36w. When CPUC decided in the second remand to challenge standing of CARE, Plaintiff Boyd did what he at all times could have done had it been raised earlier: amend his QF certification with FERC to include CARE, which at all times has been operating at the same location, participating with the same power generating facilities that are interconnected with the same utility to the same effect and with the same interests therein.

36x. CARE is entitled and has standing to participate in this action both as part of a QF certification, and as representative of other QF members.

37. CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments.

38a. CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – whose renewable energy supplies are sufficiently reliable to enable the utility to include those supplies in their total calculated renewable energy generation to meet their annual state-mandated RPS standard; and which permits the purchasing electric utility to forgo capital investments.

39. By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a ~~standard offer contract~~ tariff based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is necessarily lower than what the legally mandated avoided cost would be. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities.

40. The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action.

41. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards.

42. PURPA also expressly authorizes private utility companies and qualified facilities to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so.

42a. Most recently, CPUC has been engaged – at the behest of the IOU's – in a complete revamping effort for the NEM programs under which Plaintiffs have been compelled by their respective utility to operate.

42b. Concomitant to that, CPUC has implemented a new avoided cost protocol, effective June 28, 2021.

42c. In utter defiance of the Ninth Circuit holdings in the prior appeal herein, that new protocol not only fails to mention that published opinion, but totally ignores – fails to mention – three central holdings: (1) that avoided cost means "full avoided" cost, *i.e.* not less than the avoided cost, as mandated by FERC rules; (2) that whether a utility must include capacity costs in calculating and paying full avoided cost can be made dependant on whether the QF is guaranteeing its energy supply to the IOU, *i.e.* if there is such a guarantee, then capacity costs must be included; and (3) given the state's commitment via its RPS program – under which utilities must and do in fact meet standards of ever-increasing reliance on renewable energy – avoided cost must be tiered so that avoided costs is calculated by reference to the same energy source, i.e. renewable for renewable, fossil for fossil.

42d. If in fact Defendants were / are complying with PURPA and FERC regulations, this protocol would have been the perfect vehicle for demonstrating same; and by failing to do so, they prove that they do not mean to enforce these PURPA / FERC standards with the utilities, and will not do so unless compelled by this Court.

42e. The utilities, in turn, do not comply with pricing and tarriff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

42f. The net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments

specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

42g. In repeated communications and petitions to PG&E, FERC and CPUC, CARE Plaintiffs have sought compensation for their energy supplies to PG&E at an avoided cost that includes capital costs – *e.g.* construction and/or expansion of renewable [solar] energy facilities – for 100% of their energy production. Instead, they are offered by PG&E, with CPUC approval, less than full avoided cost for only the "surplus" above their power production, and they get little or no compensation.

42h. In short, under the claims herein, if Plaintiffs prevail, it will mean that they are entitled to full avoided cost for 100% of their power production, not some lesser amount for only the "surplus" power production. So, clearly, they have a stake in the outcome of this action and the remedies sought herein.

43. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions; and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations.

44. Plaintiffs are informed and believe, and based thereon allege, that CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other.

45. Plaintiffs are informed and believe, and based thereon allege, that the IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with

both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA.

46. CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so.

47. At all times pertinent to this ~~Sixth~~ Seventh Amended Complaint, Defendants were each an agent of the other Defendant.

48. The Defendants herein, and each of them, have conspired to do the acts and wrongs mentioned herein; and an act in furtherance thereof has been committed.

49. At all times pertinent to this ~~Sixth~~ Seventh Amended Complaint, the Defendants and each of them were acting in concert with each other and others not named as parties herein.

50. At all times pertinent to this ~~Sixth~~ Seventh Amended Complaint, each of the Defendants authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant.

51. All of the conduct alleged against each and all of the Defendants mentioned herein was intentional, and intended to accomplish each and all of the unlawful purposes described herein.

CLAIM NO. 1
CLAIM FOR ENFORCEMENT OF PURPA
[16 U.S.C. §824a-3]

52. Plaintiff CARE has at all relevant times been an organization representing electric utilities which are Qualified Facilities [‘QF”] and within the class of small power production facilities and nontraditional electricity generating facilities subject to and contemplated by FPA and PURPA, and the latter’s FERC promulgated regulations. Plaintiff CARE has 358 members, two of which are Plaintiffs Boyd and Sarvey. Plaintiff Boyd founded CARE in 1999, and Sarvey joined in 2003. Plaintiffs

Boyd and Sarvey were certified with FERC as QF's on March 19 & 28, 2003 [Certificate Nos. QF03-76 & QF03-80], respectively. [Two (2) other members of CARE (Mary Hoffman and David Hoffman) are also jointly certified as a QF.]

52a. Plaintiff Boyd has had his QF certification from FERC since 2003.

52b. On August 16, 2021, Plaintiff Boyd amended his QF certification to include CARE, which is located at the same address as Boyd.

52c. CARE has partially paid for the QF facilities, commencing in or about September 2020 and since then.

52d. CARE, with its office located at the Boyd address, has utilized since before Boyd's QF certification in 2003 – and at all times since then – the same QF facilities which inter-connect with the utility.

53. CARE Plaintiffs Boyd and Sarvey made repeated and long-standing efforts to obtain ~~standard offer ["SO"] contracts or bilateral contracts from P.G. & E, by seeking contracts and/or~~ legally sufficient avoided cost payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. CARE Plaintiffs have been unable to obtain ~~any contracts or obtain~~ aforementioned payment ~~in connection therewith, or otherwise,~~ because of refusal of the local power grid providers [P.G & E.] to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC implementing regulations, despite repeated efforts by CARE Plaintiffs to secure same.

54. ~~In seeking the aforementioned contracts,~~ CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments, which would thereby entitle Plaintiffs to avoided capacity costs.

55. ~~In seeking the aforementioned contracts,~~ CARE Plaintiffs Boyd and Sarvey were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs.

56. ~~PURPA non-compliant SO Contracts and Bilateral Contracts from~~ IOU's ~~[utilities~~ like P.G. & E~~]~~ do not pay – and have not paid CARE Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy.

57. CARE Plaintiffs ~~have been refused either form of PURPA compliant contract, and~~ get paid nothing for their guaranteed surplus energy production, or their capital and other costs of surplus energy production, in violation of PURPA and its FERC implementing regulations. Hence, not only have CARE Plaintiffs not been paid, but they have operated at a loss.

58. CARE Plaintiffs appeared at hearings, and/or submitted filings, in various FERC and CPUC proceedings, commencing in 2003 and continuing to the present, complaining about the ~~inability for smaller QF's to obtain PURPA Compliant SO Contracts or Bilateral Contracts, and concomitant~~ failure to pay anything for CARE Plaintiffs' surplus energy, in violation of PURPA and FERC implementing rules; and failure of CPUC – acting through its commissioners – to enforce PURPA and implementing FERC regulations to provide avoided cost ~~contracts and~~ tariffs and

payment to CARE Plaintiffs and similar small surplus producers of energy[1]. CARE Plaintiffs were then accused of excessive filings and threatened with sanctions, some then imposed. CARE Plaintiffs have continued their administrative enforcement efforts.

59. On January 28, 2011, Plaintiff CARE, acting on behalf of itself and its members including Plaintiffs Boyd and Sarvey, petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On March 17, 2011, FERC declined to do so. On or about July 9, 2011, Plaintiffs CARE, Boyd and Sarvey further petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170].

60. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been frustrated in their efforts to enter the energy market, prevented from doing so in a manner and in accordance with the public policies set forth in PURPA and its FERC implementing regulations; and prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs.

60a. CPUC has implemented a new avoided cost protocol, effective June 28, 2021.

[1] For instance, FERC Case Nos: EL01-2-000, EL00-95-000, EL01-65-000, EL02-71-000, EL04-11-001, EL07-49-000, EL06-89-000, EL07-50-000, EL07-37-000, EL07-40-000, EL07-49-000, EL07-50-000, EL09-65-000, EL13-30-000 & EL13-32-000; and CPUC Case Nos: A1407009, R.14-07-002, A1203026, A1106029, A1009012, A0904001, A.08-11-001, R.06-02-013, R.04-04-003, R.04-04-025 & R.99-11-022.

60b. In utter defiance of the Ninth Circuit holdings in the prior appeal herein, that new protocol not only fails to mention that published opinion, but totally ignores – fails to mention – three central holdings: (1) that avoided cost means "full avoided" cost, *i.e.* not less than the avoided cost, as mandated by FERC rules; (2) that whether a utility must include capacity costs in calculating and paying full avoided cost can be made dependant on whether the QF is guaranteeing its energy supply to the IOU, *i.e.* if there is such a guarantee, then capacity costs must be included; and (3) given the state's commitment via its RPS program – under which utilities must and do in fact meet standards of ever-increasing reliance on renewable energy – avoided cost must be tiered so that avoided costs is calculated by reference to the same energy source, i.e. renewable for renewable, fossil for fossil.

60c. If in fact Defendants were / are complying with PURPA and FERC regulations, this protocol would have been the perfect vehicle for demonstrating same; and by failing to do so, they prove that they do not mean to enforce these PURPA / FERC standards with the utilities, and will not do so unless compelled by this Court.

60d. The utilities, in turn, do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

60e. The net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy

avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

60f. In the aforementioned new protocol, CPUC does not prescribe that inclusion of capacity costs be included when QF supply is guaranteed; nor does it prescribe that avoided costs for renewable energy supplying QF's, or with utilities using QF's for that RPS purpose, be calculated by reference only to like-tiered energy sources; nor does it prescribe that avoided cost payments must be neither less not more than actual avoided cost, instead retaining market based formulae with protections only against payments exceeding actual avoided cost.

61. Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved ~~contracts,~~ tariffs, activities and proposals of the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations.

62. At all relevant times herein, CPUC has failed to adopt or implement any regulations, orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and ~~contract~~ tariff terms as mandated by PURPA and its FERC implementing regulations. Plaintiffs are informed and believe that CPUC has yet to even determine avoided cost for any utility; and has failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers.

63. Plaintiff is informed and believes that regulated utilities in California [IOU's], in turn, do not comply with pricing and ~~contract~~ tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC.

64. Plaintiff is informed and believes that the net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations.

65. Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of CPUC Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed cross-references to statutes, regulations and other actions. In each case, CPUC Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [*See e.g.* CPUC Decision D-16-01-044].

66. Plaintiffs are informed and believe, and based thereon allege, that the actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling small power production facilities and nontraditional electricity generating facilities.

67. The people of the State of California, as a whole and within the aforementioned regions served by the utilities, have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, as herein described.

68. Plaintiffs are and have been materially harmed and damaged, in an amount to be determine at trial, by the CPUC failure to enforce PURPA, a herein described.

69. In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so.

70. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" and the latter includes monetary damages as may be proved at trial herein.

CLAIM NO. 2
EQUITABLE RELIEF;
INJUNCTIVE RELIEF; DECLARATORY RELIEF

71. Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate" ~~and the former includes equitable relief as hereinafter addressed~~.

72. Plaintiffs, and each of them, are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful, in each and all of the particulars described herein.

73. Plaintiffs, and each of them, are entitled to orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein, and consequences thereof. Plaintiffs, and each of them, are seeking and are entitled to temporary, preliminary and injunctive relief.

74. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, as described herein, and will continue to be so harmed unless and until the requested declaratory and/or injunctive relief is granted as prayed.

75. At all times pertinent to this Amended Complaint, the Defendants CPUC, their respective principals and agents, and each of them, intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein.

76. Each of the Defendants CPUC, their respective principals and agents, and each of them, participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and its respective principals and agents, and each of them, and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs.

PRAYER

WHEREFORE, Plaintiffs seek judgment against defendants jointly and severally, except as specifically indicated, for:

1. Equitable relief, as prayed herein, and as may appear necessary and proper, including declaratory relief, and temporary, preliminary and permanent injunctive relief; and

2. For such further appropriate relief as the Court may deem necessary and proper~~, including but not limited to money damages~~.

Dated: March 25, 2022

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

Plaintiffs demand trial by jury.

Dated: March 25, 2022

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **REQUEST FOR CLARIFICATION OF ORDER OF MARCH 29, 2022; DECLARATION OF MEIR J. WESTREICH [UNOPPOSED]**

Plaintiffs hereby request clarification of the Court's Order of March 29, 2022 in the following particulars. In so doing, and with all due respect, Plaintiffs do so because of the draconian consequences suggested if their meaning is misapprehended, and the shortness of time allotted, though graciously extended in the latter order, which provides s follows:

> "Any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint will be **STRICKEN *unless*** the Court has granted a motion to supplement."

Order, p.3 [03.29.22] (emphasis in original).

1. The reference in the preceding quoted text to "complaint" would seem to refer to the pleading located at "ECF 271" given the Court's discussion in its two most recent orders, in particular in its Order of March 9, 2022, at pp.10-12, discussing how those alleged events occurred after the pleading at ECF 271. If not, which one?

The Court then adds in its March 29, 2022 Order:

> "Furthermore, the Court will strike any amended or supplemental pleading that contains allegations relating to claims that have been dismissed with prejudice."

Order, p.3 [03.29.22] (referencing Order of March 9, 2022).

2. The dismissal of CARE in the March 9, 2022 Order, with a specification for a need to file a Motion for Leave to File a Supplemental Complaint, does not characterize the dismissal as "with prejudice" at p.12 and characterizes it as "without prejudice" at p.18. This would seem to mean that in filing their Seventh Amended Complaint by leave already granted, by April 5, 2022, Plaintiffs Boyd-Sarvey need not delete references to CARE, only to have to restore them throughout the latest complaint when CARE files its Motion for Leave to File Supplemental Complaint.

3. Factual "allegations relating to claims that have been dismissed with prejudice" can also relate validly to claims which have not been dismissed at all, or to claims for which leave to amend has been granted, *e.g.* Plaintiffs' efforts at exhausting administrative [FERC] remedies. Hence, the quoted text would seem to mean only those allegations relating only to claims dismissed with prejudice.

NOTICE TO DEFENDANTS

4. This Request as above stated was promptly e-mailed to defense counsel once completed at 9:00 p.m. on March 30, 2022, in light of the new pending deadline on April 5, 2022, and a discussion with defense counsel was sought but could not be scheduled before April 1, 2022 at 10:00 a.m. because of the state holiday on March 31, 2022. Defendants do not oppose this requested clarification.

See also attached declaration of Meir J. Westreich.

Dated: April 1, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

2. On March 9, 2022, This Court issued its Order Granting in Part and Denying in Part Defendants' Motion to Dismiss Sixth Amended and Second Supplemental Complaint in which it *inter alia* dismissed one or matters, respectively, as follows: (a) with prejudice and without leave to amend; (b) as to with leave to amend if filed by March 25, 2022; and (c) without prejudice with a deadline for CARE to file a Motion to File a Supplemental Complaint if filed by March 25, 2022.

3. On March 25, 2022, Plaintiffs filed an Application to Modify Sequence for Filing Pleadings and Motion to Extend Time to Do So, and Defandants filed opposition. On March 29, 2022 the Court granted this application in part,

4. Plaintiffs hereby request clarification of the Court's Order of March 29, 2022 in the following particulars.

5. In so doing, and with all due respect, Plaintiffs do so because of the draconian consequences suggested if their meaning is misapprehended, and the shortness of time allotted, though graciously extended in the latter order.

6. The Order which provides as follows:

> "Any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint will be **STRICKEN *unless*** the Court has granted a motion to supplement."

Order, p.3 [03.29.22] (emphasis in original).

7. In reference to the latter text of the Order [Par. 6, *supra*], the reference in the preceding quoted text to "complaint" would seem to refer to the pleading located at "ECF 271" given the Court's discussion in its two most recent orders, in particular in its Order of March 9, 2022, at pp.10-12, discussing how those alleged events occurred after the pleading at ECF 271. If not, which one?

8. The Court then adds in its March 29, 2022 Order:

> "Furthermore, the Court will strike any amended or supplemental pleading that contains allegations relating to claims that have been dismissed with prejudice."

Order, p.3 [03.29.22] (referencing Order of March 9, 2022).

9. In reference to the latter text of the Order [Par. 8, *supra*], the dismissal of CARE in the March 9, 2022 Order, with a specification for a need to file a Motion for Leave to File a Supplemental Complaint, does not characterize the dismissal as "with prejudice" at p.12 and characterizes it as "without prejudice" at p.18.

10. The latter would seem to mean that in filing their Seventh Amended Complaint by leave already granted, by April 5, 2022, Plaintiffs need not delete references to CARE [redlined as stricken in the redline version], only to have to restore them throughout the latest complaint when CARE files its Motion for Leave to File Supplemental Complaint [redlined as added again in the redline version], which will in fact be filed within the new deadline of April 8, 2022, perhaps sooner if there is no major new redlining required from the work already completed with the March 25, 2022 Application.

11. In reference to the latter text of the Order [Par. 8, *supra*], factual "allegations relating to claims that have been dismissed with prejudice" can also relate validly to claims which have not been dismissed at all, or to claims for which leave to amend has been granted, *e.g.* Plaintiffs' efforts at exhausting administrative [FERC] remedies.

12. Hence, the quoted text in Par. 8, *supra*, would seem to mean only those allegations which relate only to claims dismissed with prejudice, and not to ones which validly relate to other claims not dismissed with prejudice, or amended claims filed in connection with claims dismissed with leave to amend.

NOTICE TO DEFENDANTS

13. When I received first notice of the March 29, 2022 Order, it became apparent that I may need to broaden my Motion to Supplement the Complaint to address other new matters cited in my opposition to the last Motion to Dismiss, with a Request for Judicial Notice, after the filing of the Sixth Amended Complaint, and scheduled a Local Rule Meet and Confer for April 1, 2022 at 10:00 a.m.

14. On March 30, 2022 the mentioned issues in text of the Order [Pars. 6-12, *supra*] became apparent and this Request was drafted. However, due to my being in a special recorded Zoom deposition-type and document production proceeding that had been scheduled weeks in advance and consumed most of the day, I could not complete same until after hours.

15. This "Request" as above stated was promptly e-mailed to defense counsel once completed at 9:00 p.m. on March 30, 2022, in light of the new pending deadline on April 5, 2022.

16. A discussion with defense counsel was sought but could not be scheduled before April 1, 2022 at 10:00 a.m. because of the state holiday on March 31, 2022.

17. Defendants do not oppose this requested clarification as stated in the Request, the body of which – other than recording the results of the meet and confer, the date and reference to this following declaration – has not been altered.

I declare under penalty of perjury that the above is true and correct. Executed on April 1, 2022 at Los Angeles, California.

s/ Meir J. Westreich

Meir J. Westreich

Meir J. Westreich CSB 73133
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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG ***ERRATA* DECLARATION OF MEIR J. WESTREICH RE REQUEST FOR CLARIFICATION OF ORDER OF MARCH 29, 2022**

ERRATA DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

2. In Par. 4 of the Request and Paragraph 17 of the Supporting Declaration, it should read that the "request for clarification" is unopposed, not the "requested clarification".

I declare under penalty of perjury that the above is true and correct. Executed on April 4, 2022 at Los Angeles, California.

s/ Meir J. Westreich

Meir J. Westreich

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE [PROPOSED] EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [*ERRATA*[1]]; SUPPORTING DECLARATIONS OF MEIR J. WESTREICH [*ERRATA*] AND MICHAEL BOYD** Hearing: May 20, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501 Courtroom 2

Notice is hereby given that on May 20, 2022 at 9:00 a.m. in the above-

[1] These *errata* filings largely correct misstated references – in the Notice of Motion, Declaration of Meir J. Westreich and concurrently filed Memorandum of Points and Authorities – to the prior pleading filed April 5, 2022 with leave of court, *i.e.* the Seventh Amended Complaint, and other pleading descriptions. These errors were not made in the lodged [Proposed] Eighth Amended and Third Supplemental Complaint, nor in the [Proposed] Order for Leave to File Eighth Amended and Third Supplemental Complaint, and are lodged herewith again without change.

referenced Courtroom No. 2, all Plaintiffs will and do hereby move this Court for an order authorizing the filing of the [Proposed] Eighth Amended and Third Supplemental Complaint, lodged herewith, by which Plaintiffs seek to supplement the operative complaint herein in accordance with the Order of March 9, 2022, as regards Plaintiff CARE, and on behalf of all Plaintiffs, as regards other late occurring events.

The motion is made under Fed.R.Civ.P. 15(a) & (d), on the grounds that:

(a) This matter is currently on remand from the Ninth Circuit Order reinstating specified claims and issues from the Fifth Amended and First Supplemental Complaint, under the Public Utility Regulatory Polices Act ["PURPA"] and seeking all forms of equitable relief, by Plaintiffs CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"], Michael E. Boyd and Robert Sarvey ["CARE Plaintiffs" or ""Plaintiff CARE"], against Defendants (a) Public Utilities Commission of California ["CPUC"], a California state agency; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]:Alice Busching Reynolds: December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; Genevieve Shiroma [January 22, 2019 - present]; Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. ["CPUC Defendants" or "Defendant CPUC"].

(b) The Ninth Circuit reversed in part the judgment against the CARE Plaintiffs' PURPA Claims, remanding specified claims and issues, and affirming dismissal of all other claims by CARE Plaintiffs.

(c) The membership ["commissioners"] of Defendant CPUC has [have] changed in the intervening time, and the CARE Plaintiffs' reinstated PURPA Claims for which equitable [*e.g.* injunctive and/or declaratory] relief can only be currently adjudicated against current members [commissioners] of Defendant CPUC.

(d) By stipulation of the parties, CARE Plaintiffs filed a Sixth Amended and

Second Supplemental Complaint, without prejudice to any objections of CPUC Defendants to the contents thereof.

(e) Following CPUC Defendants Motions to Dismiss and Strike re Plaintiffs' Sixth Amended and Second Supplemental Complaint, the Court issued an Order on March 9, 2022 granting it in part as to some claims of Plaintiffs Boyd-Sarvey with leave to amend within a specified time; granting it in part as to some claims of all Plaintiffs without leave to amend; granting it in part as to Plaintiff CARE on jurisdictional grounds with leave to file a Motion to Supplement the complaint within a specified time; and denying as moot the Motion to Strike.

(f) Following an order extending the time to file the Boyd-Sarvey amended pleading, it was timely filed on April 5, 2022, denominated as the Seventh Amended Complaint.

(g) By this Motion to Supplement, Plaintiff CARE seeks to supplement the Seventh Amended Complaint to make requisite supplemental allegations to cure the jurisdictional defects in the Sixth Amended and Supplemental Complaint, cited in the Court's Order of March 9, 2022.

(h) By this Motion to Supplement, all CARE Plaintiffs seek to supplement the Seventh Amended Complaint to make allegations re matters occurring since the Fifth Amended and First Supplemental Complaint, the operative pleading in the prior summary judgment and the Ninth Circuit's Opinion reversing in part and remanding specified claims and issues for determination in this Court, to:

(1) Plead updated relevant events; and

(2) Plead newly occurring events in light of CPUC Defendants changing of the CPUC Programs and related implementing regulations, including in particular the rules for defining and calculating avoid costs, which were the subject of the Ninth Circuit's Opinion.

(i) By making the aforementioned changes, CPUC not only altered the very framework of the matters to be considered on remand, but are acting in open and

flagrant defiance of the rulings and orders of the Ninth Circuit in this case, in large part simply ignoring them.

(j) This [Proposed] Eighth Amended and Third Supplemental Complaint deletes former members [commissioners] of Defendant CPUC and adds current members [commissioners] of Defendant CPUC.

MEET AND CONFER COMPLIANCE

This motion is made following multiple meet and confer conferences of counsel pursuant to L.R. 7-3, with which counsel complied therewith; and under which counsel agreed on a modified briefing schedule for this motion, and for responding to the Seventh Amended Complaint, both of which will be specified in a stipulation to be filed.

This motion is based on the following declaration of Meir J. Westreich; Declaration of Michael Boyd; a concurrently filed Memorandum of Points and Authorities; and on the lodged [Proposed] Eighth Amended and Third Supplemental Complaint.

Dated: April 8, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

DECLARATION OF MEIR J. WESTREICH [*ERRATA*]

1. I am attorney of record for Plaintiffs herein.

GROUNDS FOR MOTION

2. This matter is currently on remand from the Ninth Circuit Order reinstating specified claims and issues from the Fifth Amended and First Supplemental Complaint, under the Public Utility Regulatory Polices Act ["PURPA"] and seeking all forms of equitable relief, by Plaintiffs CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"], Michael E. Boyd and Robert Sarvey

[“CARE Plaintiffs” or “”Plaintiff CARE”], against Defendants (a) Public Utilities Commission of California [“CPUC”], a California state agency; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]:Alice Busching Reynolds: December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; Genevieve Shiroma [January 22, 2019 - present]; Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. [“CPUC Defendants” or “Defendant CPUC”].

3. The Ninth Circuit reversed in part the judgment against the CARE Plaintiffs’ PURPA Claims, remanding specified claims and issues, and affirming dismissal of all other claims by CARE Plaintiffs.

4. The membership [“commissioners”] of Defendant CPUC has [have] changed in the intervening time, and the CARE Plaintiffs’ reinstated PURPA Claims for which equitable [*e.g.* injunctive and/or declaratory] relief can only be currently adjudicated against current members [commissioners] of Defendant CPUC.

5. By stipulation of the parties, CARE Plaintiffs filed a Sixth Amended and Second Supplemental Complaint, without prejudice to any objections of CPUC Defendants to the contents thereof.

6. Following CPUC Defendants Motions to Dismiss and Strike re Plaintiffs’ Sixth Amended and Second Supplemental Complaint, the Court issued an Order or March 29, 2022 granting it in part as to Plaintiffs Boyd-Sarvey with leave to amend within specified time; granting it in part as to some claims of all Plaintiffs without leave to amend; granting in part as to Plaintiff CARE on jurisdictional grounds with leave to file a Motion to Supplement the complaint within a specified time; and denying as moot the Motion to Strike.

7. Following an order extending the time to file the Boyd-Sarvey amended pleading, it was timely filed on April 5, 2022, denominated as the Seventh Amended

Complaint.

8. By this Motion to Supplement, Plaintiff CARE seeks to supplement the Seventh Amended Complaint to make requisite supplemental allegations to cure the jurisdictional defects in the Sixth Amended and Supplemental Complaint, cited in the Court's Order of March 9, 2022.

9. By this Motion to Supplement, all CARE Plaintiffs seek to supplement the Seventh Amended Complaint to make allegations re matters occurring since the Fifth Amended and First Supplemental Complaint, the operative pleading in the prior summary judgment and the Ninth Circuit's Opinion reversing in part and remanding specified claims and issues for determination in this Court, to:

a. Plead updated relevant events; and

b. Plead newly occurring events in light of CPUC Defendants changing of the CPUC Programs and related implementing regulations, including in particular the rules for defining and calculating avoid costs, which were the subject of the Ninth Circuit's Opinion.

10. By making the aforementioned changes, CPUC not only altered the very framework of the matters to be considered on remand, but are acting in open and flagrant defiance of the rulings and orders of the Ninth Circuit in this case, in large part simply ignoring them.

11. This [Proposed] Eighth Amended and Third Supplemental Complaint deletes former members [commissioners] of Defendant CPUC and adds current members [commissioners] of Defendant CPUC.

PLEADING HISTORY

12. A Complaint [Dkt 1] was filed on June 10, 2011; a First Amended Complaint [Dkt 20] having been filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re CAlifornians for Renewable Energy, Inc. ["CARE"] Plaintiffs' [CARE-Boyd-Sarvey] Public Utility Regulatory Policies Act ["PURPA"] Exhaustion of Remedies.

13. The Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, were ordered voluntarily dismissed [Dkt 35] on September 9, 2011.

14. The First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61].

15. A Second Amended Complaint [Dkt 64 & 64-1] was filed pursuant to said leave to amend.

16. Remaining CARE Plaintiffs' claims were dismissed without leave to amend [Dkt 82] from said Second Amended Complaint.

17. The Ninth Circuit reversed the order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61].

18. This Court denied leave to file a proposed Fourth Amended Complaint, without prejudice, but afforded leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184].

19. CARE Plaintiffs filed said revised Fourth Amended Complaint, re-branded as the Fifth Amended and First Supplemental Complaint [Dkt 185] – to avoid having different pleadings with the same name – which remained, without further pleading practice, the operative pleading through judgment in favor of CPUC Defendants.

20. In a second appeal, the Ninth Circuit reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended and First Supplemental Complaint.

21. CPUC Defendants stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended and Second Supplemental Complaint [Dkt 253] – and the Court ordered leave to file the Sixth Amended and Supplemental Complaint [Dkt 269] which was concurrently filed [Dkt 267].

22. The Court dismissed the Sixth Amended and Second Supplemental Complaint, parts without leave to amend, parts with leave for Plaintiffs Boyd-Sarvey to amend, and parts with leave for Plaintiff CARE to file a motion to supplement [Dkt 287].

23. The filing of each of the aforementioned amended pleadings superseded the previously filed pleading, which then became a nullity [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)], thereby leaving the Sixth Amended and Supplemental Pleading as the operative pleading to which the March 9, 2022 Order applied – both explicitly and implicitly, and from which the Seventh Amended Complaint derived with leave of court [Dkt 298].

24. This now [Proposed] Eighth Amended and Third Supplemental Complaint amends and supplements the Seventh Amended Complaint [Dkt 298], to be filed with leave of court following noticed hearing.

25. The factual matters averred in the concurrently filed Memorandum of Points and Authorities are incorporated herein by this reference.

MEET AND CONFER COMPLIANCE

26. This motion is made following multiple meet and confer conferences of counsel pursuant to L.R. 7-3, with which counsel complied therewith.

27. Counsel have agreed on a modified briefing schedule for this motion, and for responding to the Seventh Amended Complaint, to defer the latter until after decision on the former, both of which will be specified in a stipulation to be filed.

I declare under penalty of perjury that the above is true and correct. Executed on April 8, 2022 at Los Angeles, California.

S/ Meir J. Westreich

Meir J. Westreich

DECLARATION OF MICHAEL BOYD

1. I, Michael, Boyd, am a Plaintiff herein, and can testify to the following matters of my own personal knowledge.

2. I am a member and President of CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"], which consists of 358 members throughout California, including two other nonprofit entities.

4. CARE is certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd [myself] and Sarvey, officers of CARE.

5. The public policies pursued by CARE since before the filing of the Complaint herein [Dkt 1] include, as its name signifies, promotion of renewable energy and its sources, but also assisting by collective and corporate efforts the many small – less than one megawatt – QF renewable energy facilities, like Sarvey and myself, who standing alone lack individual resources to meaningfully participate in and advance litigation, rulemaking and litigation related public policies, as well as efforts behalf of their own particular interests.

6. Plaintiff CARE has appeared throughout this litigation commencing with the Complaint [Dkt 1] in its representative capacity for and on behalf of its multiple member small – less than one megawatt – QF and QF-qualified renewable energy member facilities

7. I have been a Qualified Facility under PURPA and related FERC regulations since March 17, 2003. CARE has eight QF members, including myself and co-plaintiff Sarvey.

8. I operate solar panels which generate energy / power and I am connected to the PG&E grid by which I supply all of my generated power to PG&E, which also is available thereby to supply me with power should I require it.

9. I started with renewable energy production in my home when I first started a process in 2000.

10. Commencing in 2003 and since then, I sought to be compensated by PG&E under the PURPA and its investor owned utility avoided cost formula, and through efforts by CARE have unsuccessfully sought a power purchase tariff under which:

(a) I would be compensated for the power I supply by payment of PG&E's "avoided cost" – *i.e.* what it would cost PG&E, including *inter alia* capital costs in connection therewith, to create and operate solar power facilities and then generate power therefrom ["full avoided cost"]; and (b) I would pay PG&E's then prevailing market retail rate for customers in my area for any power I receive from PG&E.

11. Instead, I was involuntarily inserted, by PG&E, into their CPUC approved Net Energy Metering ["NEM"] Program whereby over a 12 month period PG&E "nets" the power I supply and receive – i.e. they pay me in energy units from cheaper, inter alia fossil fuel sources; and then either pays or charges me for the net surplus or deficit, respectively, at PG&E's then prevailing market retail rate for customers in my area who purchase power from PG&E.

12. On August 16, 2021, I amended my QF certification to include CARE, which is located at the same address as myself. [FERC Accession No. 20210816-5028 [08.16.21].

13. CARE has partially paid for the QF facilities, commencing in or about September 2020 and since then.

14. CARE, with its office located at my address, has utilized since before my QF certification in 2003 – and at all times since then – the same QF facilities which inter-connect with the utility.

15. Plaintiff CARE is thus also appearing under the "Boyd QF certificate" to which it has now been appended and merged, with our FERC record.

16. Commencing with the Complaint herein, and throughout this litigation, Plaintiff CARE has also acted in the capacity of a representative entity acting on behalf of its QF and QF-qualified members.

17. In the initial Complaint [Dkt 1], CARE had previously submitted to FERC a Petition for Enforcement ["FERC Petition"] and the 60-day period for response had lapsed, entitling CARE to file this action.

18. When CARE's standing and the procedural validity of its FERC Petition

were challenged, Plaintiffs filed the First Amended Complaint [Dkt 20], alleging that CARE and two of its QF members – Plaintiffs Boyd and Sarvey – had jointly submitted a new FERC a Petition for Enforcement ["Joint FERC Petition"] and the 60-day period for response had not yet lapsed, technically not yet completing the required exhaustion of administrative remedies.

19. By the time that the subsequent motion to dismiss was pending, the latter 60–day period had finally lapsed, but leave to amend to add the latter allegation was denied, on grounds that completed exhaustion of administrative remedies was required as of the date of filing the initial complaint, resulting in dismissal for lack of jurisdiction without leave to amend.

20. On appeal, in *Solutions for Utilities, Inc. v. CPUC*, Case No. 13-55206 (March 6, 2015), the Ninth Circuit addressed this issue as if there was the one Joint FERC Petition whose 60-day period for response had lapsed, *i.e.* "CARE fulfilled the requirement to exhaust administrative remedies," and reversed and remanded on grounds that leave to amend should have been afforded to permit completed compliance with administrative exhaustion requirements while the action was already pending.

21. Plaintiff CARE now includes a total of eight QF members, including Plaintiffs Boyd and Sarvey.

22. On the subsequent remand and second appeal, CARE continued to appear in this action in its representative capacity for its QF members, including but not limited to Plaintiffs Boyd and Sarvey.

23. When CPUC decided in the second remand to challenge standing of CARE, I did and completed what I at all earlier times could have done had it been raised earlier: I amended my QF certification with FERC to include CARE, which at all times has been operating at the same location, participating and exporting with the same power generating facilities that are interconnected with the same utility, to the same effect and with the same interests therein.

24. CARE is entitled and has standing to participate in this action both as a co-equal part of a QF certification, now approved by FERC, and as representative of other QF members.

I declare under penalty of perjury that the above is true and correct. Executed on April 8, 2022 at Soquel, California.

/s/ Michael Boyd

Michael Boyd

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION TO FILE EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [*ERRATA*[1]]** Hearing: May 20, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501, Courtroom 2

I.
PLEADING HISTORY

The filing of an amended pleading supersedes the previously filed pleading, which then becomes a nullity. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)].

A Complaint [Dkt 1] was filed on June 10, 2011; a First Amended Complaint [Dkt 20] having been filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re CAlifornians

[1] This *errata* filing corrects a caption error, prior pleading references, and a citation and heading in Section III.B.

for Renewable Energy, Inc. ["CARE"] Plaintiffs' [CARE-Boyd-Sarvey] Public Utility Regulatory Policies Act ["PURPA"] Exhaustion of Remedies. The Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, were ordered voluntarily dismissed [Dkt 35] September 9, 2011.

The First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61]. A Second Amended Complaint [Dkt 64 & 64-1] was filed pursuant to said leave to amend. Remaining CARE Plaintiffs' claims were dismissed without leave to amend [Dkt 82] from said Second Amended Complaint. The Ninth Circuit reversed the order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61].

This Court denied leave to file a proposed Fourth Amended Complaint, without prejudice, but afforded leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184]. CARE Plaintiffs filed said revised Fourth Amended Complaint, re-branded as the Fifth Amended and First Supplemental Complaint [Dkt 185] – to avoid having different pleadings with the same name – which remained, without further pleading practice, the operative pleading through judgment in favor of CPUC Defendants. In a second appeal, the Ninth Circuit reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended and First Supplemental Complaint.

CPUC Defendants stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended and Second Supplemental Complaint [Dkt 253] – and the Court ordered leave to file the Sixth Amended and Supplemental Complaint [Dkt 269] which was concurrently filed [Dkt 267]. The Court dismissed the Sixth Amended and Second Supplemental Complaint, parts without leave to amend, parts with leave for Plaintiffs Boyd-Sarvey to amend, and parts with leave for Plaintiff CARE to file a motion to supplement [Dkt 287].

The filing of each of the aforementioned amended pleadings superseded the previously filed pleading, which then became a nullity. *See Lacey*, 693 F.3d at 928, thereby leaving the Sixth Amended Pleading as the operative pleading to which the March 9, 2022 Order applied, and from which the Seventh Amended Complaint derived with leave of court [Dkt 298]. This now [Proposed] Eighth Amended and Third Supplemental Complaint seeks to amend and supplement the Seventh Amended Complaint [Dkt 298], to be filed with leave of court following noticed hearing.

II.
PLAINTIFF CARE IS ENTITLED TO THIS FIRST OPPORTUNITY TO CURE ANY JURISDICTIONAL PLEADING DEFECTS WHETHER BY AMENDMENT OR SUPPLEMENT OF THE LATEST COMPLAINT

A.
AMENDMENT STANDARD

As applied by this Court in its Order of March 9, 2022, "Courts are free to grant a party leave to amend whenever 'justice so requires,' Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with 'extreme liberality.' *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001) (*quoting Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). In the absence of any case management order specifying a deadline for pleading motions, whether to grant a motion for leave to amend is governed by "the liberal standard" of Fed.R.Civ.P. 15(a).

> "Rule 15(a)'s liberal amendment policy . . . focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party . . . [citation omitted]."

See In re W. States Wholesale Natural Gas Antitrust Litigation, 715 F.3d 716, 737 (9th Cir. 2013). "The court should freely give leave when justice so requires." *In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d at 737 n.16. "Rule 15(a)'s liberal amendment policy . . . focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party . . . [citation omitted]. *See In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d

716, 737 (9th Cir. 2013)."The court should freely give leave when justice so requires." *In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d at 737 n.16.

A Plaintiff is entitled to at least one opportunity to correct defects for which he has received clear notice from the Court. *See Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 732, 738 (9th Cir. 1987); *Vess,* 317 F.3d at 1107. *Accord, Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983) (denial of leave to amend only based on undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant).

B.
SUPPLEMENT STANDARD

Hence, under Fed.R.Civ.P. 15(d), a plaintiff may cure an Article III standing defect by filing a supplemental complaint alleging facts that arose after the filing of the original complaint, and should also include changes in circumstances based on actions of the Defendant. *See Northstar Financial Advisors Inc. v. Schwab Investors*, 779 F.3d 1036, 1044 (9th Cir. 2015). *See generally Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018) (describing split in circuits, and joining 9th Circuit and others in applying this permissive standard). Hence, "a party [may] serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed.R.Civ.P. 15(d). *See also* Section III.B, *infra* [re law of the case and scope of action on remand].

C.
AMENDMENT AND SUPPLEMENT STANDARDS APPLIED HEREIN

The Ninth Circuit's first reverse and remand order – on grounds *inter alia* of standing and jurisdiction re CARE Plaintiffs' PURPA claims – applied to a First Amended Complaint that was later superseded by a Second Amended Complaint, and later became the court-approved basis for a Fifth Amended and First Supplemental Complaint implementing the first remand order. The Ninth Circuit's second reverse

and remand order applied to the Fifth Amended and First Supplemental Complaint, later superseded by the stipulated and ordered Sixth Amended and Second Supplemental Complaint seeking to implement the second remand order, soon to be at last a Seventh Amended Complaint. [There were no Third or Fourth Amended Complaints filed herein].

Plaintiff CARE now seeks to supplement the current pleading to correct any standing defects to the extent it is based on events occurring since the filing of the Sixth Amended and Second Supplemental Complaint, in particular to correct and update the QF status of CARE based on actions taken since the filing of the latest pleading that merged the Boyd and CARE QF certifications; and correcting the changing personnel on the CPUC for equitable relief issues.

The [Proposed] Eighth Amended and Third Supplemental Complaint lodged herewith also includes the amendments by Plaintiffs, filed with leave of Court in the Seventh Amended Complaint [with a few minor cleanup corrections shown in the former as redline in the lodged redline version], addressing the standing and other issues noted in this Court's Order of March 9, 2022, that being Plaintiffs' first opportunity to make those pleading corrections following clear notice of the purported defects. *Compare* [Proposed] Eighth Amended and Third Supplemental Complaint [clean and redline versions] *with* the previously filed Seventh Amended Complaint [clean and redline versions] [Dkt 298], the latter of which will be superseded and a nullity if the former is ordered filed as requested herein.

Finally, all Plaintiffs now seek to further supplement the Sixth Amended and Second Supplemental Complaint – and any preceding but now superseded version – to add claims and allegations which have arisen since the Fifth Amended and Second Supplemental Complaint, which was the operative pleading in the prior summary judgment reversed in part and remanded in the Ninth Circuit Opinion, from which these current remand proceedings derive.

III.
SUPPLEMENTING THE OPERATIVE COMPLAINT IS PERMITTED TO ADDRESS NEW CLAIMS AND EVENTS SINCE THOSE ADDRESSED IN THE NINTH CIRCUIT OPINION

A.
APPELLATE COURT RULINGS IN LIGHT OF OPERATIVE PLEADING: THE FIFTH AMENDED COMPLAINT

To assess what was ordered by the Ninth Circuit in *CARE, supra*, the starting point of the analysis is the operative pleading on which the district court issued its summary judgment and the Ninth Circuit reversed, in part, and affirmed, in part, the Fifth Amended and Supplemental Complaint.

In the Fifth Amended and Supplemental Complaint, Plaintiffs sought enforcement by CPUC of PURPA requirements in connection with guaranteed IOU (a) avoided cost payments and (b) connectivity. In respect to the former, there were three issues posited in the claims: (1) avoided cost payments by IOU to QF must be exactly that, *i.e.* not more nor less; (2) avoided cost must include capacity costs; and (3) avoided costs must be tier calculated, *i,e.* by like energy source. There is no reference in the Fifth Amended and Supplemental Complaint to any of the CPUC approved IOU programs – *e.g.* NEM, RPS, RE-MAT, CHP or QF Settlement. All of the latter were injected into the case by CPUC as defenses.

On appeal herein, the judgments on all of the damages claims, and the connectivity claims, were affirmed. The appellate court, however, issued nuanced rulings on the defenses to the PURPA avoided cost claims. It did not rule against the avoided costs claims without reference to the CPUC asserted defenses.

Hence, the Court ruled on those affirmative defenses, s*ee CARE,* 922 F.3d at 933-35, as follows: While CPUC has broad discretion to implement "avoided cost" under PURPA, courts must not abdicate responsibility to ensure PURPA compliance. *See CARE,* 922 F.3d at 936. PURPA requires that when avoided cost is calculated, it is the "full avoided cost" standard, *i.e.* a floor as well as a ceiling. *See CARE,* 922 F.3d at 936-37.

In assessing full avoided cost, the Court struck a middle ground between Plaintiffs' position that avoided cost should always be multi-tiered re energy source and the CPUC position that mixed sources are always acceptable. *See CARE,* 922 F.3d at 936-38.

> "Where a state has an RPS [renewable energy requirements] and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided cost based on energy sources that would not also meet the RPS. . . . [This is a fact based] examination of the costs that a utility is *actually avoiding* . . . ."

CARE, 922 F.3d at 937 (emphasis in original). Likewise, whether the re-MAT and CHP programs can rely on natural gas sources instead of renewable energy is a fact-based inquiry in connection with whether the utility is using the supplier for meeting RSP requirements. *See CARE,* 922 F.3d at 940.

Again, in assessing full avoided cost, capacity costs must be included where the supplier affords "sufficient legally enforceable guarantees of deliverability" or when the utility knows how much energy the supplier will provide, but not otherwise. *See CARE,* 922 F.3d at 938-39. NEM programs are not "categorically exempt from PURPA." *See CARE,* 922 F.3d at 939.

In summary, the Ninth Circuit herein described "full avoided cost" as a legal mandate under PURPA and FERC rules which require that utilities pay to QF power providers an avoided cost defined as no less than, as well as no more than, their avoided cost. In so doing, the Ninth Circuit has also described when such "full avoided cost" must include replacement "capacity costs" and when these calculations must employ a multi-tiered formula, i.e. calculating the avoided costs by comparing like sources of power.

The Ninth Circuit also ruled that the District Court, in its earlier rulings, had (a) misinterpreted PURPA'S requirements in connection with avoided cost and multiple sources of power, and (b) did not consider whether utilities are fulfilling any

of their RPS obligations through the herein challenged CPUC programs. In light of the aforementioned determinations in the preceding Paragraph, the Ninth Circuit also remanded the matter for the district court to make specified determinations whether the herein challenged CPUC programs: (a) are de facto impermissible under PURPA; and/or (b) comply with the multiple source rules under PURPA. *See CARE,* 922 F.3d at 937-38. These considerations, in turn, impact application of the correct rules for calculation of full avoided cost and when, and under what circumstances, that implicates inclusion of capacity costs.

B.
LAW OF THE CASE AND RULE OF MANDATE IN LIGHT OF CHANGING LEGAL AND FACTUAL PREDICATES

First, to the extent that the doctrine of the "law of the case" and "rule of mandate" govern on remand, they apply with equal force to both sides. Second, the impact of the doctrines vary if on remand there is new or different evidence, and/or the matter is not foreclosed by the mandate. *See Stacy v. Colvin*, 825 F.3d 563, 567-68 (9th Cir. 2016) (holding).

> "A court may have discretion to reopen a previously resolved question only where (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993)."

Disimone v. Browner, 121 F.3d 1262, 1266 (9th Cir. 1997).

C.
CPUC HAS ALTERED THE PROGRAM AND REGULATORY FRAMEWORK WHICH WAS REVIEWED BY THE NINTH CIRCUIT AND ON WHICH ITS REMAND APPLIES

The PUC decried the Ninth Circuit's published Opinion herein, as follows:

> "If [the Opinion is] not remedied through rehearing, this misreading of PURPA will interfere with California's efforts to encourage renewable development and will create confusion on the calculation of avoided

> cost rates that will stall PURPA implementation and associated renewable development across the country."

CPUC Petition for Rehearing in the Ninth Circuit, p.4. Case No. 55-297 (06.21.19).

> "For RPS states, the [Opinion]'s new rule will interfere with state regulators' discretion over procurement by requiring that any RPS programs implemented under PURPA be RPS-only. . . . Under the [Opinion]'s new rule, this standard offer program would violate PURPA because RPS generators in that program are contributing to the state's RPS, but the avoided cost rate is not based on RPS generation."

CPUC Petition for Rehearing, at p.14.

> "Consequently, if left undisturbed, the . . . [O]pinion will put in question the PURPA programs in all RPS states. Each RPS state – and any other state considering one – will need to review whether its PURPA programs that include RPS resources establish avoided cost rates consistent with the Majority's new rule and modify or terminate those programs that do not."

CPUC Petition for Rehearing, at p.15.

Yet, commencing in August 2020, CPUC has been engaged – at the behest of the IOU's – in a complete revamping effort for the NEM programs December 13, 2021 [Proposed Decision re Net Energy Metering Tariffs and Subtariffs in CPUC Rulemaking (R 20-08-020) (12.13.21)]. Concomitant to that, CPUC has implemented a new avoided cost protocol, effective June 28, 2021 which adopts updates to the "Avoided Cost Calculator." [CPUC Resolution E-5150 (06.28.21)].

In utter defiance of the Ninth Circuit holdings in the prior appeal herein, and notwithstanding the stated fears of CPUC, that new protocol not only fails to mention that published opinion, but totally ignores – fails to mention – three central holdings: (1) that avoided cost means "full avoided" cost, *i.e.* not less than the avoided cost, as mandated by FERC rules; (2) that whether a utility must include capacity costs in

calculating and paying full avoided cost can be made dependant on whether the QF is guaranteeing its energy supply to the IOU, *i.e.* if there is such a guarantee, then capacity costs must be included; and (3) given the state's commitment via its RPS program – under which utilities must and do in fact meet standards of ever-increasing reliance on renewable energy – avoided cost must be tiered so that avoided costs is calculated by reference to the same energy source, *i.e.* renewable for renewable, fossil for fossil.

In the aforementioned new avoided cost protocol, CPUC does not prescribe that inclusion of capacity costs be included when QF supply is guaranteed; nor does it prescribe that avoided costs for renewable energy supplying QF's, or with utilities using QF's for that RPS purpose, be calculated by reference only to like-tiered energy sources; nor does it prescribe that avoided cost payments must be neither less not more than actual avoided cost, instead retaining market based formulae with protections only against payments exceeding actual avoided cost.

If in fact Defendants were / are complying with PURPA and FERC regulations, this protocol would have been the perfect vehicle for demonstrating same with, inter alia, compliance with the Ninth Circuit mandates; and by failing to do so – they do not even reference the decision or its specific provisions – they prove that they do not mean to enforce these PURPA / FERC standards with the utilities, and will not do so unless compelled by this Court.

CONCLUSION

Accordingly, Plaintiffs urge the filing of the Eighth Amended and Third Supplemental Complaint as lodged herewith.

Dated: April 8, 2022

Respectfully submitted,

s/ Meir J. Westreich

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Attorney for Plaintiffs

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **PLAINTIFFS' NOTICE OF MOTION AND MOTION TO RECONSIDER ORDER OF MARCH 29, 2022 AND MINUTE ENTRY OF APRIL 4, 2022; SUPPORTING DECLARATION OF MEIR J. WESTREICH** Hearing: May 20, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501 Courtroom 2

Notice is hereby given that on May 20, 2022 at 9:00 a.m. in the above-referenced Courtroom No. 2, Plaintiffs will and do hereby move this Court for an order reconsidering a specified portion of its Order or March 29, 2022 [Dkt 294] [Exhibit A] and Minute Entry of April 5, 2022 [Dkt 296] [Exhibit B], and instead ruling that:

a. As of the dates of the referenced orders [Dkt 294 & 296], the operative pleading was the Sixth Amended and Second Supplemental Complaint [Dkt 267], and

that was the pleading referenced in the Court's Order granting leave to amend in relevant parts [Dkt 287]. All previous pleadings are superseded and a nullity.

b. The Seventh Amended Complaint [Dkt 298] filed on April 5, 2022 is now the operative pleading, and supersedes the Sixth Amended and Second Supplemental Complaint [Dkt 267], which is a nullity.

c. Any supplementing of the operative pleading(s) herein will be determined in connection with the now pending Plaintiffs' Motion for Leave to File Eighth Amended and Third Supplemental Complaint [Dkt 299, 300].

d. Any pleading the filing of which the Court may authorize in connection with Plaintiffs' Motion for Leave to File Eighth Amended and Third Supplemental Complaint [Dkt 299, 300], will – if and when filed – supersede the Seventh Amended Complaint [Dkt 298], which will thereafter be a nullity.

This motion is made under Fed.R.Civ.P. 15, *Lee v. City of Los Angeles,* 250 F.3d 668, 683 & n.7 (9th Cir. 2001), and Local Rule 7-18, on the grounds that:

(1) As more particularly discussed in the supporting Declaration of Meir J. Westreich and Memorandum of Points and Authorities, filed herewith, the Court *sua sponte* decided a matter and/or relied on a certain ground not presented or raised by Defendants, hence entitling Plaintiffs to be heard after notice thereof by written memorandum [now submitted], before such decision(s) become final. *See Lee v. City of Los Angeles,* 250 F.3d 668, 683 & n.7 (9th Cir. 2001).

(2) As hereinafter discussed, the Court failed and/or omitted to consider material pleading facts and events presented to the Court before its Orders [Dkt 294 & 296], including matters to which judicial notice was/is requested, and which arose after the motions were under submission, and only discovered after the initial orders herein. *See* Local Rule 7-18.

(3) In particular, while Plaintiff was contending – on the one hand – that the operative pleading herein has been the Sixth Amended and Second Supplemental Complaint since its filing [Dkt 267] with leave of Court on May 17, 2022 [Dkt 269],

obtained by agreement of counsel in a Joint Status Report filed May 7, 2022 [Dkt 266] with an identical redlined version of said pleading lodged therewith [Dkt 266-1] as appeared to be the case in the Court's Order or March 9, 2022 [Dkt 287], Defendants were contending – on the other hand – that the operative pleading was the preceding Fifth Amended and First Supplemental Complaint [Dkt 185], which was the operative pleading before the Ninth Circuit in its Opinion from which arises the current remand, this Court struck an unanticipated third alternative course when it ruled / clarified on April 4, 2022 [Dkt 296] that the operative pleading was and is the original Complaint herein [Dkt 1], which would / should serve as the pleading benchmark for further pleadings as ruled / clarified on March 29, 2022 [Dkt 294].

(4) Because a completely different Plaintiff and its claims had been adjudicated in the Second Amended Complaint [Dkt 64] and, having not appealed, were no longer party to any part of the proceedings in the first reversal in part, remand and mandate [Dkt 183], and because the CARE Plaintiffs' partially successful appeals from orders arising from First Amended Complaint [Dkt 20] and Second Amended Complaint [Dkt 64] permitted them to plead belated mid-stream exhaustion of administrative remedies [Dkt 173], a pleading cleanup was necessary for the first remand and mandate proceedings.

(5) In its clarifying orders [Dkt 294 & 296], the Court referenced the incompletely entitled "Order Denying Without Prejudice Motion for Leave to File Fourth Amended Complaint and First Supplemental Complaint" [Dkt 184], which in fact concluded as follows:

> "[T]he Court **DENIES WITHOUT PREJUDICE** CARE Plaintiffs' Motion [to File Fourth Amended and First Supplemental Complaint (Dkt 178-3)]. Should CARE Plaintiffs choose to further amend their pleading, they may do so by filing a Fourth Amended Complaint for enforcement of PURPA pursuant to 16 U.S.C. § 824a-3 that is consistent with both this Order and the Court's prior Orders."

[Dkt 184,p.9 (emphasis in original)].

(6) The aforementioned amended pleading was filed with the name "Fifth Amended and First Supplemental Complaint" [Dkt 185] – so entitled only to avoid duplicate titles for different pleadings – which adhered to the mentioned court ordered limitations, to which Defendants answered [Dkt 188] and to which no pleading motion or objection was raised by Court or counsel, so that it then became the operative pleading for all subsequent proceedings through summary judgment [Dkt 217-218] and the filing of the Ninth Circuit Opinion [Dkt 224] that is the basis for the current remand and mandate proceedings.

(7) By strict operation of law, allowing for no exceptions, any filed amended complaint supersedes any preceding complaint, which thereby becomes a nullity, requiring a special set of rules affording retained preservation of appeal rights from any order dismissing claims from the superseded pleading, to avoid the necessity for pleading parties to include in amended pleadings claims and allegations previously dismissed with prejudice or without leave to amend. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9^{th} Cir. 2012) (*en banc*).

(8) Notwithstanding the aforementioned, Plaintiffs are nevertheless seeking leave of Court to add the supplemental allegations and claims specified in the pending Motion for Leave to File Eighth Amended and Third Supplemental Complaint [filed 04.08.22, as corrected by errata filing on 04.09.22], seeking thereby to file a pleading which will then supersede the Seventh Amended Complaint [filed on 04.05.22 with leave of court to amend to correct deficiencies specified in the Court's Order of 03.09.22, as clarified in connection therewith on 03.29.22].

MEET AND CONFER COMPLIANCE

(9) Counsel completed meet and confer obligations under Local Rule 7-3, in connection with this motion.

This motion is based on the attached Declaration of Meir J. Westreich and exhibits referenced therein; the request for judicial notice and the documents and facts

contained therein, for which judicial notice is requested; the Memorandum of Points and Authorities filed herewith; and on the briefing of the two motions which led to the orders subject to this motion.

Dated: April 12, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

2. Plaintiffs will and do hereby move this Court for an order reconsidering a specified portion of its Order or March 29, 2022 [Dkt 294] [Exhibit A] and Minute Entry of April 5, 2022 [Dkt 296] [Exhibit B], and instead ruling as set forth in the motion [above].

3. This motion is made under Fed.R.Civ.P. 15, *Lee v. City of Los Angeles,* 250 F.3d 668, 683 & n.7 (9th Cir. 2001), and Local Rule 7-18.

4. As more particularly discussed in the supporting Memorandum of Points and Authorities, filed herewith, the Court *sua sponte* decided a matter and/or relied on a certain ground not presented or raised by Defendants, hence entitling Plaintiffs to be heard after notice thereof by written notice [now afforded], before such decision(s) become final. *See Lee v. City of Los Angeles,* 250 F.3d 668, 683 & n.7 (9th Cir. 2001).

5. As hereinafter discussed, the Court failed and/or omitted to consider material pleading facts and events presented to the Court before its Orders [Dkt 294 & 296], including matters to which judicial notice was/is requested, and which arose after the motions were under submission, and only discovered after the initial orders herein. *See* Local Rule 7-18.

6. Plaintiff was contending – on the one hand – that the operative pleading herein has been the Sixth Amended and Second Supplemental Complaint since its filing [Dkt 267] with leave of Court on May 17, 2022 [Dkt 269], obtained by

agreement of counsel in a Joint Status Report filed May 7, 2022 [Dkt 266] with an identical redlined version of said pleading lodged therewith [Dkt 266-1] as appeared to be the case in the Court's Order or March 9, 2022 [Dkt 287].

7. Defendants were contending – on the other hand – that the operative pleading was the preceding Fifth Amended and First Supplemental Complaint [Dkt 185], which was the operative pleading before the Ninth Circuit in its issuing of its Opinion [Dkt 224] from which arises the current remand proceedings.

8. This Court struck an unanticipated third alternative course when it ruled / clarified on April 4, 2022 [Dkt 296] that the operative pleading was and is the original Complaint herein [Dkt 1], which would / should serve as the pleading benchmark for further pleadings as ruled / clarified on March 29, 2022 [Dkt 294].

9. Heretofore, a completely different Plaintiff and its claims had been adjudicated in the Second Amended Complaint [Dkt 64] and, having not appealed, were no longer party to any part of the proceedings in the first reversal in part, remand and mandate [Dkt 183].

10. Meanwhile, CARE Plaintiffs' partially successful appeals from orders arising from First Amended Complaint [Dkt 20] and Second Amended Complaint [Dkt 64] permitted them to plead belated mid-stream exhaustion of administrative remedies [Dkt 173].

11. Hence, a pleading cleanup was necessary for the first remand and mandate proceedings.

12. This was attempted by what, in its clarifying orders [Dkt 294 & 296], the Court referenced as the incompletely entitled "Order Denying Without Prejudice Motion for Leave to File Fourth Amended Complaint and First Supplemental Complaint" [Dkt 184].

13. Said Order [Dkt 184] in fact concluded as follows:

> "[T]he Court **DENIES WITHOUT PREJUDICE** CARE Plaintiffs' Motion [to File Fourth Amended and First Supplemental Complaint (Dkt 178-3)]. Should CARE Plaintiffs choose to further amend their pleading, they may do so by filing a Fourth Amended Complaint for enforcement of PURPA pursuant to 16 U.S.C. § 824a-3 that is consistent with both this Order and the Court's prior Orders."

[Dkt 184,p.9 (emphasis in original)].

14. The aforementioned amended pleading was filed instead with the name "Fifth Amended and First Supplemental Complaint" [Dkt 185] – so entitled only to avoid duplicate titles for different pleadings – which adhered to the mentioned court ordered limitations.

15. Defendants answered [Dkt 188], and no pleading motion or objection was raised by Court or counsel, so that it then became the operative pleading for all subsequent proceedings through summary judgment [Dkt 217-218] and the filing of the Ninth Circuit Opinion [Dkt 224] that is the basis for the current remand and mandate proceedings.

16. By strict operation of law, allowing for no exceptions, any filed amended complaint supersedes any preceding complaint, which thereby becomes a nullity, requiring a special set of rules affording retained preservation of appeal rights from any order dismissing claims from the superseded pleading, to avoid the necessity for pleading parties to include in amended pleadings claims and allegations previously dismissed with prejudice or without leave to amend. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9^{th} Cir. 2012) (*en banc*).

17. Notwithstanding the aforementioned, Plaintiffs are nevertheless seeking leave of Court to add the supplemental allegations and claims specified in the pending Motion for Leave to File Eighth Amended and Third Supplemental Complaint [filed 04.08.22, as corrected by errata filing on 04.09.22].

18. Plaintiffs are seeking thereby to file an amended and supplemental pleading which will then supersede the Seventh Amended Complaint [filed on 04.05.22 with leave of court to amend to correct deficiencies specified in the Court's Order of 03.09.22, as clarified in connection therewith on 03.29.22].

MEET AND CONFER COMPLIANCE

19. Counsel completed meet and confer obligations under Local Rule 7-3, in connection with this motion.

I declare under penalty of perjury that the above is true and correct. Executed on April 12, 2022 at Los Angeles, California.

S/ Meir J. Westreich

Meir J. Westreich

EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—
GENERAL

Case No.	2:11-cv-04975-JWH-JCGx	Date	March 29, 2022
Title	*Solutions for Utilities, Inc., et al. v. California Public Utilities Commission, et al.*		

Present: The Honorable	JOHN W. HOLCOMB, UNITED STATES DISTRICT JUDGE

Irene Vazquez	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: ORDER REGARDING PLAINTIFFS' APPLICATION TO MODIFY SEQUENCE OF NEW PLEADING FILINGS AND EXTEND TIME TO DO SO [ECF NO. 288] (IN CHAMBERS)

Defendants California Public Utilities Commission and current and former Commissioners of that entity (collectively, the "CPUC") previously moved to dismiss the sixth amended complaint of Plaintiffs Californians for Renewable Energy, Inc. ("CARE") and two of its members, Michael Boyd and Robert Sarvey, (collectively, "Plaintiffs").[1] On March 9, 2022, the Court granted that motion in part and denied it in part.[2] Relevant here, the Court dismissed CARE's claims without prejudice for lack of standing, and it dismissed Boyd and Sarvey's implementation claim under the Public Utility Regulatory Policies Act

[1] Defs.' Mot. to Dismiss the Sixth Am. Compl. and Mot. to Strike References to Second Suppl. From Sixth Am. Compl. [ECF No. 271].

[2] Order Granting in Part and Den. in Part the Mot. of California Public Utilities Commission and Commissioners to Dismiss Sixth Am. Compl. and Mot. to Strike References to Second. Suppl. from Sixth Am. Compl. (the "Order") [ECF No. 287].

("PURPA") with leave to amend.[3] In view of that Order, Plaintiffs now apply for an extension of time and a modified sequence to amend their pleadings.[4] The arguments that Plaintiffs make in their Application reveal their misunderstanding of the Order.

The Order gave Plaintiffs a choice of four options: (1) file a ***motion*** for leave to file a ***supplemental*** pleading with respect to CARE's claim that the Order dismissed for lack of standing; (2) ***amend*** their existing pleading with respect to Boyd and Sarvey's PURPA claim that the Order dismissed with leave to amend; (3) do both; or (4) do neither.[5] There was no option for Plaintiffs simultaneously to supplement and amend with a confusing multicolor redline. *See* Fed. R. Civ. P. 15(d) (requiring a motion to file a supplemental pleading). Regrettably, it appears that Plaintiffs misread or misunderstood the Order, as they have attempted to do just that.

Plaintiff should note that a supplemental complaint is distinct from an amended complaint. *Compare* Fed. R. Civ. P. 15(a) *with* Fed. R. Civ. P. 15(d). Each pleading should stand alone and should contain allegations pertaining only to the claims asserted therein and not to claims that have been previously dismissed or abandoned. This Court's Local Rules do not suggest or require that a ***supplemental*** complaint should be contained within an ***amended*** complaint. *Cf.* L.R. 15-2.

In its Opposition, the CPUC insists that all of Plaintiffs' claims should now be dismissed with prejudice, as the Order itself contemplates, for Plaintiffs' failure to amend or to file a motion to supplement by March 25, 2022—the deadline for Plaintiffs to act.[6] While the Court agrees that Plaintiffs did not meet that deadline, the Court strongly favors deciding cases on the merits, rather than through procedural technicalities. Because it appears that Plaintiffs have the substance of their amended pleading ready (but Plaintiffs may have been confused regarding the

3 *Id.* at 18:18-19:13.

4 Pls.' Appl. to Modify Sequence of New Pleading Filings and Extend Time to Do So (the "Application") [ECF No. 288].

5 Order 18:16-19:13.

6 Opp'n by Defs. to the Application [ECF No. 289] 1:8-2:8.

form or sequence),[7] dismissing this action now would run counter to that policy of deciding cases on the merits. *See also* Fed. R. Civ. P. 1.

For those reasons, the Court hereby **ORDERS** as follows:

1. Plaintiffs' Application is **GRANTED in part** and **DENIED in part**.

2. The deadline for Boyd and Sarvey to file an amended complaint—but only as it relates to their PURPA implementation claim within the scope of the Ninth Circuit's remand—is **EXTENDED** to no later than April 5, 2022. If Boyd and Sarvey choose to file an amended pleading, then they are also **DIRECTED** to file contemporaneously therewith a Notice of Revisions to the Sixth Amended Complaint that provides the Court with a redline version that shows the amendments. If Boyd and Sarvey fail to file their amended pleading by the extended deadline, then the Court will dismiss Boyd and Sarvey from this action with prejudice.

3. The deadline for CARE to file a motion pursuant to Rule 15(d) for leave to file a supplemental complaint is **EXTENDED** to April 8, 2022. If CARE fails to file a motion for leave to file a supplemental complaint by that date, then the Court will dismiss CARE from this action with prejudice.

4. Any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint will be **STRICKEN** ***unless*** the Court has granted a motion to supplement. *See* Fed. R. Civ. P. 15(d). Furthermore, the Court will strike any amended or supplemental pleading that contains allegations relating to claims that have been dismissed with prejudice.[8]

IT IS SO ORDERED.

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[7] *See generally* Application, Lodging of Combined Redline-Blueline of Intended Proposed Seventh Am. and Third Compl. for Equitable Relief [ECF No. 288-2].

[8] *See generally* Order.

EXHIBIT B

Subject: **Summary of ECF Activity**
Date: 4/5/2022 12:03:24 AM Pacific Standard Time
From: cacd_ecfmail@cacd.uscourts.gov
To: noreply@ao.uscourts.gov

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
***** NOTE TO PUBLIC ACCESS USERS *****
This Daily Summary Report may contain documents for which one or more of the following policies apply:

Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

There is no charge for viewing opinions.

Activity has occurred in the following cases:

2:11-cv-04975-JWH-JCG Solutions for Utilities Inc et al v. California Public Utilities Commission et al
Generic Text Only Entry 296 (No document attached)

Docket Text:
(IN CHAMBERS) ORDER by Judge John W. Holcomb: In response to Plaintiff's Request for Clarification [ECF No. [295]], the Court provides the following clarification of its Minute Order (the "Order") [ECF No. 294]: (1) The "Complaint" refers to Plaintiffs' Complaint for Damages and Equitable Relief (the "Complaint") [ECF No. 1]. (2) Plaintiffs Boyd and Sarvey need not delete references to CARE in their anticipated amended complaint, so long as (a) those allegations are relevant to the sole claim for which they have been granted leave to amend; and (b) the allegations do not concern transactions, occurrences, or events that happened after the date of the filing of the Complaint. See Fed. R. Civ. P. 15(d). The Court reminds Plaintiffs that it denied their only prior motion to file a supplemental pleading, albeit without prejudice. See Order Den. Without Prejudice Mot. for Leave to File Fourth Am. Compl. and First Suppl. Compl. [ECF No. 184]. (3) Plaintiffs are not barred from making allegations in an amended or supplemental pleading, so long as (b) those allegations are related to claims asserted in that particular amended or supplemental pleading; and (b) those allegations otherwise comport with the Federal Rules of Civil Procedure and Local Rules. CARE's anticipated supplemental pleading (which CARE must obtain leave to file) should not contain any claims that are asserted in Boyd and Sarvey's anticipated amended pleading. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (iva) TEXT ONLY ENTRY

2:11-cv-04975-JWH-JCG Solutions for Utilities Inc et al v. California Public Utilities Commission et al
Declaration (Motion related) 297

Docket Text:
DECLARATION of Meir J. Westreich in Support of Request for Clarification First REQUEST to Supplement Clarify Order of March 29, 2022 re Order on Motion for Extension of Time to Amend,,,, [294] *Urgent Attention Required Due 04.05.22 Filing Deadline*[295] *Errata Declaration* filed by Plaintiff Robert Sarvey. (Westreich, Meir)

2:20-cv-05581-DSF-GJS Beyond Blond Productions, LLC v. Edward Heldman III et al
Order on Motion for Reconsideration 222

Docket Text:
ORDER by Judge Dale S. Fischer DENYING Motion for Reconsideration (Dkt. [203]). See Order for specifics. (jp)

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **MEMORANDUM OF POINTS AND AUTHORITIES RE PLAINTIFFS' MOTION TO RECONSIDER ORDER OF MARCH 29, 2022 AND MINUTE ENTRY OF APRIL 4, 2022** Hearing: May 20, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501 Courtroom 2

INTRODUCTION

This motion to Reconsider is filed with the intent of having it be considered and decided in conjunction with the Motion for Leave to File [Proposed] Eighth Amended and Third Supplemental Complaint [Dkt 299,300]. Plaintiffs also request the Court to take judicial notice of the pleadings and orders cited with their docket numbers in the motion as well as the supporting Declaration of Meir J. Westreich and this Memorandum, in their original and errata versions [that largely corrected mis-citations to the Seventh Amended Complaint (Dkt 298, 298-1)].

I. GROUNDS FOR MOTION TO RECONSIDER WHEN COURT RULES *SUA SPONTE* OR FAILS TO CONSIDER MANIFESTLY CONTROLLING RULE OF LAW

Plaintiffs are entitled to be heard on reconsideration of an issue first raised *sua sponte* by the Court. *See Lee v. City of Los Angeles,* 250 F.3d 668, 683 & n.7 (9th Cir. 2001) (reversible error when court, in ruling on Rule 12(b)(6) motion, rules *sua sponte* on a matter without notice to plaintiff and opportunity to file written memorandum). Likewise, reconsideration under Local Rule 7-18 may be sought if the Court failed to consider application of a clearly controlling authority and rule of law.

Plaintiff were / are contending – on the one hand – that the operative pleading herein has been the Sixth Amended and Second Supplemental Complaint since its filing [Dkt 267] with leave of Court on May 17, 2022 [Dkt 269], obtained by agreement of counsel in a Joint Status Report filed May 7, 2022 [Dkt 266] with an identical content [redlined] of said pleading lodged therewith [Dkt 266-1] and as appeared to be the case in the Court's Order or March 9, 2022 [Dkt 287]. Defendants were/are contending – on the other hand – that the operative pleading was the preceding Fifth Amended and First Supplemental Complaint [Dkt 185], which was the operative pleading before the Ninth Circuit in its issuing of its Opinion [Dkt 224] from which arises the current remand proceedings. This Court struck an unanticipated third alternative course when it ruled / clarified on April 4, 2022 [Dkt 296] that the operative pleading was and is the original Complaint herein [Dkt 1], which would / should serve as the pleading benchmark for further pleadings as ruled / clarified on March 29, 2022 [Dkt 294].

This motion is Plaintiffs' first opportunity to brief and argue this issue as framed by the Court with its rulings on March 29, 2022 [Dkt 294] and April 4, 2022 [Dkt 296]. And Plaintiffs are doing so based primarily on the controlling authority discussed in the succeeding Section II.

II.
THE FILING OF EACH AMENDED PLEADING SUPERSEDED THE PRECEDING PLEADING WHICH BECAME A NULLITY

By strict operation of law, allowing for no exceptions, any filed amended complaint supersedes any preceding complaint, which thereby becomes a nullity, requiring a special set of rules affording retained preservation of appeal rights from any order dismissing claims from the superseded pleading, to avoid the necessity for pleading parties to include in amended pleadings claims and allegations previously dismissed with prejudice or without leave to amend. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*).

Hence, the Complaint [Dkt 1] herein was superseded and became a nullity by the filing of the First Amended Complaint [Dkt 20] filed by right under Fed.R. Civ.P. 15(a), which was then superseded and became a nullity by the filing of the Second Amended Complaint [Dkt 64]. Following remand from the first appeal [Dkt 173], the Second Amended Complaint [Dkt 64] was superseded and became a nullity by the filing of the Fifth Amended and First Supplemental Complaint [Dkt 185].

[Proposed] Third Amended Complaint [Dkt 63-1,63-2] and [Proposed] Fourth Amended Complaint [Dkt 178-3] were lodged but never filed.

Following remand from second appeal [Dkt 224], the Fifth Amended and First Supplemental Complaint [Dkt 185] was superseded and became a nullity by the filing of the Sixth Amended and Second Supplemental Complaint [Dkt 267], which has now been superseded and became a nullity by the filing of the Seventh Amended Complaint [Dkt 298 & 298-1 (clean and redline versions)], which will be superseded and will become a nullity if and when the currently lodged Eighth Amended and Third Supplemental Complaint [Dkt 299-3,299-4,300-3,300-4 (clean and redline versions)] or some variant is ordered filed.

CONCLUSION

The Court is hence respectfully requested to reconsider its Order of March 29, 2022 [Dkt 294] and Minute Entry of April 4, 2022 [Dkt 296] in connection with specifying the operative pleading, and to instead rule as follows:

1. As of the dates of the referenced orders [Dkt 294 & 296], the operative pleading was the Sixth Amended and Second Supplemental Complaint [Dkt 267], and that was the pleading referenced in the Court's Order granting leave to amend in relevant parts [Dkt 287]. All previous pleadings are superseded and a nullity.

2. The Seventh Amended Complaint [Dkt 298] filed on April 5, 2022 is now the operative pleading, and supersedes the Sixth Amended and Second Supplemental Complaint [Dkt 267], which is a nullity.

3. Any supplementing of the operative pleading(s) herein will be determined in connection with the now pending Plaintiffs' Motion for Leave to File Eighth Amended and Third Supplemental Complaint [Dkt 299, 300].

4. Any pleading the filing of which the Court may authorize in connection with Plaintiffs' Motion for Leave to File Eighth Amended and Third Supplemental Complaint [Dkt 299, 300], will – if and when filed – supersede the Seventh Amended Complaint [Dkt 298], which will thereafter be a nullity.

Dated: April 13, 2022

Respectfully submitted,

s/ Meir J. Westreich

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER ORDER OF MARCH 29, 2022, AND MINUTE ORDER OF APRIL 4, 2022

Date: June 17, 2022
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

Defendants California Public Utilities Commission and its current Commissioners (hereafter "Defendants") hereby oppose Plaintiffs' Motion to Reconsider Order of March 29, 2022, and Minute Entry of April 4, 2022 (the "Motion").

I. INTRODUCTION

On March 9, 2022, this Court made its Order Granting in Part and Denying in Part the Motion of California Public Utilities Commission and Commissioners to Dismiss Sixth Amended Complaint and Motion to Strike References to Second Supplement from Sixth Amended Complaint (ECF #287). To comply with the conditions of that Order, Plaintiffs were to do certain things no later than March 25, 2022, to cure defects or face dismissal with prejudice. Instead, Plaintiffs have made an application (ECF #288), requested clarification (ECF #295), and sought reconsideration (ECF #301), avoiding dismissal in the process. For the reasons set forth here, and those in Defendants' Opposition to Plaintiffs' Motion for Leave to Supplement, which this reference incorporates, this Court should deny Plaintiffs' Motion for Reconsideration.

II. PLAINTIFFS' MOTION DOES NOT COMPLY WITH LOCAL RULE 7-18 AND, THUS, SHOULD BE DENIED

District courts have the inherent power to reconsider their interlocutory determinations, and this Court has codified such power in its Local Rules. *Smith v. Massachusetts*, 543 U.S. 462, 475, 125 S. Ct. 1129, 1139 (2005).

To that end, Local Rule 7-18 provides as follows:

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

> oral or written argument made in support of, or in opposition to, the original motion. Absent good cause shown, any motion for reconsideration must be filed no later than 14 days after entry of the Order that is the subject of the motion or application.

Firstly, Plaintiffs' Motion is untimely under the rule. Plaintiffs did not file their Motion until April 13, 2022, which is fifteen (15) days after the Court's Minute Order of March 29, 2022 (ECF #294) (hereafter "the Minute Order"). Defendants submit that Plaintiffs have not shown good cause for them to file their Motion late. Although, admittedly, the Motion may be timely to the extent the Court views the Court's In Chambers Order of April 4, 2022 (ECF #296) (hereafter "the Chambers Order") as having tolled reconsideration of the Minute Order.

Additionally, Plaintiffs fail to meet the grounds for reconsideration, instead claiming very generally that "the Court failed and/or omitted to consider material pleading facts and events presented to the Court before its Orders [Dkt 294 & 296], including matters to which judicial notice was/is requested, and which arose after the motions were under submission, and only discovered after the initial orders herein." This appears to be an invocation of Local Rule 7-18(c), though with little to no analysis thereof. Furthermore, Plaintiffs support their Motion with an improper and objectionable declaration that nearly verbatim repeats and realleges as fact opinions and arguments set forth in Plaintiffs' motion and memorandum. *See Anhing Corp. v. Thuan Phong Co. Ltd.*, 215 F. Supp. 3d 919, 928 (C.D. Cal. 2015) (observing that under Local Rule 7-7 declarations must contain only factual, evidentiary matter and shall conform as far as possible to the requirements of Fed. R. Civ. P. 56(c)(4), which must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.); *see also In re Marriage of Heggie*, 99 Cal. App. 4th 28, 30 n.3, (2002) ("The proper place for argument is in points and authorities, not declarations.").

Plaintiffs' contention that the Court should reconsider its prior orders rests almost entirely on two cases from the Ninth Circuit; however, those cases do not compel reconsideration.

First, Plaintiffs assert that *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) entitles them to reconsideration.[1] This is an inapt citation. In *Lee*, the Ninth Circuit noted in a footnote that while a trial court could dismiss a claim *sua sponte*, it must give notice of its intention to dismiss and afford plaintiffs an opportunity to at least submit a written memorandum in opposition to such action. 250 F.3d at 683 n.7. Here, neither the Minute Order nor the Chambers Order dismissed any claim; rather, according to Plaintiffs, the Court's error was in its statement of the established and basic law of Federal Rule of Civil Procedure 15(d), that a pleader may only "permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented."

Lacey v. Maricopa Cty., 693 F.3d 896 (9th Cir. 2012) is equally inapt. There, the Ninth Circuit stated only: "For claims dismissed with prejudice and without leave to amend, we will not require that they be repled in a subsequent amended complaint to preserve them for appeal." 693 F.3d at 928. But this has nothing to do with this Court's order that is the subject of Plaintiffs' Motion for Reconsideration, which admonished Plaintiffs that any amended or supplemental pleading should not replead allegations the Court has dismissed.[2]

For these reasons, Plaintiffs' Motion is improper and this Court ought to dismiss it on the grounds of not following Local Rule 7-18.

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[1] *See* ECF # 301 at 2; ECF #301-1 at 2.

[2] *See* ECF # 294 at 3.

III. THE "OPERATIVE PLEADING" CONCEPT IS IRRELEVANT TO FEDERAL RULE OF CIVIL PROCEDURE 15(d)

Aside from the procedural impropriety of Plaintiffs' Motion, it is equally improper as a matter of substance. It is well established that a motion for leave to file a supplemental pleading will lie only in conformity with the Federal Rules of Civil Procedure and the cases construing them.[3] Federal Rule of Civil Procedure 15(d) provides, "[o]n motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time." The Rule contains no mention of the expression "operative pleading." Further, and by its own terms, the Rule countenances no supplemental pleading without leave of Court. Finally, as a matter of logic and by reference to the express text of the second sentence, the Rule acknowledges that the starting point is the original pleading.

As this Court reminded Plaintiffs in the Chambers Order, Plaintiffs' only prior motion to supplement was denied, albeit without prejudice. Thus, the Chambers Order correctly clarified that the statement in Ordering Paragraph 4 of the Minute Order referred to the pleading of a transaction, occurrence or event after the initial Complaint for Damages and Equitable Relief (ECF #1) (hereafter "Initial Complaint") was filed, on June 10, 2011.

This was a simple application of Rule 15(d). A supplemental pleading is the only means of expanding the scope of the litigation to include events that postdate

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[3] Defendants refer to and incorporate by reference their Opposition to Plaintiffs' Motion for Leave to File [Proposed] Eighth Amended and Third Supplemental Complaint.

the filing of the initial complaint. *Keith v. Volpe,* 858 F.2d 467, 471 (9th Cir.1988); *see also William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1981); *Wagner v. Pro. Engineers in California Gov't*, 354 F.3d 1036, 1051 (9th Cir. 2004); *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010) (citing *Cabrera v. City of Huntington Park,* 159 F.3d 374, 382 (9th Cir.1998)). This is true regardless of how the pleader chooses to label it. *See Rhodes v. Robinson*, 621 F.3d 1002, 1006–07 (9th Cir. 2010). And Rule 15(d) clearly requires that a supplemental pleading may be filed only with leave with the Court.

Plaintiffs' arguments about which of their pleadings is the "operative pleading" is irrelevant for purposes of Rule 15(d). The expression appears nowhere in either the Local Rules or the text of the Federal Rules of Civil Procedure. The expression "operative pleading" is a term used to delimit the scope of class action litigation (*United States ex rel. Terry v. Wasatch Advantage Grp., LLC*, 327 F.R.D. 395, 402 (E.D. Cal. 2018)), justiciability (*Rich v. Shrader*, No. 09 CV 0652 MMA BGS, 2011 WL 181764, at *2 (S.D. Cal. Jan. 18, 2011) ("The Court's jurisdiction is strictly limited to the case and controversy before it, as defined by the operative pleading."), and the material facts for purposes of a motion for summary judgment (*Stevenson v. Jones*, 254 F. Supp. 3d 1080, 1095 (N.D. Cal. 2017)). The Court has made no material error of fact in law in clarifying for Plaintiffs that Rule 15(d) requires leave from the Court be granted as a prerequisite to pleading allegations based on any transaction, occurrence or event that occurred after the date of the initial complaint.

Plaintiffs filed this case in 2011. At no time, despite the labels Plaintiffs have placed upon their pleadings, have Plaintiffs obtained leave of Court to file a supplemental pleading. More importantly, none of the pleadings filed since the Initial Complaint affect the date after which leave of court must be sought for purposes of supplementation. Whatever pleading is the "operative pleading" is simply irrelevant for purposes of Rule 15(d).

IV. CONCLUSION

For the foregoing reasons, and any additional reasons raised in oral argument at the hearing on the Motion or otherwise, Defendants respectfully request that this Court deny the Motion.

Dated: May 20, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR LEAVE TO FILE [PROPOSED] EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT

Date: June 17, 2022
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

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I. INTRODUCTION

Plaintiffs Motion for Leave to File Eighth Amended and Third Supplemental Complaint (the Motion to Supplement) and the Proposed Eighth Amended and Third Supplemental Complaint (the Proposed Supplemental Complaint) violate the clear direction of this Court and the law of this case. The Motion to Supplement puts before this Court a complaint with vague and conclusory allegations unrelated to the issue for which this case was remanded, and for which Plaintiffs have not exhausted their administrative remedies and lack statutory and Article III standing. For these reasons and others set forth more fully below, this Court should deny Plaintiff's Motion to Supplement.[1]

II. BACKGROUND

Plaintiffs filed their initial complaint in this action eleven years ago.[2] After several years of litigation, in which Plaintiffs were afforded numerous opportunities to articulate a claim for which relief could be granted, this Court granted summary judgment in favor of defendants on all counts. Rather than trying to parse Plaintiffs' claims, Defendants affirmatively explained all their PURPA-related programs and the Court found that Plaintiffs had not met their summary judgment burden in identifying any violation of the Public Utility Regulatory Policies Act of 1978 (PURPA).[3]

The Ninth Circuit affirmed this judgment in all respects except one. The Ninth Circuit remanded for this Court to consider whether California's Renewable Portfolio Standard Program (RPS) affects Plaintiffs' claims. *CAlifornians for*

[1] Defendants incorporate by reference as if set forth in full herein their Opposition to Plaintiffs' Motion for Reconsideration.

[2] *See* Complaint for Equitable Relief and Damages (ECF 1).

[3] Order Granting Defendant's Motion for Summary Judgment (ECF 217).

Renewable Energy v. California Pub. Utilities Comm'n (hereinafter *CARE v. CPUC*), 922 F.3d 929, 942 (9th Cir. 2019).

In examining Plaintiff's Fifth Amended and First Supplemental complaint—which was the operative complaint after remand—Defendants noted it did not articulate a justiciable claim bearing any relation to the issue on remand. In compliance with the deadlines set by the initial Scheduling Order issued by this Court after remand,[4] Defendants promulgated discovery on Plaintiffs through which Defendants sought clarity as to Plaintiffs' claims post-remand, and what if any interest Plaintiffs have in California's RPS Program. Plaintiffs did not respond to these discovery requests.

Rather than compel discovery or file a motion for judgment on the pleadings, Defendants agreed Plaintiffs should be afforded an opportunity to file an Amended Complaint to clarify what, if any, justiciable claims Plaintiffs have pertaining to the issue on remand.[5] However, Defendants unambiguously objected to any supplemental pleading based on any transaction, occurrence, or event not pled in the Fifth Amended and First Supplemental Complain, or including any events after the date the Fifth Amended and First Supplemental Complaint (ECF No. 185) was filed.[6]

In May 2021, over two years after the Ninth Circuit remanded this matter, Plaintiffs filed a Sixth Amended Complaint (Sixth Complaint).[7] On March 9, 2022, this Court granted Defendants' Motion to Dismiss the Sixth Complaint.[8] This Court dismissed the Sixth Complaint, finding it failed to plead sufficient facts to

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[4] ECF 265 at 6.
[5] *Id.*
[6] ECF 265 at 6.
[7] ECF 267.
[8] ECF 287.

demonstrate a case in controversy within the scope of remand and reraised issues previously settled by the law of this case.[9] This Court also found that although no Plaintiff had Article III standing, CARE additionally lacked statutory standing because it had not been certified as a qualified facility (QF). Thus, this Court granted CARE leave to file a motion pursuant to FRCP 15(d) to supplement its complaint to potentially allow CARE to establish its statutory standing.[10] This Court, however, cautioned that CARE "must support its potential motion with sufficient, admissible evidence that warrants a supplemental pleading."[11]

On March 29, 2022, in response to Plaintiffs' *ex parte* Application to Modify Sequence of New Pleading Filings and Extend Time (ECF 288), this Court issued a Minute Order (ECF 294) that granted Plaintiffs request to extend time and provided additional direction as to the parameters under which CARE may file a motion to supplement. The Minute Order highlighted the distinction between a supplemental and an amended complaint, and specified that "[e]ach pleading should stand alone and should contain allegations pertaining only to the claims asserted therein and not to claims that have been previously dismissed or abandoned."[12] It also gave Plaintiffs the following warning:

> Any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint will be **STRICKEN** ***unless*** the Court has granted a motion to supplement. *See* Fed. R. Civ. P. 15(d). Furthermore, the Court will strike any amended or supplemental pleading that

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[9] This Court dismissed Plaintiffs' as-applied claims and claims for damages with prejudice and Plaintiffs implementation Claims without prejudice. *See* ECF 287 at 15-19.

[10] *Id.*

[11] ECF 287 at 12.

[12] ECF 288 at 2.

contains allegations relating to claims that have been dismissed with prejudice.[13]

This Court reiterated this direction to Plaintiffs through an In Chambers Order on April 4, 2022, stating that "CARE's anticipated supplemental pleading (which CARE must obtain leave to file) should not contain any claims that are asserted in Boyd and Sarvey's anticipated amended Pleading."[14]

On April 5, 2022, Plaintiffs filed a "Seventh Amended Complaint" (ECF 298), which may be the subject of a separate motion to be filed by Defendants.

On April 8, 2022, Plaintiffs filed the incident Motion to Supplement (ECF 299) which attached the proposed "Eighth Amended and Third Supplemental Complaint for Equitable Relief" (ECF 299-3).[15]

III. DISCUSSION

A. Plaintiffs Motion and Proposed Supplemental Complaint Disregard the Clear Orders of This Court and the Law of this Case

Plaintiffs' Motion to Supplement and Proposed Supplemental Complaint exceed the leave granted by this Court and disregards the Court's explicit direction in almost every respect. In its order dismissing the Sixth Complaint, this Court granted leave to file a Supplemental Complaint *only* to CARE, for the sole purpose of adding supplemental allegations to establish statutory standing in this case.[16] Subsequently, this Court clarified that any supplemental pleading filed by CARE should stand alone, should not duplicate any pleadings, and should not contain any

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[13] ECF 294 at 3.

[14] ECF 296.

[15] Errata to ECF 299 & 299-1 were filed the following day, one-day after the deadline. See ECF 300 & 300-1.

[16] *See* ECF 287 at 18-19.

claims that are asserted in Boyd and Sarvey's anticipated amended pleading.[17] This Court further specified that any amended or supplemental complaint must not contain allegations relating to claims that have been dismissed with prejudice, and warned it would strike any amended or supplement pleading that contained such allegations.[18]

Federal Rule of Civil Procedure 41(b) provides in pertinent part: "If the plaintiff fails to . . . comply with . . . a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits." It is undisputed that Plaintiffs' Motion for Leave exceeds what the Court's Orders awaited, and the Ninth Circuit has upheld dismissals in similar situations. *Yourish v. California Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999) (dismissing action with prejudice for plaintiffs' failure to timely amend complaint in conformity with court order dismissing complaint with sixty days leave to amend); *see also O'Brien v. Sinatra* 315 F.2d 637, 641-642 (9th Cir. 1963); *Fendler v. Westgate-California Corp.* 527 F.2d 1168, 1169-1170 (9th Cir. 1975).

The Court's Order of March 9, 2022 (ECF 287), reads as follows at 18:18-24:

> All claims of Plaintiff CARE are **DISMISSED without prejudice** for lack of standing. CARE may file a motion pursuant to Rule 15(d) to file a supplemental pleading in order potentially to cure its standing deficiency. CARE is **DIRECTED** to file *that motion*, if at all, on or before March 25, 2022. If CARE fails to file a motion to supplement by that date, then the Court will **DISMISS** CARE from this action **with prejudice**.

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[17] *See* ECF 294 at 3.

[18] *See* ECF 294 at 3-4.

(underline and italics supplied).

Plaintiffs' Motion to Supplement is most certainly not "*that motion*." Thus, Defendants respectfully request that in response to Plaintiffs noncompliance with the Court's Order, the Court carry through with the consequence explained in its Order and dismiss CARE with prejudice. Instead of proposing to file a discrete supplemental complaint, with specific allegations from CARE to establish its standing in this case, as this Court permitted, the proposed Supplemental Complaint seeks to expand the Complaint filed by *all* Plaintiffs. Furthermore, the bulk of the supplemental allegations bears no relation to the issue of CARE's standing or status as a qualifying facility.[19] The Court's Order deliberately and carefully balanced the scope of the remand from the Ninth Circuit against the public policy favoring disposition on the merits. Plaintiffs have flouted that balance.

Where the proposed Supplemental Complaint does bear relation to CARE, it fails to follow the Court's Order granting the Defendants' Motion to Dismiss because, it recycles allegations previously adjudicated in favor of Defendants. For example, the Proposed Supplemental Complaint includes numerous allegations relating the CPUC's supposed failure to require capacity payments, including in the Net Energy Metering (NEM) program.[20] Similarly, in their Motion to Supplement, Plaintiffs write:

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[19] As best Defendants can discern, the Proposed Supplemental Complaint addresses the issue of CARE's standing only in paragraphs 4a, 4b, 36o, 36p, and 52a-52n; a small fraction of the 29-page document.

[20] *See* Proposed Supplemental Complaint paragraph 35 ("Under the CPUC approved Net Energy Metering [NEM] Program, utilities are permitted to exclude avoided capacity costs in payments to QFs for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forego capital investments."). In addition, Proposed Supplemental Complaint Paragraphs 17, 42b, 42e, 42i, 42k & 42j are premised on the supposed obligation to require capacity payments for plaintiff's resources. In particular, paragraph 42i mischaracterizes the

> Again, in assessing full avoided costs, capacity costs must be included where the supplier affords 'sufficient legally enforceable guarantees of deliverability' or when the utility knows how much energy the suppliers will provide, but not otherwise NEM programs are not categorially exempt from PURPA.[21]

But the Ninth Circuit explicitly affirmed that the CPUC "is not required to take capacity costs into account in the NEM Program." *See CARE v. CPUC* at 939. And as this Court noted in grating the Defendants' Motion to Dismiss, allegations relating to the failure to make capacity payments were dismissed on summary judgment.[22] The Proposed Supplemental Complaint also persists in alleging the existence of a fictitious "multiple source rule,"[23] which was expressly rejected by the Ninth Circuit. *See CARE v. CPUC* at 937 ("We do not hold that the avoided cost must be calculated for each type of energy.") Thus, the Proposed Supplemental Complaint "contains allegations relating to claims that have been dismissed with prejudice" in violation of this Court's explicit direction in its Minute Order.[24] For this reason alone, Plaintiffs' Motion to Supplement should be denied.

As a consequence of Plaintiffs' persistence in pursuing previously adjudicated claims, granting Plaintiffs' Motion to Supplement would impermissibly conflict with the law of this case. Under the law of the case doctrine, "a court is generally

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Ninth Circuit's "core holding" as including "whether a utility must include capacity costs in calculating and paying full avoided costs can be made dependent on whether the QF is guaranteeing its energy supply to the IOU, *i.e.* if there is such a guarantee the capacity costs must be included," and 42j complains that the "CPUC does not prescribe that inclusion of capacity costs be included when QF supply is guaranteed."

[21] Motion to Supplement, p. 7.

[22] Order on Motion to Dismiss, p. 14.

[23] *See*, *e.g.*, Proposed Supplemental Complaint, paragraphs 19 and 42d.

[24] ECF 294 at 3.

precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F. 3d 443, 452 (9th Cir. 2000). "Although amendment of pleadings following remand may be permitted, such amendment cannot be inconsistent with the appellate court's mandate. . . . On remand, a trial court cannot consider issues decided explicitly or by necessary." *Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984).[25] Plaintiffs' Motion to Supplement and Proposed Supplemental Complaint are transparent attempts to relitigate "issues decided explicitly or by necessary implication" by this Court on summary judgment and affirmed by the Ninth Circuit, rather than establish standing for organizational Plaintiff CARE as the Court contemplated in its Order granting the Motion to Dismiss. Rather than expand the scope of this case beyond the sole issue before this Court on remand, the Motion to Supplement should be denied.

B. Factors Courts Use to Evaluate the Propriety of Allowing a Supplemental Complaint Weigh Against Granting Plaintiffs' Motion to Supplement

This Court should exercise its discretion to deny Plaintiffs' Motion to Supplement. Under the Federal Rule of Civil Procedure 15(d) courts may, on a party's motion, upon both reasonable notice and just terms, allow the party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. *Strojnik v. R.F. Weichert V, Inc.*, No. 20-CV-00354-VKD, 2021 WL 5085977, at *3 (N.D. Cal. Nov. 2, 2021). Rule 15(d) "is a tool of judicial economy and convenience, and courts have broad discretion in deciding whether to allow a supplemental pleading." *Id.* (citing *Keith v. Volpe*, 858 F.2d 467, 473 (9th Cir. 1988)). "The five factors

[25] This Court discussed the preclusive effects of the law on Plaintiffs claims in its prior Order Denying Without Prejudice Motion for Leave to File Fourth Amended Complaint and First Supplemental Complaint (ECF 184) at 4.

commonly used to evaluate the propriety of a motion for leave to amend (and thus, a motion to supplement) are: (1) undue delay, (2) bad faith or dilatory motive on the part of the movant, (3) repeated failure of previous amendments, (4) undue prejudice to the opposing party, and (5) futility of the amendment." *Strojnik*, 2021 WL 5085977 at *3 (citing *Lyon v. U.S. Immigr. & Customs Enf't*, 308 F.R.D. 203, 214 (N.D. Cal. 2015)). "Courts also consider whether allowing leave to supplement would align with the goal of Rule 15(d), which is to promote judicial efficiency." *Lyon*, 308 F.R.D. at 214 (cleaned up).

Individually and cumulatively, these factors weigh in favor of denying Plaintiffs' Motion.

(1) *Undue delay*. This case has been through three District Judges, has been to the Ninth Circuit twice, and has over 300 docket entries. It is already difficult to recount the saga that is this case's procedural history, and allowing Plaintiffs to file the Proposed Supplemental Complaint would be the antithesis of promoting judicial efficiency. This case is about to enter its twelfth year. Allowing the Proposed Supplemental Complaint could allow Plaintiffs to renew allegations previously adjudicated on the merits for the Defendants. The Ninth Circuit laid out the sole issue before this court on remand; allowing a supplement to the complaint after summary judgment could effectively restart this litigation and significantly forestall resolution of this already protracted proceeding.

In addition, the statute of limitations for claims made under PURPA is not indefinite. In *Riggs v. Curran*, the First Circuit applied Rhode Island's three-year statute of limitations for personal injury actions in a PURPA action. 863 F.3d 6, 10 (1st Cir. 2017). For federal statutes enacted prior to 28 U.S.C. § 1658(a), courts will borrow from analogous state statutes pursuant to the Rules of Decision Act. § 15:461. Law governing applicable statute of limitations, generally, 5 Cyc. of Federal Proc. (3d ed. 2022). Under California law, an action "upon a liability

created by statute, other than a penalty or forfeiture" that does not provide its own statute of limitations must be commenced within 3 years. Cal. Civ. Proc. Code § 338(a).

> [W]hether the supplemental complaint may encompass the entire period following commencement of suit, despite the statute of limitations, will depend upon the nature of the claims raised in the supplemental pleading. If those claims are unrelated to those alleged in the initial complaint, or rely on conduct or events different from those involved in the original action, the statute of limitations should be applied.

William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1057 (9th Cir. 1981). Here, more than a decade after the filing of the initial complaint in this matter, CARE claims to have been certified as a QF, but there is no reason that such certification should relate back and/or toll operation of a three-year statute of limitations.[26]

(2) *Bad faith or dilatory motive on the part of Plaintiffs.* As discussed at length above, both the Motion to Supplement and the Proposed Supplemental Complaint disregarded this Court's explicit direction in setting the parameters of leave to supplement – namely to establish standing, both Article III and statutory, for entity Plaintiff CARE - after dismissing the foregoing complaint. The Plaintiffs' Proposed Supplemental Complaint instead seeks to expand the vague allegations in the dismissed Sixth Complaint, including those explicitly adjudicated in favor of Defendants, on behalf of all Plaintiffs in order to challenge recent actions of the CPUC.[27] Plaintiffs inclusion of these claims in the Proposed Supplemental

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[26] Plaintiffs make much of the fact that the CPUC membership changes; however, that fact is of no moment, as pursuant to Rules 17(d) and 25(d) of the Federal Rules of Civil Procedure, new members of the Commission replace the former by operation of law, such that supplementation is both automatic and unnecessary.

[27] *See, e.g.*, Proposed Supplemental Complaint, paragraphs 36i, 42g-h, and 71a-d.

Complaint avoids their obligation to exhaust administrative remedies with FERC pursuant to 16 USC § 824a-3(h)(2), or even to participate in ongoing CPUC proceedings or challenge final CPUC orders in accordance with California Law.[28] None of this reflects a good faith attempt on the part of Plaintiffs to litigate the sole issue outstanding in this case, in accordance with the direct of this Court and the Ninth Circuit, but rather evidences a strategy to confuse and protract this litigation.

(3) *Repeated failure of previous amendments*. Through the course of this litigation, this Court afforded Plaintiffs numerous opportunities to articulate a claim, gave Plaintiffs every benefit of the doubt as to vague and conclusory allegations, and ultimately ruled in favor of Defendants on summary judgment after carefully examining Defendants' programs implementing PURPA. This Court found, and the Ninth Circuit largely upheld, that Defendants comply with PURPA. The Ninth Circuit only remanded for consideration of a discrete question relating to the existence of a Renewables Portfolio Standard that this Proposed Supplemental Complaint does not help adjudicate on the merits. Plaintiffs Motion to Supplement now seeks to refresh their vague and conclusory allegations, which have largely been considered and rejected, and redirect them at recent and pending CPUC activity.

(4) *Undue prejudice to Defendants.* Defendants have repeatedly raised that Plaintiffs lack standing[29] and this supplement does not state a justiciable claim for organizational Plaintiff, CARE, before this Court under PURPA. Granting leave to file the Proposed Supplemental Complaint would allow for the re-litigation of issues already adjudicated in favor of Defendants, depriving them of the benefit of their

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[28] See Cal. Pub. Util. Code §§ 1731 & 1756.

[29] This Court avoided the standing issue expressly at summary judgment, despite Defendant's consistently raised arguments that Plaintiffs lack standing. See ECF 217.

past advocacy and the considerable efforts in litigating this case to date. Such developments would be highly prejudicial to the CPUC.

(5) *Futility of Proposed Supplemental Complaint*. The Proposed Supplemental Complaint is futile due to several deficiencies, including those discussed above, such as that the Proposed Supplemental Complaint is unduly delayed and persists in making allegations that have been adjudicated in favor of Defendants. Claims that have been the subject of final adjudication may not be relitigated in a motion to supplement. *See Planned Parenthood of S. Arizona v. Neely*, 130 F.3d 400, 402–03 (9th Cir. 1997) (rejecting a motion to supplement filed after final disposition of a case).

Most importantly, the Proposed Supplemental Complaint fails to accomplish the one objective for which this Court granted CARE leave to file a supplemental complaint, which was to establish its standing to continue this lawsuit. The exhaustion requirement in 16 USC § 824a-3(h)(2) precludes the Proposed Supplemental Complaint from establishing CARE's statutory standing. Even if this Court accepts that Plaintiff Boyd amending his QF certification on August 16, 2021 to include CARE gave it status as a QF, this would only give CARE statutory standing to challenge the CPUC's implementation of PURPA after this date.[30] But since Plaintiffs have only exhausted administrative remedies to challenge implementation decisions made prior to July of 2011, CARE gaining QF status in August of 2021 is irrelevant to claims that may be raised in this case.

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[30] Defendants disagree that Boyd amending his QF registration to include CARE is sufficient to give CARE status as a QF, unless CARE has an ownership in the property or generating units, which is not alleged. Defendants also note that allegations in Paragraphs 36o & 36p of the Proposed Supplemental Complaint related to CAREs activities in WREGIS are irrelevant to CARE's QF Status. Defendants have objected to the Declaration of Michael Boyd in connection with this Opposition.

And even if CARE became a QF in August 2021, it lacks an injury in fact. The Proposed Supplemental Complaint fails to demonstrate a concrete injury caused by the CPUC to CARE that is likely to be remedied by the requested relief. *See Lujan v. Defenders of* Wildlife, 504 U.S. 555, 560-61 (1992). CARE clearly suffered no harm under PURPA while it was not a QF and should be barred from now having standing to supplement this lawsuit.

Furthermore, any alleged harm to CARE in the Proposed Supplemental Complaint is directed at two proceedings this Court lacks jurisdiction to hear. First, Paragraph 42g of the Proposed Supplemental Complaint attacks a proposed decision in the CPUC's ongoing NEM rulemaking proceeding, Rulemaking 20-08-020, which has not been adopted by the Commission. Such a challenge is not ripe for judicial review, as it is merely *proposed*.[31] Issues with ongoing CPUC proceedings should be taken up before the CPUC itself. Second, Paragraph 42h of the Proposed Supplemental Complaint challenges the CPUC's adoption of Resolution E-5150 on June 24, 2021. Resolution E-5150 makes no mention of PURPA or qualifying facilities, and indeed is not the CPUC's implementation of PURPA, and therefore

[31] "Federal courts may review final agency rules, but federal courts do not have authority to review proposed rules." *Minnesota Auto Dealers Ass'n v. Minnesota by & through Minnesota Pollution Control Agency*, 520 F. Supp. 3d 1126, 1140 (D. Minn. 2021); *see also Surfrider Found. v. Martins Beach 1. LLC*, 14 Cal. App. 5th 238, 256, 221 Cal. Rptr. 3d 382, 398 (2017) ("A takings claim that challenges the application of regulations to particular property is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.") (Internal quotation omitted). Additionally, as further discussed herein, Plaintiffs have not exhausted administrative remedies as required by 16 USC § 824a-3(h)(2) for any action of the CPUC after July 2011, which would foreclose Plaintiffs from challenging any action taken in Rulemaking 20-08-020 or any other recent or pending proceeding.

bears no relation to this case.[32] Consequently, this Court lacks subject matter jurisdiction over the CPUC Resolution E-5150.

Finally, Plaintiffs' Proposed Supplemental Complaint is futile because the allegations it contains do not meet the pleading standard of Federal Rule of Civil Procedure 12(b)(6). To meet this standard with respect to the issue on remand, Plaintiffs would need to plead sufficient facts to give rise to a reasonable inference that the CPUC's programs implementing PURPA as of July 2011 improperly calculated the avoided cost of energy used by a utility for RPS purposes. *See Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009). But the Proposed Supplemental Complaint is devoid of any specificity whatsoever as to *how* the CPUC's programs implementing PURPA improperly calculate the avoided costs of resources used by a utility to comply with its RPS obligation. Instead, it contains a series of legal assertions (many of which are inaccurate), conclusory allegations, and inflammatory assertions lacking specificity and insufficient to state a claim for the issue on remand.[33] The allegations in Plaintiffs Proposed Supplemental Complaint are comparable to those at issue *Strojnik v. R.F. Weichert V, Inc.*, in which the court

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[32] Plaintiffs may have been confused by the reference to "avoided cost" in Resolution E-5150 and assumed it bore some relation to PURPA. However, the Resolution is irrelevant to this federal case; "avoided cost" is a commonly used term in the context of utility regulation with varying meanings. *See also* ECF No. 282 (DEFENDANTS' OBJECTION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE AND DECLARATION OF MEIR J. WESTREICH) at 4 (explaining that Resolution E-5150 is unrelated to PURPA).#

[33] In the M&Ps in Support of their Motion to Supplement Plaintiffs acknowledge that their allegations lack specificity, pointing that there was no reference in the Fifth Amended and Supplemental Complaint which was the subject of summary judgment to *any* CPUC programs, and that these were injected into the case by Defendants. *See* M&Ps at 6. These were not affirmative defenses. Rather, the vague and conclusory nature of Plaintiffs allegations effectively placed the burden on Defendants to prove their programs were in compliance—a burden this Court found Defendants met. The Defendants' strategic decision to proceed in such fashion does not relieve Plaintiffs of their obligations pursuant to Federal Rule of Civil Procedure 8 or otherwise.

denied a request to supplement a complaint with vague and conclusory allegations of a website's noncompliance with the Americans with Disabilities Act. *See* 2021 WL 5085977 at *5-6; *see also Glatt v. Chicago Park Dist.*, 87 F.3d 190, 194 (7th Cir. 1996), denying a motion to file a supplemental pleading due to plaintiff's failure to substantiate the claims in the supplemental complaint.

For all the foregoing reasons, the allegations in the Proposed Supplemental Complaint are futile, and the Motion to Supplement should be denied.

IV. CONCLUSION

For the foregoing reasons, and those that may be made at oral argument, Plaintiffs' Motion to Supplement should be denied.

Dated: May 20, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

NOTICE OF MOTION AND MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SEVENTH AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE PORTIONS THEREOF

Date: September 16, 2022
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

NOTICE IS HEREBY GIVEN that at 9:00 a.m. on Friday, September 16, 2022, in Courtroom 9D of the Ronald Reagan Federal Building and U.S. Courthouse, located at 411 W. 4th Street, Santa Ana, California 92701, or as soon thereafter as the Court may hear counsel, Defendants, California Public Utilities Commission ("CPUC") and current Commissioners of the CPUC in their official capacities will hereby and do move, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), for dismissal of the Seventh Amended Complaint. By stipulation, Plaintiffs have agreed to file their Opposition on or before August 19, and Defendants have agreed to file their Reply on or before September 2.

This Motion is made on the grounds that: (1) the pleading fails to comply with the Court's Dismissal Order, (2) the pleading continues to fail to state a claim upon which relief can be granted, (3) this Court continues to lack subject matter jurisdiction, and (4) further leave to amend would be futile, all of which are set forth more fully in the Memorandum of Points and Authorities.

NOTICE IS FURTHER GIVEN that, in the alternative and pursuant to Federal Rule of Civil Procedure 12(f), joined here pursuant to Rule 12(g), Defendants move to strike from the Seventh Amended Complaint the following redundant, immaterial, impertinent, or scandalous portions: ¶¶ 4a, 4b, 19, 20, 21, 33, 35, 36, 36b (11:7), 36c (11:10), 36d (11:13), 36e (11:16), 36h (11:27), 36j (12:3), 37, 38, 38a, 40, 42g, 42h, 43, 44, 45, 52 (16:6-11), 53, 54, 55, 56, 57, 58 (17:19), 60, 60d, 60e, 61, 62, 65 (20:12), 67, 68, and 70. As set forth more fully herein, the allegations relate to matters that have been dismissed with prejudice, relate to matters that are supplemental without a predicate order allowing supplementation, relate to matters pertaining to CARE that are not relevant to the sole claim for which the individual Plaintiffs have been granted leave to amend, or relate to matters that are outside the scope of remand, and are therefore immaterial.

This Motion is made following the conference of counsel pursuant to L.R. 7-3, which occurred telephonically between Ian P. Culver and Meir Westreich on July 15, 2022.

This Motion is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, all other papers and pleadings on file in this matter, and the oral arguments of counsel, should they be received at a hearing on this Motion.

Dated: July 22, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SEVENTH AMENDED COMPLAINT OR, IN THE ALTERNATIVE, MOTION TO STRIKE CERTAIN PORTIONS THEREOF

Date: September 16, 2022
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

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GLOSSARY[1]

Avoided Cost	The incremental cost to an electric utility of electric energy, capacity, or both which, but for the purchase from a qualifying facility, the utility would generate itself or purchase from another source. *CARE v. CPUC* at 932 citing 18 CFR § 292.101(6).
Capacity costs	"The costs associated with providing the capability to deliver energy; they consist primarily of the capital costs of facilities." *CARE v. CPUC* at 934 (cleaned up). "The CPUC is not required to take capacity costs into account in the NEM program." *Id.* at 939.
CARE	Plaintiff Californians for Renewable Energy, a non-profit corporation
CPUC	Defendant California Public Utilities Commission, a state regulatory agency allowed "to determine exactly how [it] will comply with PURPA and FERC's regulations." *CARE v. CPUC* at 931.
DLAP	Default Load Aggregation Point. "DLAP is an hourly day-ahead electricity market price, in other words, what the utility is paying one day out in the marketplace. DLAP does not include capacity costs." *CARE v. CPUC* at 934.
FERC	Federal Energy Regulatory Commission
NEM	Net Energy Metering. A retail billing program for public utility consumers with solar power generation facilities installed at the site of the consumer's consumption, e.g., their home, which offsets the retail rate for the volume of electricity consumed by the volume of electricity generated from the on-site solar facility. "The NEM Program calculates how much electricity a consumer uses and how much electricity a consumer generates over a twelve-month period. If the consumer generates more electricity than it uses, then the excess electricity goes back into the electrical grid. The utility pays the consumer for this electricity based on the default load aggregation point price." *CARE v. CPUC* at 934. The price paid is the Net Surplus Compensation Rate, which the CPUC has determined should be the utility's DLAP. Plaintiffs Boyd and Sarvey participate in the NEM program. *Id.* at 946 (Nguyen, J., dissenting).

[1] *CARE v. CPUC* references in this glossary are all to *CAlifornians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929 (9th Cir. 2019) (*CARE v. CPUC*), *cert. denied sub nom.*, *Boyd et al. v. Cal. Pub. Utils. Comm'n*, 140 S. Ct. 2645 (2020).

PURPA	Public Utility Regulatory Policies Act of 1978
QF	Qualifying Facility. A QF is either a "small power production facility" or "cogeneration facility." *CARE v. CPUC* at 932, citing 18 C.F.R. §§ 292.201 & 292.203.
RPS	A Renewables Portfolio Standard is a state program that sets targets by which utilities must source specific amounts of electricity from eligible renewable resources. "CPUC-regulated utilities have met their 2020 targets and are on track to reach their 2030 targets. Most of these goals have been met by purchasing energy from producers with capacity over 20 [megawatts]." *CARE v. CPUC* at 934-35. California's Renewable Portfolio Standard Program is codified at Article 16 (commencing with Section 399.11) of the Cal. Pub. Util. Code.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs' Seventh Amended and Third Supplemental Complaint ("Seventh Complaint") violates the clear direction of this Court[1] and the law of this case, a case which has stretched over eleven years with two Ninth Circuit appeals.[2] The Seventh Complaint puts before this Court another pleading substantially similar to its Sixth Amended and Second Supplemental Complaint and the Fifth Amended and First Supplemental Complaint before that. The Seventh Complaint not only continues to assert merely vague and conclusory allegations, but its allegations are also unrelated to the issue for which this case was remanded and insufficient to grant standing. For these reasons and others set forth more fully below, this Court should dismiss the Seventh Complaint with prejudice, without any further opportunity to amend.

II. BACKGROUND

A. Public Utility Regulatory Policies Act of 1978 (PURPA)

Congress enacted the Public Utility Regulatory Policies Act of 1978 (PURPA)[3] to encourage cogeneration and small power production facilities, known as "Qualifying Facilities" or "QFs," and reduce the reliance of electric utilities on oil and gas. *FERC v. Mississippi,* 456 U.S. 742, 745, 750-51 (1982). Congress authorized the Federal Energy Regulatory Commission (FERC), in consultation with

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[1] *See* Order Granting in Part and Denying in Part the Motion of California Public Utilities Commission and Commissioners to Dismiss Sixth Amended Complaint and Motion to Strike References to Second Supplement from Sixth Amended Complaint (March 9, 2022, ECF#287) ("Dismissal Order"), and In Chambers Order (April 4, 2022, ECF #296) ("Chambers Order").

[2] *Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. 571 (9th Cir. 2015) and *CAlifornians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 922 F.3d 929 (9th Cir. 2019), *cert. denied sub nom.*, *Boyd et al. v. Cal. Pub. Utils. Comm'n*, 140 S. Ct. 2645 (2020) ("*CARE v. CPUC*").

[3] Codified generally at 16 U.S.C. §§ 2601, *et seq.*, with definitions contained in 16 U.S.C. § 796, and other requirements at 16 U.S.C. § 824a-3.

the States, to adopt rules requiring utilities[4] to contract with QFs,[5] and requiring State regulatory authorities to implement FERC's rules. *Id.*[6]

Small power production facilities that are QFs under PURPA are defined to include electric generation facilities fueled by "biomass, waste, renewable resources, geothermal resources, or any combination thereof." 18 C.F.R. § 292.204(b) (2020). The utility obligation to buy from QFs is in 18 C.F.R. § 292.303 (1980). Section 210(f) of PURPA delegates to States the authority to set up rules, including rates, for these purchases.[7]

1. Avoided Cost under PURPA

The rates paid to QFs must be just and reasonable, in the public interest, and may not exceed the *utility's* incremental cost of alternative electric energy or "avoided" cost.[8] PURPA was never intended to "subsidize" QFs, "guarantee" QFs a return, or assure that a QF would never run at a loss. *Swecker v. Midland Power Co.*, 807 F.3d 883, 884 (8th Cir. 2015) (cleaned up). The focus of avoided-cost rates is on costs that the *utility* avoids in buying from the QF.

FERC's regulations afford States "latitude" in implementing PURPA. *FERC v. Mississippi*, 456 U.S. at 751. States do not have to adopt a specific rate or rate

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[4] Under PURPA, "electric utility" is defined as an individual, corporation, or federal or state agency that sells electric energy. 16 U.S.C. § 796(4), (22)(A).

[5] "Qualifying facility" is an "eligible" cogeneration or small power production facility. 18 C.F.R. § 292.101(b)(1) (2020). "Qualifying small power production facility" and "qualifying cogenerator facility" are facilities that apply for an order from FERC or self-certify that the facility meets FERC's requirements. 16 U.S.C. § 796(17)(C), (18)(B). 18 C.F.R. § 292.207(2020). Certain acronyms and terms of art used herein are defined in the glossary preceding this Memorandum.

[6] *See* 16 U.S.C. § 824a-3(f). "State regulatory authority" and "State commission" are defined in 16 U.S.C. § 796(15), (21).

[7] 16 U.S.C. § 824a-3(f); 18 C.F.R. §§ 292.101(b)(1), 292.304 (2020).

[8] *See* 16 U.S.C. § 824a-3(b); 18 C.F.R. §§ 292.304(a)(1), (b)(2), (e) (2020). Avoided costs is the "incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 C.F.R. § 292.101(b)(6) (2020).

scheme and may comply through the issuance of regulations, by resolving disputes on a case-by-case basis, or any other means designed to give effect to FERC's regulations. *Id.* at 749-51. The regulations prescribe factors to be considered by State commissions, "to the extent practicable," in setting avoided cost rates, which are: (1) utility system cost data; (2) the terms of any contract, including contract duration; (3) the availability of power from a QF during the system and seasonal periods; (4) the relationship of the availability of power from the QF to the ability of the utility to avoid costs; and (5) the costs or savings resulting from variations in line losses. *Id.*; 18 C.F.R. § 292.304(e) (2020). A utility need not pay for electricity that exceeds what it needs to serve its customers. *See City of Ketchikan, Alaska,* 94 FERC ¶ 61,293, 2001 WL 275023, at *6 (2001) ("the purchase rate should only include payment for energy or capacity which the utility can use to meet its total system load").

2. PURPA's Enforcement Regime

PURPA has a specific enforcement scheme. *Indus. Cogenerators v. FERC,* 47 F.3d 1231, 1234 (D.C. Cir. 1995); *see* 16 U.S.C. § 824a-3(g), (h). Section 210(g) of PURPA authorizes "as applied" challenges in state court to enforce requirements a State regulatory authority establishes under PURPA. 16 U.S.C. § 824a-3(g).

In contrast, Section 210(h) of PURPA authorizes petitions before FERC courts by an electric utility or a QF to enforce the implementation of FERC's rules by a State regulatory authority ("implementation" challenges). 16 U.S.C. § 824a-3(h)(2)(B). If FERC does not initiate an enforcement action within sixty (60) days of receiving a petition filed per Section 210(h), the petitioner may bring an action in district court against the State regulatory authority to enforce compliance. *Id.* This is a jurisdictional exhaustion of administrative remedies requirement. Per the statute, a federal court may only "issue such injunctive or other relief as may be appropriate." *Id.* PURPA does not authorize damages or other equitable relief. *CARE v. CPUC*, 922 F.3d at 941-943.

B. California's Renewables Portfolio Standard (RPS) Program

The California Renewables Portfolio Standard (RPS) Program is not a program to set the rates for the purchase of power. California's RPS Program[9] generally requires electric utilities to procure specified quantities of electricity products from facilities certified as eligible resources by the CPUC's sister state agency, the California Energy Commission. *See* Cal. Pub. Util. Code §§ 399.11(a) & (b), 399.12(e), (h) & (j), 399.25, & Cal. Pub. Res. Code § 25741.[10] Consistent with Public Utilities Code § 399.25, the California Energy Commission publishes a regulatory guidebook setting forth the substantive and procedural requirements for certifying a facility as RPS eligible.[11] Only facilities generating electricity using a technology specified in Public Resources Code § 25741(a)(1) may participate in the program, and there are many other substantive and procedural requirements with which a facility must comply in order for it to produce electricity eligible for a utility to claim it for RPS compliance purposes.[12] Not every renewable energy resource is a facility that can help a utility meets its RPS obligations, and being a QF under PURPA is not synonymous with being an RPS eligible resource.[13]

A utility meets its RPS Program target by buying energy and the energy's associated renewable energy credits (RECs) from RPS-certified resources.

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[9] California Public Utilities Code, Division 1, Part 1, Chapter 2.3, Article 16 (§§ 399.11 through 399.33).

[10] Aspects of California's RPS Program have evolved since June 2011, when Plaintiffs filed their initial complaint.

[11] *See* the Energy Commission's RPS Eligibility Guidebook, setting forth criteria facilities must meet to become RPS certified, the current version of which is available at https://efiling.energy.ca.gov/getdocument.aspx?tn=217317.

[12] *See, e.g.*, Public Utilities Code section 399.12(h) requiring renewable energy credits (RECs) to be issued through the accounting system established by the California Energy Commission, and section 399.25, requiring the California Energy Commission to certify facilities as RPS eligible and to establish an accounting system for the tracking and verifying RECs.

[13] *Compare* the definition of fuel sources for small power production facility QFs in 18 C.F.R. 292.204(b).

Evidence of compliance with the RPS Program is manifested by RECs for each unit of energy generated. Compensation for RECs is not an issue of federal law. *CARE v. CPUC*, 922 F.3d at 940 ("As CARE acknowledged in its brief, RECs are not covered under PURPA; rather, they are considered state programs and do not factor into the avoided cost determination.").

C. California's Net Energy Metering (NEM) Program

Plaintiffs Boyd and Sarvey participated in California's Net Energy Metering (NEM) program. *CARE v. CPUC*, 922 F.3d at 939 n 4; and at 946 (Nguyen, J., *dissenting*). As the Ninth Circuit explained, "[t]he NEM Program calculates how much electricity a consumer uses and how much electricity a consumer generates over a twelve-month period. If the consumer generates more electricity than it uses, then the excess electricity goes back into the electrical grid. The utility pays the consumer for this electricity based on the default load aggregation point ("DLAP") price." *Id.* at 934.

Under the Federal Power Act, FERC has authority only over "the sale of electric energy at wholesale," meaning a sale of electric energy to any person for resale. 16 U.S.C. § 824(b)(1) and (d). All other authority over sales between retail customers and their utility are reserved to the jurisdiction of the states. *Id.*; *New York v. FERC*, 535 U.S. 1, 17 (2001) (holding that the FPA restricts the Commission's jurisdiction for electricity sales to those at wholesale). To "specif[y] terms of sale at retail" is "a job for the States alone." *FERC v. Elec. Power Supp. Ass'n*, 577 U.S, 260, 280 (2016). PURPA applies only to any excess electricity generated beyond the retail bill credit, where the NEM generator receives "a separate payment to customers." *CARE v. CPUC*, 922 F.3d at 939.

D. Plaintiffs' Seventh Complaint Continues to Be Confusing and Conclusory

The Seventh Complaint is substantially similar to the Fifth Amended and First Supplemental Complaint (ECF # 185) and the dismissed Sixth Amended and Second Supplemental Complaint (ECF # 267). *See generally* Dismissal Order at 16

(describing Plaintiffs' prior pleading as "merely mak[ing] a slew of conclusory statements" about the Defendants). Plaintiffs generally claim that "a utility is required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources" and that the California Public Utilities Commission (CPUC) may "just as permissibly aggregate all sources that could satisfy its RPS obligation." 7AC ¶¶ 20, 30. Plaintiffs admit that "[i]f a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." 7AC ¶ 31. Additionally, Plaintiffs state that the CPUC and utilities are "generally indistinguishable" so as to "render the actions of one the actions of the other." 7AC ¶ 44.

The Seventh Complaint alleges two claims. The first claim is for the enforcement of PURPA, where Plaintiffs appear to claim that the two individual CARE members' NEM rooftop solar installations that "have operated at a loss" offer "guaranteed energy supplies of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forego capital investments, which would thereby entitle Plaintiffs to avoided capacity costs." 7AC ¶¶ 52, 54-57. Plaintiffs claim that the Defendants "have generally failed to perform regulatory functions" and state incomprehensibly that the Plaintiffs have been "prevented from obtaining a reasonable return on their investments in renewable excess energy avoided capacity costs." 7AC ¶¶ 60, 60e, 61.[14] Plaintiffs seek monetary damages, in an amount to be determined, for the CPUC's alleged failure to enforce PURPA. 7AC ¶¶ 67, 68, 70. The second claim is

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[14] *But see* Plaintiffs' admission in Paragraph 36a that "[u]nder NEM, utility customers have at all relevnt [*sic*] times been compensated for their power generation of net surplus energy – above their own usage – which is supplied through their utility supplied power connection, by FERC mandate." *See also* 7AC ¶ 36e ("Plaintiffs CARE, Boyd and Sarvey have at all relevant times been compensated for supplying their net surplus energy under the PUC approved NEM Program.").

for equitable, injunctive, and declaratory relief and asserts that Plaintiffs "are entitled to orders enjoining the unlawful conduct . . . to remedy each and all particulars described herein, and consequences thereof." 7AC ¶ 73.

III. PROCEDURAL HISTORY

In 2011, Californians for Renewable Energy ("CARE") and Solutions for Utilities Inc. ("SFUI") sued the CPUC and Southern California Edison alleging violations of PURPA and 42 U.S.C. § 1983. The Court dismissed the § 1983 claims and CARE's PURPA claims and entered summary judgment for defendants, finding that SFUI did not have standing to bring its PURPA claim. On appeal, the Ninth Circuit found that the Court correctly dismissed many of the claims but found that the Court erred in dismissing CARE's PURPA enforcement claim because CARE had fulfilled its requirement to exhaust administrative remedies at that time. *Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. at 572.

After remand, the CPUC again moved for summary judgment.[15] "In December 2016, the Court granted summary judgment for the CPUC on all claims." Dismissal Order at 5. Plaintiffs again appealed, and on appeal the Ninth Circuit closely scrutinized the CPUC's implementation of PURPA. "The Ninth Circuit affirmed the Court in all respects except one." *Id.* at 6.

The only issue the Ninth Circuit did not affirm was whether, under the programs that the Court reviewed, the avoided cost prices for RPS facilities were based on prices from resources for which utilities receive RPS credit. *CARE v.* CPUC, 922 F.3d at 937; *see* 933-35 (describing the CPUC's implementation programs). The Ninth Circuit considered CARE's argument that the CPUC "impermissibly base[s] avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark" but did not hold that any renewable generator is

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[15] The CPUC defended its implementation of PURPA by describing its PURPA programs: the QF Settlement SOC and the MIF; the Feed-in Tariff program; the NEM program with NSCR; and the AB 1613 CHP program.

entitled to an avoided-cost rate based on renewable resources. *CARE v. CPUC*, 922 F.3d at 936. Rather, the Ninth Circuit held that "where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS." *Id.* at 937. The Ninth Circuit was explicit in its narrow holding: "And if a QF is not aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources." *Id.* at 937-38. The Ninth Circuit remanded this case back on this single issue.

Following the second remand from the Ninth Circuit, this Court granted in part the CPUC's motion to dismiss filed July 2021. The Dismissal Order did four things: First, it dismissed all claims against plaintiff CARE for lack of statutory standing, while giving CARE the opportunity to move for leave to file a supplemental pleading to potentially cure its standing deficiency. Dismissal Order at 18; *see also* ECF # 315 (denying leave to file supplemental pleading and dismissing plaintiff CARE). Second, it dismissed all Plaintiffs' "as-applied" claims, including allegations relating to the failure to pay capacity costs, with prejudice. *Id.* at 14, 18. Third, it dismissed Plaintiffs' claims for monetary relief with prejudice. *Id.* at 19. Fourth, it dismissed Plaintiff Boyd and Sarvey's PURPA implementation claim and granted leave to amend "only as it relates to their implementation claim within the scope of the Ninth Circuit's remand." *Id.* The Dismissal Order also held that "Plaintiffs have failed to state a claim" related to the issue on remand because "in order to determine whether the CPUC's programs comply with PURPA, Plaintiffs must first allege facts with sufficient particularity that utilities are fulfilling their California RPS obligations through those utilities' use of ***Plaintiff's*** energy." *Id.* at 17 (emphasis in original).

To follow the conditions of the Dismissal Order, Plaintiffs were to do certain things no later than March 25, 2022, to cure defects or face dismissal with prejudice. Instead, Plaintiffs have made an application (ECF #288), requested clarification

(ECF #295), and sought reconsideration (ECF #301), avoiding dismissal in the process. The Defendants respectfully now move for the Seventh Complaint to be dismissed with prejudice and without leave to amend.

IV. PLAINTIFFS CLAIMS SHOULD BE DISMISSED FOR FAILURE TO COMPLY WITH THE DISMISSAL ORDER

A. The Court May Dismiss the Seventh Complaint Pursuant to FRCP 41(b)

Federal Rule of Civil Procedure 41(b) provides in pertinent part: "If the plaintiff fails to . . . comply with . . . a court order, a defendant may move to dismiss the action or any claim against it. Unless the dismissal order states otherwise, a dismissal under this subdivision (b) . . . operates as an adjudication on the merits." Plaintiffs' Seventh Complaint exceeds what the Dismissal Order anticipated in granting leave to amend, as further explained below, and the Ninth Circuit has upheld dismissals in similar situations. *Yourish v. California Amplifier*, 191 F.3d 983, 992 (9th Cir. 1999) (dismissing action with prejudice for plaintiffs' failure to timely amend complaint in conformity with court order dismissing complaint with sixty days leave to amend).

The Court's Dismissal Order reads at 19:3-6: "Boyd and Sarvey are **DIRECTED** to file an amended complaint – but only as it relates to their implementation claim within the scope of the Ninth Circuit's remand." And in an order issued March 29, 2022, the Court warned Plaintiffs that "the Court will strike any amended or supplemental pleading that contains claims that have been dismissed with prejudice." ECF #294 at 2.

B. The Seventh Complaint Impermissibly Seeks Reconsideration of Issues Already Decided Contrary to this Court's Order

Plaintiffs' Seventh Complaint does not amend the Sixth Complaint "only as it relates to their implementation claim within the scope of the Ninth Circuit's remand." Dismissal Order at 18. Rather, the Seventh Complaint, by its retention of dismissed matters, implicitly seeks reconsideration of matters already decided in this

single, continuing lawsuit, and on July 5, 2022, the Court denied Plaintiff's Motion for Reconsideration. ECF #312.

Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). Any claims aside from the specific issue on remand are barred the law of this case. *See Matter of Beverly Hills Bancorp*, 752 F.2d 1334, 1337 (9th Cir. 1984) ("[o]n remand, a trial court cannot consider issues decided explicitly or by necessary implication"). Upon remand of a case for further proceedings after decision by an appellate court, the trial court must continue in accordance with mandate and law of case as established on appeal. *United States v. Van Pelt*, 938 F. Supp. 697 (D. Kan. 1996). The law of the case doctrine rests upon the sound public policy that litigation must end because no court could "efficiently perform its duty to provide expeditious justice to all if a question once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal." *Coleman v. Calderon*, 210 F.3d 1047, 1052 (9th Cir. 2000). "No litigant deserves an opportunity to go over the same ground twice" – or in this case – no less than eight times over more than a decade. *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir. 1997) (cleaned up).

The Seventh Complaint does not state allegations *only* relating to Plaintiffs' implementation claim within the scope of remand as the Dismissal Order instructed. Instead, the Seventh Complaint persists in seeking relief beyond the scope of the Ninth Circuit's remand such as alleging that the CPUC has failed to adopt *any* PURPA compliant implementation. 7AC ¶¶ 61-62. Such conclusory allegations are beyond the narrow scope of remand, as the Ninth Circuit affirmed this Court's Summary Judgment Order finding that California *has* implemented programs that comply with PURPA. *See*, *e.g.*, *CARE v. CPUC*, 922 F.3d at 939 (explaining that summary judgment was appropriate in the CPUC's favor on the QF settlement

contract price and that the CPUC's NEM program not paying for capacity does not violate PURPA). The Ninth Circuit affirmed this Court's summary judgment on all claims in Plaintiffs Fifth Amended Complaint, where this Court explained that "CARE Plaintiffs have failed to allege a violation of PURPA or its implementing regulations" after the Court conducted a detailed analysis of California's programs. Summary Judgment Order ECF #217 at 20. The Ninth Circuit only remanded this case to consider "whether an RPS changed the calculation of avoided cost" – the *only* issue this Court directed the individual Plaintiffs' amended complaint to cover. Dismissal Order at 19. But instead of following this Court's direction, Plaintiffs' Seventh Complaint is substantially similar to its prior pleadings, reiterating and repackaging the same assertions explicitly previously rejected by this Court and the Ninth Circuit.

The Dismissal Order and Ninth Circuit opinion bar more particular statements as well. For example, Plaintiffs' allegations in Paragraphs 19 and 20, that avoided cost must be calculated for each type of generating resource, is the very position the Ninth Circuit rejected. *CARE v. CPUC*, 922 F.3d at 937 ("We do not hold that the avoided cost must be calculated for each individual type of energy"). As another example, the Seventh Complaint makes allegations about capacity payments many times (7AC ¶¶ 18, 26, 33, 34, 35, 36, 37, 38, 38a, 60d, 60e, 62, & 64), but the Ninth Circuit affirmed that the Plaintiffs NEM resources are not eligible for capacity payments under federal law. *See CARE v. CPUC*, 922 F.3d at 938 (explaining that an avoided cost rate need not include capacity costs where the purchase does not allow the utility to avoid the need to construct or buy generation). As a final example of a new allegation added in the Seventh Complaint that is beyond the scope of remand and contrary to the law of the case, Plaintiffs state that prevailing in this case will entitle them to "full avoided cost for 100% of their power production, not some lesser amount for only the 'surplus' power production." 7AC ¶ 42h. But

as the Ninth Circuit explained, the only aspect of NEM governed by PURPA is net surplus compensation. *See CARE v. CPUC*, 922 F.3d at 939.

C. Plaintiffs' Impermissibly Continue to Seek Monetary Damages Despite Injunctive or Declaratory Relief Being the Only Remedies Available

The Ninth Circuit affirmed that equitable damages and attorneys' fees are not an available remedy in federal court under PURPA. *CARE v. CPUC*, 922 F.3d at 941; *see also Solutions for Utils., Inc. v. CPUC*, 596 Fed. Appx. at 572-73 (affirming the rejection of claims that would have allowed for damages). This Court clearly stated that "Plaintiffs' claims for monetary relief are **DISMISSED with prejudice**." Dismissal Order at 19 (emphasis in original).

Despite this express direction, the Seventh Complaint persists in alleging claims for monetary relief. For example, in Paragraph 68, the Seventh Complaint alleges that "Plaintiffs are and have been materially harmed and damaged, in an amount to be determined at trial." 7AC ¶ 68. And Plaintiffs conclude their first claim for enforcement of PURPA with an allegation that 16 U.S.C. § 824a-3 entitles them "to recover 'injunctive or other relief as may be appropriate' and the latter includes monetary damages as may be proved at trial herein." 7AC ¶ 70. Both these allegations are in direct contravention to the direction from this Court and the Ninth Circuit.

D. Plaintiffs' Press As-Applied Claims Against Actions of Utilities that this Court Ordered Dismissed with Prejudice

The Court plainly stated that "[t]o the extent Plaintiffs assert any as-applied claims, such claims are **DISMISSED with prejudice**." Dismissal Order at 18. The Seventh Complaint violates this Order by continuing to assert as-applied claims. 16 U.S.C. §§ 824a-3(g)(2) & 2633. But the Seventh Complaint asserts claims about

actions of a utility[16] and imputes actions by a utility onto the CPUC.[17] These constitute as-applied claims, which violate the Court's dismissal of as-applied claims with prejudice.

E. The Seventh Complaint Impermissibly Supplements Plaintiffs' Claims

The Court's Dismissal Order provided that Plaintiff CARE (and only Plaintiff CARE) could file a motion for leave to supplement pursuant to Rule 15(d), for the singular purpose of potentially establishing statutory standing. *See* Dismissal Order at 18. In a subsequent order issued March 29, 2022, the Court reminded Plaintiffs that a supplemental complaint may only be filed with leave of the Court, and admonished plaintiffs that "[a]ny pleading that contains material concerning any transaction, occurrence or event that happened after the date of the filing of the complaint will be **STRICKEN** ***unless*** the Court has granted a motion to supplement." ECF #294 (emphasis in original). And in a subsequent Chamber's Order, the Court reminded Plaintiffs that "it denied their only prior motion to file a supplemental pleading," and instructed Plaintiffs Boyd and Sarvey that they "need not delete references to CARE in their anticipated amended complaint, so long as (a) those allegations are relevant to the sole claim for which they have been granted leave to amend; and (b) the allegations do not concern transactions, occurrences, or events that happened after the date of the filing of the Complaint." ECF #296.

Plaintiffs have disregarded this explicit direction. Without leave, they entitle their new pleading the "Seventh Amended and Third *Supplemental* Complaint for Equitable Relief" (emphasis added) and include at least one allegation that clearly

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[16] *See*, *e.g.*, allegations against PG&E, despite PG&E not being involved in lawsuit. 7AC ¶¶ 40, 53-57, 60; *see also*, ¶¶ 42h, & 60e.

[17] *See* allegations in Paragraphs 43-45, including that CPUC surrendered its regulatory authority to IOUs and "the actions of one are the actions of the other." 7AC ¶ 44.

postdates the initial complaint in this action. *See* 7AC¶ 65 (complaining about CPUC Decision (D.) 16-01-044 issued in 2016).[18]

Because the Seventh Complaint violates the express direction of this Court, by including supplemental acts and continuing to bring claims beyond the scope of remand on behalf of dismissed Plaintiff CARE,[19] the pleading should be dismissed.

V. THE SEVENTH COMPLAINT CONTINUES TO FAIL TO STATE A CLAIM

A. Standard of Review under Fed. R. Civ. P. 12(b)(6)

Rule 8(a) of the Federal Rules of Civil Procedure requires a complaint to contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This Court's Order aptly explained that "[a] claim should be dismissed under Rule12(b)(6) when the plaintiff fails to assert a "cognizable legal theory," or the complaint contains "[in]sufficient facts . . . to support a cognizable legal theory." Dismissal Order at 8. This Court explained further that "[t]o survive a motion to dismiss, the complaint must allege 'more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.'" Dismissal Order at 8.

While a complaint need not contain detailed factual allegations, the allegations in the complaint "must be enough to raise a right to relief above the speculative level," and allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal* at 678. A claim must give the defendant "fair notice of what the . . . claim is and the grounds upon which

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[18] Further, many of the allegations in the Seventh Complaint are vague and lacking any temporal reference, but others also seem to appear to pertain to those that occurred after Plaintiffs filed their initial complaint. *See*, *e.g.*, 7AC¶¶ 60d & 60e, framing allegations in the present tense.

[19] *See* ECF # 315.

it rests." *Twombly*, 550 U.S. at 555, and thereby "enable the opposing party to defend itself effectively." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

Furthermore, given the procedural posture of this case, Plaintiffs may only articulate a claim within the Ninth Circuit's remand relating to whether the Defendants implementation of PURPA in 2011 erred in calculating the avoided cost of energy given the existence of the California RPS program. *See* Dismissal Order 17-18; *CARE v. CPUC*, 922 F.3d at 938, 940.

B. Plaintiffs Fail to Meet the Pleading Standard of Rule 8

The Seventh Complaint fails to meet the standard of Fed. R. Civ. P. 8. It contains neither a "cognizable legal theory" nor "sufficient facts alleged under a cognizable legal theory," *see Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988), let alone one that bears any relation to the issue on remand. As noted by the Court in examining Plaintiffs' prior complaints, this complaint continues to make "highly confusing allegations" without citation to various requirements of PURPA and purported failures of the CPUC to regulate. 7 AC ¶¶ 17-39, 56-64; ECF #184 at 5-6. It does not name any specific decision or action that is a violation of federal law within the scope of remand.[20]

Instead, Plaintiffs broadly allege that CPUC Defendants "have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations . . ." and make and sweeping conclusions that the CPUC has "harmed the public interest by undermining the public policy purposes of PURPA" and "conspired and colluded" to cause some unexplained harm contrary to Congressional wishes. 7AC¶¶ 61, 66, 69. This Court is "not required to accept as true conclusory allegations which are contradicted by documents referred to in the

[20] Indeed, as noted in section IV. B. above, the only specific deficiencies mentioned relate to claims that have been dismissed with prejudice (*e.g.*, the failure to make capacity payments to plaintiffs, and the CPUC's failure to calculate a separate avoided a cost for distinct types of energy).

complaint." *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998). The Seventh Complaint's broad allegations that the CPUC is violating the purposes or provisions of PURPA are contradicted by the prior Orders in this case. Like its predecessors, the Seventh Complaint "merely make[s] a slew of conclusory statements that the CPUC and its Commissioners have shirked their obligations under PURPA." Dismissal Order at 16.

The conclusory statements of the Seventh Complaint are not allegations with attendant facts of sufficient particularity to state *any* claim for relief related that is "plausible on its face," let alone one related to the issue on remand. *See Twombly*, 550 U.S. 544 at 570; *Iqbal*, 556 U.S. at 678. The Court cannot "assume the truth of legal conclusions merely because they are cast in the form of factual allegations." *Warren v. Fox Family Worldwide*, 328 F.3d 1136, 1139 (9th Cir. 2003).

The Seventh Complaint also makes no attempt to explain how Defendants violate the principle established by the Ninth Circuit relating to the calculation of avoided cost of generation used for RPS purposes. In considering the allegations of the prior pleading in the light most favorable to Plaintiffs, the Dismissal Order allowed for the possibility that there might be a potential claim, but Plaintiffs failed to state it. Dismissal Order at 17.

The Seventh Complaint does not articulate such a claim. Instead, it adds a speculative, conclusive, and formulaic recitation that Plaintiffs' respective net surplus energy has been included at the relevant times by utilities to meet their RPS. ¶¶ 36h, 36j.[21] This does not give rise to a "reasonable inference" that Defendants

[21] As discussed *infra*, Defendants submit that the conclusory allegations in paragraphs 36h & 36j are implausible and should not be accepted by the Court. Defendants observe that the Seventh Complaint appears to conflate the ideas of renewable power generation that qualifies under PURPA on the one hand, versus the specific requirements of the RPS program on the other. For example, Plaintiffs do not allege their resources are certified as RPS-eligible by the Energy Commission, which is a prerequisite for a utility to claim RECs from a facility for RPS compliance purposes. *See* Cal. Pub. Util. Code §§ 399.12(h)(1), 399.25(a); *see also* Cal. Pub. Util. Code § 399.12(e), (h), (i), defining foundational terms for the RPS Program.

have improperly calculated the avoided cost of any generation claimed by a utility for RPS purposes, which is what Plaintiffs would need to allege to articulate a claim within the scope of remand. *See Iqbal* at 678.

Because the Seventh Complaint is comprised entirely of allegations that are vague and conclusory (or which have already been adjudicated in favor of Defendants), the Seventh Complaint fails in its most basic objective; for this reason, this Court should dismiss it.

VI. THIS COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS

A. Standard of Review FRCP 12(b)(1)

The absence of Article III standing compels dismissal of a case from federal court. *Maya v. Centex Corp.*, 658 F.3d 1060, 1067 (9th Cir. 2011). A court must dismiss a case "for lack of subject matter jurisdiction under Rule 12(b)(1) when the district court lacks the statutory or constitutional power to adjudicate it." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

B. Requirements of Article III Standing

Plaintiffs bear the burden of showing each of them has Article III standing for the relief each seeks. *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). "To demonstrate Article III standing, a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Dismissal Order at 7, citing *Robins v. Spokeo*, 578 U.S. 330, 338 (2016). Injury-in-fact must be "actual or imminent, not conjectural or hypothetical" and caused by a party before the court. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs must prove standing for each claim and each form of relief as a risk of future harm does not satisfy the concrete injury requirement for Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). "To satisfy the redressability requirement of Article III standing, the plaintiff must show that 'it is likely, as opposed to merely speculative,

that the injury will be redressed by a favorable decision."' *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 (2d Cir. 2017).

C. Plaintiffs Lack Article III Standing

a) Plaintiffs' Injury-in-Fact is Conjectural or Hypothetical

The Court held that "to demonstrate Plaintiffs have been injured from an incorrect calculation of avoided costs, they must first allege that utilities are fulfilling any of their RPS obligations through the challenged CPUC programs with ***their*** energy." Dismissal Order at 16 (emphasis in original). The Court dismissed the Sixth Complaint in part due to this omission but allowed Plaintiffs "one final opportunity to amend their pleading to correct its deficiencies." *Id.* at 17.

In the Seventh Complaint Plaintiffs added a conclusive and formulaic recital that "Plaintiffs' – CARE, Boyd and Sarvey – respective net surplus energy supplied under the PUC approved NEM Program has at all relevant timees [*sic*] been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard." 7AC ¶¶ 36h, 36j. This Court should not accept as true the legal conclusions in Paragraphs 36g, 36h, and 36j of the Seventh Complaint. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986) (in considering a motion to dismiss, a Court is "not bound to accept as true a legal conclusion couched as a factual allegation.")

Furthermore, Plaintiffs' allegation is implausible, particularly given how California's RPS works.[22] Renewable energy credits are the compliance mechanism under the RPS, and to produce RECs the Energy Commission must certify a facility as "eligible renewable energy resources." *See* Pub. Util. Code §§ 399.12(h),

[22] We note that Plaintiffs' respective utility is Pacific Gas and Electric Company. Summary Judgment Order ECF #217 at 1.

399.25(a).[23] The Seventh Complaint provides no indication that the California Energy Commission has certified any of Plaintiffs' facilities as eligible[24] under the RPS.

b) The Plaintiffs' Seventh Complaint Is Not Traceable to Challenged Conduct of the CPUC.

Plaintiffs' Seventh Complaint does not name any particular CPUC action within the scope of remand that has harmed the Plaintiffs.[25] Despite multiple rounds of discovery, including initial discovery having completed in 2012, the claim against the CPUC remains a vague, hyperbolic argument[26] – "Plaintiffs are informed and believe, and based thereon allege, that CPUC Defendants have generally failed to perform regulatory functions." 7AC ¶ 61.

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[23] In June 2011, when Plaintiff filed their initial complaint, these were codified as Pub. Util. Code sections 399.12(c) and 399.13(a), respectively.

[24] Paragraph 36k of the Seventh Complaint alleges "Boyd and Sarvey have at all relevant times met RPS-eligibility requirements for QF's established by the [California Energy Commission]." But claiming to have been *eligible* for something is not the same as being *actually certified* to participate in the RPS program, where statutory law requires actual certification to participate in the state RPS program.

[25] The CPUC decision mentioned in Paragraph 65 (D.16-01-044) is from 2016, but Plaintiffs lack leave of Court to Supplement to include occurrences after the initial complaint. Events occurring after the case was filed "must be alleged in a supplemental complaint under Rule 15(d), not in an amended complaint under Rule 15(a). ECF #301 at 4, citing *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874 (9th Cir. 2010). The Seventh Complaint has one footnote which also lists "for instance" various proceedings of FERC and the CPUC. 7AC at 18. None of the citations in this list are to a specific order or decision of the CPUC; rather, the citations are all to proceedings generally. It is unclear how these proceedings are related to this lawsuit with their varied topics such as A1106029 – an application by PG&E relating to Smart Grid Deployment, A100912 – an application by CARE filed Sep. 20, 2010, to modify CPUC Decision 06-07-027 relating to metering infrastructure, or A0904001 – an application by PG&E to approve a power purchase agreement. Four of these proceedings were commenced after the filing of this lawsuit [Application 14-07-009, Rulemaking 14-07-002, Application 12-03-026, and Application 11-06-029].

[26] *See also*, *e.g.*, 7AC ¶ 69 alleging that "combined efforts of CPUC and other major utilities / power grid owners" have "conspired and colluded."

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Furthermore, the Plaintiffs' broad allegations are precluded by the law of this case,[27] and not traceable to the CPUC. The Ninth Circuit affirmed that the CPUC *has* implemented PURPA. Plaintiffs may not continue to generally challenge conduct of the CPUC whose general implementation of PURPA was upheld on appeal. Instead, the allegations of the Seventh Complaint are primarily traceable to third parties not before this Court. Plaintiffs direct their PURPA enforcement claim at the "refusal of the local power grid providers" and entities "like PG&E [Pacific Gas and Electric Company]." 7AC ¶¶53, 56, 60d. Plaintiffs allege that the CPUC "acted in concert with the other named Defendant [Southern California Edison] and its respective principals and agents and other persons whose identities and/or extent of involvement are not yet known to Plaintiffs."[28] 7AC ¶ 76. Plaintiffs do not truly seek a remedy from the CPUC, rather they seek "compliance by regulated utilities in respect to pricing." 7AC ¶ 61.

c) Claims of the Plaintiffs Are Not Likely to Be Redressed

Primarily, Plaintiffs continue to seek remedies barred by the Eleventh Amendment that have been dismissed from this case with prejudice. Dismissal Order at 16. The Seventh Complaint claims material harm and damage and seeks as a remedy, "an amount to be determine [*sic*] at trial, by the CPUC failure to enforce PURPA."[29] 7AC ¶ 68. However, only declaratory or prospective injunctive relief is

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[27] For examples of impermissible allegations by the Plaintiffs in their claims for relief, *see*, *e.g.*, 7AC ¶ ¶ 53-55 seeking to relitigate avoided capacity costs or 7AC ¶ 62 asserting that the CPUC "has failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers."

[28] There are no fictitiously named defendants, nor could there be this far into this litigation. *See* FRCP 4(m).

[29] *See also* 7AC ¶ 70, seeking other relief as may be appropriate, including monetary damages.

available to the Plaintiffs.[30] No declaratory or prospective injunctive relief will remedy the Seventh Complaint. Plaintiffs have laid out no specific order or decision of the CPUC as to which this court could grant injunctive relief to cure any allegation by Plaintiffs. Furthermore, Plaintiffs' enforcement claim is not redressable by a favorable judicial decision of this court because it states an as-applied claim, primarily concerned with the actions or omissions of utilities that this court lacks jurisdiction to hear.[31] Even assuming it would redress the Plaintiffs to have this Court lay out rules of PURPA implementation, the Ninth Circuit has already done so in this case.

VII. FURTHER LEAVE TO AMEND WOULD BE FUTILE

This case would be further delayed and continue to burden the CPUC if Plaintiffs were allowed to further amend or supplement their pleading, particularly when prior pleadings did not cure deficiencies. *See*, *e.g.*, *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (liberal amendment standard does not justify amendments that prejudice the opposing party, create undue delay, are sought in bad faith, or constitute an exercise in futility). As this case already had a summary judgment ruling in the CPUC's favor and multiple periods of discovery, allowing any amendment or supplementation of claims is not only futile and long delayed but also unduly prejudicial. *See Williams v. California*, 764 F.3d 1002,

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[30] CPUC Commissioners have absolute immunity in suits for damages against them in their official capacity. *See Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731-34, (1980) (rulemaking is a legislative function accorded absolute immunity), *see also Tenney v. Brandhove*, 341 U.S. 367, 377 (1951) (a claim of an unworthy motive or intent does not destroy the immunity.). The Eleventh Amendment bars CARE's claim for equitable relief and money damages leaving CARE the possibility of only prospective injunctive relief under the *Ex Parte Young* exception to the Eleventh Amendment. *CARE v. CPUC*, 922 F.3d at 941. It is the law of the case that PURPA does not authorize damages or other equitable relief. *Id.* at 941-943.

[31] *See*, *e.g.*, 7AC ¶¶ 53, 57. 61, 63; *and see* discussion *supra* relating to tracing the complaint to challenged conduct of the CPUC.

1027 (9th Cir. 2014) (denying leave to amend where plaintiffs failed in only two chances to sufficiently plead claims).

The Court granted Plaintiffs' "one final opportunity to amend their pleading to correct its deficiencies" and the Plaintiffs did not correct the deficiencies with this opportunity. Dismissal Order at 17. Since there is a decision on the merits (the Summary Judgment Order) and guidance from the Ninth Circuit on PURPA implementation, this Court should not grant leave to amend again as it is "not automatic." Dismissal Order at 9, *citing Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 2020 WL 5775174 at *1 (C.D. Cal. July 8, 2020). Thus, with the duration of this litigation and delays coming at a cost to the CPUC, the Court is well within its discretion to deny further leave to amend. *AE ex rel. Hernandez v. Cty. of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012).

VIII. IN THE ALTERNATIVE, THIS COURT SHOULD STRIKE CERTAIN PORTIONS OF THE SEVENTH COMPLAINT

Federal Rule of Civil Procedure 12(f) permits a party to move to strike from a pleading any redundant, immaterial, impertinent, or scandalous matter before responding to the pleading. Based on its prior orders (*i.e.*, Dismissal Order, ECF #294, and Chambers Order), Plaintiffs have been barred from making allegations post-dating the initial complaint and allegations relating to claims that have been dismissed with prejudice, all of which would tend to fall into the "immaterial" category. An allegation is immaterial if it has no essential or important relationship to the claim for relief being pled. *Amini Innovation Corp. v. McFerran Home Furnishings, Inc.*, 301 F.R.D. 487, 490 (C.D. Cal. 2014). The purpose of striking such matters is to keep the parties from having to litigate issues that are not properly within the scope of the litigation. *See Barnes v. AT&T Pension Ben. Plan-Nonbargained Program*, 718 F.Supp.2d 1167, 1170 (N.D. Cal. 2010).

For the reasons set forth *supra* in Sections IV. B-E, if the Court is disinclined to dismiss the Seventh Complaint in its entirety, it may and should strike the following portions of the Seventh Complaint because they relate to matters that have

been dismissed with prejudice, relate to matters that are supplemental without a predicate order allowing supplementation, relate to matters pertaining to CARE that are not relevant to the sole claim for which the individual Plaintiffs have been granted leave to amend, or relate to matters that are outside the scope of remand, and are therefore immaterial: 7AC ¶¶ 4a, 4b, 19, 20, 21, 33, 35, 36, 36b (11:7), 36c (11:10), 36d (11:13), 36e (11:16), 36h (11:27), 36j (12:3), 37, 38, 38a, 40, 42g, 42h, 43, 44, 45, 52 (16:6-11), 53, 54, 55, 56, 57, 58 (17:19), 60, 60d, 60e, 61, 62, 65 (20:12), 67, 68, and 70.

IX. THIS COURT MAY ALTERNATIVELY RESOLVE THE QUESTION OF THE PLAINTIFFS' ARTICLE III STANDING AS A THRESHOLD MATTER

In a second alternative, if the Court declines to dismiss the Seventh Complaint in its entirety, Defendants ask the Court to resolve the threshold jurisdictional question of whether Plaintiffs have Article III standing to pursue the issue on remand, before allowing the case to go ahead. "A district court may hear evidence and make findings of fact necessary to rule on the subject matter jurisdiction question prior to trial, if the jurisdictional facts are not intertwined with the merits." *Rosales v. United States*, 824 F.2d 799, 803 (9th Cir. 1987). Here, the threshold question of whether any utility has claimed generation from individual Plaintiffs qualified facilities to meet the utility's RPS obligation is not intertwined with the merits of any allegation related to the CPUC's compliance with PURPA. This Court should therefore require Plaintiffs to produce evidence to support their allegations in Paragraphs 36h & 36k, and to allow Defendants an opportunity to produce evidence to contradict Plaintiffs' evidence, before continuing with any other matters in this case.

X. CONCLUSION

For the reasons above, this Court should dismiss the Seventh Complaint and its claims with prejudice and without leave to amend. Alternatively, this Court may strike the following portions of the Seventh Complaint for the reasons above: 7AC

¶¶ 4a, 4b, 19, 20, 21, 33, 35, 36, 36b (11:7), 36c (11:10), 36d (11:13), 36e (11:16), 36h (11:27), 36j (12:3), 37, 38, 38a, 40, 42g, 42h, 43, 44, 45, 52 (16:6-11), 53, 54, 55, 56, 57, 58 (17:19), 60, 60d, 60e, 61, 62, 65 (20:12), 67, 68, and 70. As a further alternative, this Court may make the Plaintiffs show cause why this case should not be dismissed for their lack of Article III standing.

Dated: July 22, 2022

Respectfully submitted,

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., a California Corporation; CALIFORNIANS FOR RENEWABLE ENERGY, INC., a California Non-Profit Corporation; and MICHAEL E. BOYD and ROBERT SARVEY, Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, an Independent California State Agency; SOUTHERN CALIFORNIA EDISON CO., a California Corporation; MARYBEL BATJER, MARTHA GUZMAN ACEVES, CLIFFORD RECHTSCHAFFEN GENEVIEVE SHIROMA and DARCIE L. HOUCK, in their official and individual capacities as current Public Utilities Commission of California Members, Defendants.	Case No. 2:11-CV-04975-JWH-JCG **OPPOSITION TO MOTIONS TO DISMISS SEVENTH AMENDED COMPLAINT OR, IN THE ALTERNATIVE, TO STRIKE PORTIONS THEREOF** **Date: September 16, 2022** **Time: 9:00 a.m.** **Courtroom: Hon. John W. Holcomb**

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INTRODUCTION

Following the second remand in this action, *see CAlifornians for Renewable Energy ["CARE"] v. California Public Utilities Commission,* 922 F.3d 929 (9th Cir. 2019), with leave of Court pursuant to Fed.R,Cv.P. 15, Plaintiffs filed their Sixth Amended and Second Supplemental Complaint. By Order, the Sixth Amended and Second Supplemental Complaint was dismissed with leave to amend as specified therein, and following clarifying orders, the Seventh Amended Complaint was filed[1].

This is a federal question action in which Plaintiffs, CAlifornians for Renewable Energy, Inc. ["CARE"], California based small scale energy companies, and two qualified facility ["QF"] members of CARE, are seeking equitable relief and damages from Defendants, California Public Utilities Commission ["CPUC"] a California state agency charged with *inter alia* California energy policymaking and delegated federal regulation enforcement, and named members of CPUC sued in their official capacities, to effectively undermine the federal policy of promoting the viability and integration of small energy generating companies and protecting them from monopolistic practices, to the great injury to Plaintiffs and the public interest.

Plaintiffs seek injunctive, equitable and/or declaratory relief compelling and/or commanding Defendant CPUC and its members to perform its/their federal-mandated regulatory duties, including federally mandated standards in connection with the Public Utility Regulatory Policies Act ["PURPA"], as prescribed by the Federal Energy Regulatory Commission ["FERC"]; and in accordance with Ninth Circuit rulings herein issued.

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[1] The lodged redline version of the Seventh Amended Complaint contains a mistaken reference to "supplemental complaint" in caption, though not in introductory text. The filed version is correct in all respects. Defendants' counsel appears to have relied only on the former in submitting the instant Motion to Dismiss.

I.
GENERAL ELEMENTS OF PLAINTIFFS' CLAIMS AS CURRENTLY BEFORE THIS COURT

On March 9, 2022, this Court granted in part and denied in part Defendants' motion to dismiss the Sixth Amended and Supplemental Complaint, in particular, dismissing the Michael Boyd and Robert Sarvey ["Plaintiffs"] "implementation claim [within the scope of the Ninth Circuit's remand] under the Public Utility Regulatory Policies Act ("PURPA") with leave to amend" by filing an amended complaint by March 25, 2022, later extended on March 29, 2022 to April 5, 2022 ["March 9, 2022 Order"]. Plaintiffs filed the Seventh Amended Complaint ["SAC"]on April 5, 2022, along with required redline version showing changes from the previous complaint.

As identified by this Court in its March 9, 2022 Order, p.10 & n.25, Plaintiffs' sole remaining claim – concurred in by Defendants – is "CPUC's alleged failure to calculate avoided costs properly when determining what utilities should pay QFs when the QFs supply energy to help meet that utility's Renewable Portfolio Standard ("RPS") obligations [SAC.PP. 24-30]." ["PURPA Avoided Cost Claim"]. Plaintiffs also seek equitable [injunctive and declaratory] relief to remedy the PURPA Avoided Cost Claim. The Court mistakenly supposed a second claim based on SAC.PP.54-58 [March 9, 2022 Order, p.10 & n.26], which it then dismissed as previously barred by the Remand Order [March 9, 2022 Order, p.14]. In their Opposition to Motion to Dismiss Sixth Amended Complaint, p.13 n.1, Plaintiffs stated the following:

> "The Court of Appeal ruled that Plaintiffs were herewith making an 'as applied' PURPA challenge which requires therm to seek a state court remedy; but it did not hold that these allegations are irrelevant as evidence that in fact NEM suppliers can provide requisite guaranteed deliverability with a QF contract. *See CARE,* 922 F.3d at 939, n.4."

So, Plaintiffs were not then, nor are they now, asserting a dismissed claim, but make the allegations at PP.53-58, now further clarified in text, solely to meet the cited "guaranteed deliverability" element of their PURPA Avoided Cost Claim.

Furthermore, Plaintiffs are not asserting any "transaction, occurrence, or event that happened after the date of the pleading to be supplemented" which were addressed in a separate motion and order of this Court. Defendants were able to identify only one such purported allegation at SAC.P.65. Yet the text of that entire paragraph is identical in every complaint herein[2], except for the citation – "[*See e.g.* CPUC Decision D-16-01-044]" – added in the Fifth Amended and Supplemental Complaint, to which Defendants asserted no pleading motion.

The elements of a private claim under 16 U.S.C. §824, *et seq*. are (1) failure of a state utilities commission to perform its implementation duty, and (2) failure of FERC to petition in district court for enforcement after sixty days following petition by a qualified facility. *See FERC v. Mississippi*, 456 U.S. 742, 751 (1982). The Opinion provides an excellent discussion of the statutory background of PURPA. *See CARE,* 922 F.3d at 932-33.

The Opinion then adds that while CPUC has broad discretion to implement "avoided cost" under PURPA, courts must not abdicate responsibility to ensure PURPA compliance. *See CARE,* 922 F.3d at 936. PURPA requires that when avoided cost is calculated, it is the "full avoided cost" standard, *i.e.* a floor as well as a ceiling. *See CARE,* 922 F.3d at 936-37. The Opinion then summarizes:

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

CARE, 922 F.3d at 938. In respect to two elements in assessing full avoided cost, the Opinion struck a middle ground between Plaintiffs' positions and CPUC positions:

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[2] In Original and First Amended Complaint at P.41; in Second Amended Complaint at P.61; in Fifth Amended Complaint at P.51; in Sixth and Seventh Amended Complaint at P.65.

First, capacity costs must be included where supplier affords "sufficient legally enforceable guarantees of deliverability" or when the utility knows how much energy the supplier will provide, but not otherwise. *See CARE,* 922 F.3d at 938-39. NEM programs are not "categorically exempt from PURPA." *See CARE,* 922 F.3d at 939.

Second, in assessing full avoided cost, the Opinion rejected Plaintiffs' position that avoided cost should always be a multi-tiered re energy source and CPUC's position that mixed sources are always acceptable. *See CARE,* 922 F.3d at 936-38.

> "Where a state has an RPS [renewable energy requirements] and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided cost based on energy sources that would not also meet the RPS. . . . [This is a fact based] examination of the costs that a utility is *actually avoiding* . . . ."

CARE, 922 F.3d at 937 (emphasis in original). Likewise, whether the re-MAT and CHP programs can rely on natural gas sources instead of renewable energy is a fact-based inquiry in connection with whether the utility is using the supplier for meeting RSP requirements, which may be considered on remand. *See CARE,* 922 F.3d at 940.

Though Plaintiffs did not earlier make a requisite showing on NEM decreasing utilities' spending on capacity by showing guaranteed deliverability, *see CARE,* 922 F.3d at 939, the Opinion does not preclude Plaintiffs from doing so on remand.

> "Because we hold that the district court misinterpreted PURPA's requirements, **we remand for the district court to make such a determination in the first instance**.

CARE, 922 F.3d at 938 (emphasis added).

Defendants' contrary arguments – that capacity costs are now precluded from the remanded avoided cost claims – are plainly illogical and erroneous. The RPS issue only arises in the context of avoided capacity costs, *i.e.* whether in calculating avoided capacity costs, does that mean calculating only in reference to the particular energy source of the QF supplier, or in reference to all energy sources of the utility.

Contrary to Defendants' arguments, Plaintiffs plainly and sufficiently plead that Defendants are failing to enforce the avoided cost mandates against utilities which do not pay avoided capacity costs when paying Plaintiffs and like QF's for their surplus energy. [SAC.PP.33-36,36a-36k,37-39]. Plaintiffs are not seeking guaranteed profit, only their capacity costs which in practical effect are often the profitability margin.

Plaintiffs now only plead the remaining avoided cost claims, as modified to reflect the Ninth Circuit Ruling, and now also addressing the matters for which leave to amend was afforded by the District Court. In Section III [The Facts Which Must Be Deemed True], the added amending allegations – made with leave of court and with cross-references to the specific paragraphs of the Seventh Amended Complaint – are italicized. In doing so, Plaintiffs addressed the following instruction:

> "What is plainly missing here [in Sixth Amended Complaint] is any allegation that Plaintiffs' energy resources were actually used to satisfy RPS obligations or that their resources participated in the RPS program. To demonstrate that Plaintiffs have been injured from an incorrect calculation of avoided costs, they must first allege that utilities are fulfilling any of their RPS obligations through the challenged CPUC programs with ***their*** energy. It is unclear from Plaintiffs' operative pleading that this injury has actually occurred."

March 9, 2022 Order, p.15 (emphasis in original).

Conversely, the entire Section IV of Defendants memorandum in support of their pending Motion to Dismiss is a collection of red herrings: (a) Plaintiff filed the SAC within the extended time ordered in the March 29, 2022 Order; (b) Plaintiffs are not seeking anything beyond what is described in this section and hence is not seeking reconsideration of anything; (c) Plaintiffs are alleging injury and damages solely for purposes of meeting Article III jurisdictional standing, and not for any recovery thereof in these proceedings, as made clear in the Prayer and elsewhere; (d)

the allegations which supported the now dismissed "as applied claims" are maintained solely in support of meeting Article III jurisdictional standing, and not for any recovery thereof in these proceedings, as above-explained; and (e) there are no efforts in the SAC seeking to supplement anything, not even by the one citation fragment identified by Defendants in SAC.P.65, as hereinafter explained. Hence, this entire Section IV is baseless, and the same is then necessarily the case with the alternative Motion to Strike, which expressly cross-references this Section IV, as set forth in Defendants' Memorandum, pp.22-23 [Section VIII].

II.
THE ALLEGATIONS IN PLAINTIFFS' COMPLAINT MUST BE DEEMED TRUE, VIEWED TOGETHER, AND LIBERALLY CONSTRUED IN A LIGHT MOST FAVORABLE TO PLAINTIFFS

All material allegations of fact in Plaintiffs' Seventh Amended Complaint ["SAC"] at specified paragraphs ["PP"], and plausible inferences therefrom, are presumed to be true, and must be construed in a light most favorable to plaintiff, including matters to which judicial notice is proper, *see Daniels-Hall v. National Education Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010)*,* no matter how improbable – *i.e.* the Court cannot elect to disbelieve them, *see Ashcroft v. Iqbal*, 562 U.S. 662, 679 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007). Conclusions are appropriate, if "supported by factual allegations." *Ashcroft*, 562 U.S. at 679. No particularity is required when "allegations describe non-fraudulent conduct." *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009); *Vess v. Ciba-Geigy Corp, U.S.A.,* 317 F.3d 1097, 1104 (9th Cir. 2003). Federal pleading is notice pleading, requiring "sufficient factual matter, accepted as true, to state a claim of relief." *Harris v. County of Orange*, 682 F.3d 1126, 1131 (9th Cir. 2012).

> "[A Court] may take judicial notice of undisputed matters of public record, *Lee v. City of Los Angeles*, 250 F.3d 668, 689 (9th Cir.2001), including documents on file in federal or state courts. *See Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n. 2 (9th Cir.2002)."

Harris, 682 F.3d at 1132.

Even if the allegations are deficient, "dismissal with prejudice and without leave to amend is not appropriate" – *i.e.* the entire action "should not be [dismissed] unless it is clear that the complaint could not be saved by any amendment,"*Harris*, 682 F.3d at 1132; *Eminence Capital, LLC v. Aspen, Inc*., 315 F.3d 1048, 1052 (9th Cir. 2003); *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996); *Kelson v. City of Springfield*, 776 F.2d 651, 656 (9th Cir. 1985); or amendment would be futile given conclusions the Court reaches with all facts presumed in favor of plaintiff, *see F.E. Trotter, Inc. v. Watkins*, 869 F.2d 1312, 1313-14, 1317-18 (9th Cir. 1989).

Ordinarily, an order granting a motion to dismiss a complaint pursuant to a motion to dismiss under *Fed.R.Civ.P.* 12(b)(6) carries with it a right to amend under *Fed.R.Civ.P.* 15(a), unless the order unmistakably indicates that no possible amendment could save the complaint, either by so stating or by submission of written findings which unmistakably establish same. *See State of California v. Harvier*, 700 F.2d 1217, 1218-19 (9th Cir. 1983). Plaintiff is entitled to at least one opportunity to correct defects for which he has received clear notice from the Court. *See Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 732, 738 (9th Cir. 1987); *Vess,* 317 F.3d at 1107. *Accord, Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983) (denial of leave to amend only based on undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant).

III.
THE FACTS WHICH MUST BE DEEMED TRUE

A. JURISDICTION AND GENERAL MATTERS

Remanded Plaintiffs include Michael E. Boyd and Robert Sarvey, qualified facilities ["QF"]. References herein to Plaintiffs include Plaintiffs Boyd and Sarvey. [SAC.P.4]. California Defendants are: (a) Public Utilities Commission of California ["CPUC"], a California state agency, established under the California State

Constitution as an independent agency, charged with *inter alia* California energy policymaking and, by express terms of federal laws on which this action is based, express delegated federal regulatory enforcement; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]: Marybel Batjer [August 16, 2019 (Commissioner) and December 30, 2020 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]: Martha Guzman Aceves [January 28, 2016 - present]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; and Darcie L. Houck [February 9, 2021 - present]. [SAC.P.5].

The Federal Power Act ["FPA"], 16 U.S.C. §791, *et seq*., and its followup act, the Public Utility Regulatory Policies Act ["PURPA"], 16 U.S.C. §824, *et seq.,* were each adopted by Congress under the Commerce Clause of the United States Constitution in light of the inter-state nature of the subject matter of the statutory scheme, and expressly preempted state authority in that field to the extent (a) provided therein or (b) state law conflicts therewith, under the Supremacy Clause of the United States Constitution. [SAC.P.6]. PURPA was adopted by Congress to encourage the development of nontraditional cogeneration and small power production facilities, to: (a) reduce the demand for traditional fossil fuels; and (b) rectify the problems that impeded development of nontraditional electricity generating facilities: (1) reluctance of traditional electricity utilities to purchase power from, or sell power to, nontraditional electricity generating facilities; and (2) state utility regulations of alternative energy sources which impose financial burdens on nontraditional facilities and thus discourage their development. [SAC.P.7].

In accordance with its aforesaid regulatory authority, FERC has duly adopted federal regulations to implement PURPA mandates for protections for small power production facilities and nontraditional electricity generating facilities, including, *inter alia*, (a) mandatory requirements and standards therefor, (b) provision for certification of qualifying facilities as defined therein ["Qualifying Facility" or "QF"]

which are thereby rendered eligible for PURPA compliant tariffs and/or interconnection and payment for power production to be supplied to regulated utilities, and (c) enforcement obligations, powers and procedures. [SAC.P.9]. In so doing, FERC has issued interpretive rulings of PURPA provisions and its aforementioned regulations. [SAC.P.9].

PURPA is an amendment to FPA, and, by definition, a "Qualifying Facility" as referenced in PURPA and FERC implementing regulations mean one with a production capacity of less than 80 megawatts ["MW"]. Under FERC orders, "Qualifying Facilities" are divided into (a) those with a production capacity of 20MW or less, per FERC Order No. 2006 ["Standardization of Small Generator Interconnection Agreements and Procedures" ["Small Facilities"]; and (b) those with production capacity in excess of 20MW, but less than 80MW, per FERC Order No. 2003 ["Standardization of Generator Interconnection Agreements and Procedures"]. [SAC.P.10]. All of the Plaintiffs' facilities at issue in this case are under the 20MW threshold. [SAC.P.10].

PURPA is based in material part on the assumptions and/or findings that the utilities were reluctant to purchase power from Small Facilities; and that state regulatory authorities were reluctant to control the utilities' conduct in this regard, but rather imposed financial burdens that discouraged Small Facility development. [SAC.P.11]. As an integral part of the regulatory scheme of PURPA, the individual states and their respective energy regulatory agencies are required under Section 210 of PURPA, *see* 16 U.S.C. §824a-3, to enforce energy production and ratemaking standards promulgated by FERC; and the regulatory scheme presupposes the creation by the several states of respective state agencies to implement within their respective jurisdictions the statutory policies and mandates of PURPA and federal regulations adopted in connection therewith. [SAC.P.12]. These include *inter alia* requirements for respective utility's avoided cost pricing, calculated in connection with the

alternative options, under FERC regulations, for Small [SAC.P.12]. Facilities to be paid, at their choice, for "available capacity" or "energy" delivered. [SAC.P.12].

PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards. [SAC.P.13]. PURPA also expressly authorizes "any electric utility, qualifying cogenerator, or qualifying small power producer" to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so. [SAC.P.14].

PURPA and its FERC implementing regulations intend full compliance therewith by all utilities – nonregulated and regulated – with the federal pricing mandates, without distinction except that: (a) nonregulated utilities are subject directly to legal enforcement actions by FERC or private facilities, and (b) regulated facilities are subject indirectly to enforcement by the state regulating agency, which are then subject to legal enforcement actions by FERC or "any electric utility, qualifying cogenerator, or qualifying small power producer." [SAC.P.15]. Defendant CPUC is the California state agency which is empowered to provide the regulatory authority and responsibility contemplated by FPA and PURPA, and their FERC adopted implementing regulations, and hence is subject to their respective regulatory authority. [SAC.P.16].

CPUC has adopted regulations, orders and programs for ratemaking standards for FERC certified QFs who produce small quantities of power for wholesale sales to utilities ["QFs"]. [SAC.P.17]. However, in regards to pricing, and other mandated

tariff terms, these regulations, orders and programs for QFs do not comply with PURPA or its FERC implementing regulations for such facilities in connection with calculations of avoided cost and its subset of capacity costs. [SAC.P.17].

CPUC has purported to assess "avoided cost" for utilities in terms of "available capacity" with a formula denominated as "as available capacity" based on gas [fossil fuel] prices, which does not comply with PURPA / FERC mandates for avoided cost and/or alternative energy sources. [SAC.P.18]. CPUC improperly calculates avoided cost based on multiple sources of electricity, rather than calculating avoided cost for each type of power ("multi-tiered pricing"). [SAC.P.19]. *See CARE*, 922 F.3d at 936.

If a utility purchases energy from natural gas producers, coal producers, and solar producers, the utility would be required to calculate an avoided cost for natural gas, an avoided cost for coal, and an avoided cost for solar; rather than calculating a single avoided cost based on all the energy sources. [SAC.P.20]. *See CARE*, 922 F.3d at 936. Several CPUC programs impermissibly base avoided cost on the cost of a natural gas benchmark, rather than a renewables benchmark. [SAC.P.21]. CPUC contends that while FERC has said that multi-tiered pricing is permissible, it is not mandatory. [SAC.P.21]. *See CARE*, 922 F.3d at 937.

While PURPA does not require utilities to always use multi-tiered pricing, avoided cost must reflect prices available from *all sources* able to sell to utility whose avoided costs are being determined. [SAC.P.22]. *See CARE*, 922 F.3d at 936-37. An important qualification to this "all sources" requirement is that if a state required a utility to purchase 10% of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source "able to sell" to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs. [SAC.P.23]. *See CARE*, 922 F.3d at 936-38.

California has a California statutorily adopted Renewable Portfolio Standard ["RPS"], establishing standards for gradual ultimate adoption of 100% renewable

energy attributes, which necessarily changes the avoided cost calculation. [SAC.P.24]. See CARE, 922 F.3d at 937-38. Under the RPS, each utility is required to utilize renewable energy as defined by RPS as a specified percentage of their power generation, calculated on an annual basis with gradual increases toward the 100% goal. [SAC.P.24a].

When a state has a requirement that utilities source energy from a particular type of generator, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement. [SAC.P.25]. Thus, where a state has an RPS and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided costs based on energy sources that would not also meet the RPS. [SAC.P.25]. *See CARE*, 922 F.3d at 937-38.

If purchasing energy from a QF allowed a utility to forego energy purchases, then the cost of energy was to be included in the avoided cost; but "if a purchase from a qualifying facility permits the utility to avoid the addition of new capacity," then the avoided cost of the new capacity should be used. [SAC.P.26]. *See CARE*, 922 F.3d at 938-39. PURPA requires an examination of the costs that a utility is actually avoiding, which comports with PURPA's goal to put QFs on an equal footing with other energy providers. [SAC.P.27]. *See CARE*, 922 F.3d at 937-38.

Where a utility uses energy from a QF to meet the utility's RPS obligations, the relevant comparable energy sources are other renewable energy providers, not all energy sources that the utility might technically be capable of buying energy from. [SAC.P.28]. *See CARE*, 922 F.3d at 936-38. Where a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS. [SAC.P.29]. *See CARE*, 922 F.3d at 936-38.

If the CPUC chooses to calculate an avoided cost for each type of energy source, it may do so; but it may just as permissibly aggregate all sources that could satisfy its RPS obligations. [SAC.P.30]. *See CARE*, 922 F.3d at 936-38. If a QF is not

aiding a utility in meeting its RPS obligations, the avoided cost in that context need not be limited to RPS energy sources. [SAC.P.31]. *See CARE*, 922 F.3d at 937-38. When avoided cost is based on renewable energy where energy from QFs is being used to meet RPS obligations, CPUC must consider whether utilities are fulfilling any of their RPS obligations through its CPUC programs, and hence whether, in the first instance, CPUC's programs comply with this aspect of PURPA. [SAC.P.32]. *See CARE*, 922 F.3d at 936-38.

In connection with the CPUC's Re-MAT Programs and CHP Programs, they each and all have one thing in common, *i.e.* there is no component for actual avoided capacity costs. [SAC.P.33]. *See CARE*, 922 F.3d at 939-40. To the extent that either program bases capacity costs on a new natural gas or similarly sourced facility, rather than renewable energy facilities, its avoided cost and capacity cost determinations and definitions are likewise to be evaluated as if done in the context of an RPS. [SAC.P.34]. *See CARE*, 922 F.3d at 939-40.

Under the CPUC approved Net Energy Metering ["NEM"] Program, utilities are permitted to exclude avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.35]. *See CARE*, 922 F.3d at 939. Likewise, under the CPUC approved NEM Program, utilities are permitted to exclude renewable energy avoided capacity costs in payments to QF's for supplying surplus power when the QF is unable to offer renewable energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.36]. *See CARE*, 922 F.3d at 939.

Under NEM, utility customers are compensated for their power generation of net surplus energy – above their own usage – which is supplied through their utility supplied power connection, by FERC mandate. [SAC.P.36a]. Plaintiffs are utility

customers with power generators they constructed in order to supply their net surplus energy to the utility [Power Supply Facilities] [SAC.P.36b], and built so as to guarantee a net surplus energy supplied to the utility on both a monthly and annual basis.[SAC.P.36c]. Plaintiffs operate their Power Supply Facilities to provide net surplus energy to their respective utilities via a utility supplied meter [SAC.P.36d], and are compensated for supplying their net surplus energy under the PUC approved NEM Program [SAC.P.36e].

Pursuant to PUC mandate, a utility is permitted to include a customer's annual net surplus energy, generated by a renewable source, in their total calculated annual renewable energy generation to meet their annual state-mandated RPS standards [SAC.P.36f], and though the net renewable energy supplied by individual customers has been and is relatively small, the total sum deriving from all participating NEM compensated customers with reliably net energy supplies is substantial in enabling utilities to meet their annual state-mandated RPS standards [SAC.P.36g].

Plaintiffs' respective net surplus energy supplied under the PUC approved NEM Program has at relevant times been included by their respective utilities' total calculated annual renewable energy generation to meet their annual state-mandated RPS standard[SAC.PP.36h,36j], and Plaintiffs have met / meet RPS-eligibility requirements for QF's, established by the California Energy Commssion [CEC], the primary energy policy and planning agency in California, e.g. they have used RPS-eligible sources of generation [solar energy]; and they have used utility supplied meters that report generation with an accuracy rating of two percent or higher accuracy [one per cent][SAC.P.36k].

CPUC fails to compel the utilities to provide a program which includes in its pricing of avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.37].

CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – who have a demonstrated ability to offer energy of sufficient reliability and legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments. [SAC.P.38].

CPUC fails to compel the utilities to provide a program which includes in its pricing of renewable energy avoided capacity costs for small QF's – under 1 megawatt production capacity – whose renewable energy supplies are sufficiently reliable to enable the utility to include those supplies in their total calculated renewable energy generation to meet their annual state-mandated RPS standard; and which permits a purchasing electric utility to forgo capital investments. [SAC.P.38a].

By failing and refusing to set avoided costs rates for the regulated utilities in their respective regions of operation, in accordance with PURPA / FERC mandates, and/or mandating a tariff based thereon, QFs are forced into competitive market pricing with larger and/or fossil fuel facilities that is necessarily lower than what the legally mandated avoided cost would be. [SAC.P.39]. This market based pricing is expressly rejected and unlawful under PURPA / FERC, whether as approved by CPUC or utilized by the utilities. [SAC.P.39].

The Investor Owned Utility ["IOU"] in the region where CARE intended and sought to interconnect and supply energy, at rates and otherwise in accordance with the requirements and standards established by PURPA and FERC in its implementing regulations, Pacific Gas and Electric Company ["PG&E"], is not named in this action. [SAC.P.40]. PURPA also expressly authorizes FERC to enforce the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, by action in federal district court, which has exclusive jurisdiction over such enforcement actions; or, alternatively, to interpose its own judgment on ratemaking and interconnection standards. [SAC.P.41]. PURPA also expressly authorizes private utility companies and qualified facilities to enforce

the requirements of PURPA and related federal regulations against (a) any state regulatory agency, or (b) any nonregulated electric utility, also by action in federal district court, which has exclusive jurisdiction over such enforcement actions, provided only that said company first petitions FERC to seek the specified enforcement, and within the following sixty (60) days FERC fails or declines to do so. [SAC.P.42].

The utilities do not comply with pricing and tarriff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC. [SAC.P.42e]. The net effect is that there has not been – and are not – available PURPA compliant options within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing Power Supply Facilities to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations [SAC.P.42g].

In repeated communications and petitions to PG&E, FERC and CPUC, Plaintiffs have sought compensation for their energy supplies to Power Supply Facilities at an avoided cost that includes capital costs – e.g. construction and/or expansion of renewable [solar] energy facilities – for 100% of their energy production. Instead, they are offered by respective Power Supply Facilities PG&E, with CPUC approval, less than full avoided cost for only the "surplus" above their power production, and they get little or no compensation [SAC.P.42g]. If Plaintiffs prevail, it will mean that small power producing facilities are entitled to full avoided cost for 100% of their power production, not some lesser amount for only the

"surplus" power production, affording them a clear stake in the outcome of this action and the remedies sought herein. [SAC.P.42g].

CPUC Defendants have effectively surrendered its regulatory authority, if any, over IOU's by affording the IOU's undue influence and control over CPUC deliberations, decisions and actions [SAC.P.43], and by politically incestuous relationships between regulator [CPUC] and regulated IOU officials, which effectively preclude any independent judgment and exercise of discretion in the implementation and application of governing and controlling federal and state laws and regulations [SAC.P.43]. CPUC and the IOU's, and their respective members, managers and/or staff, routinely engage in joint and collaborative tasks, functions and decisonmaking, with mobility between respective staffs, that render them generally indistinguishable, and further render the actions of one the actions of the other. [SAC.P.44]. The IUO's routinely and by arrangement and/or implicit understanding files and pursues before various agencies, including CPUC and FERC, positions under implementations of PURPA and FERC regulations which clearly are at variance with both of them, but which are intended to enable CPUC to take actions and issue decisions which are also at variance with both of them while appearing to take compromise positions and appearing to reflect a false adversarial posture, and have the net effect of producing CPUC actions and decisions which fail in their duty to implement and enforce PURPA, and in fact violate PURPA. [SAC.P.45].

CPUC Defendants have at all relevant times herein acted by affirmative conduct as well as its omissions to act despite having a duty to do so; were each an agent of the other Defendant; conspired to do the acts and wrongs mentioned herein and an act in furtherance thereof has been committed; were acting in concert with each other and others not named as parties herein; authorized and/or ratified the acts, omissions, representations and agreements of the other Defendant; and all of the conduct mentioned herein was intentional and intended to accomplish each and all of the unlawful purposes described herein. [SAC.PP.46-51].

B. FACTS ALLEGED SPECIFIC TO CLAIM NO. 1: CLAIM FOR ENFORCEMENT OF PURPA [16 U.S.C. §824a-3]

Plaintiffs made repeated and long-standing efforts to obtain legally sufficient avoided cost payment for surplus energy from P.G. & E., respectively; and by participating in relevant CPUC proceedings, and filing complaints with PG&E, the CPUC and FERC, in accordance with PURPA and its FERC implementing regulations, and the economic restitution, capitalization and/or viability afforded thereby. [SAC.P.53]. Plaintiffs have been unable to obtain aforementioned payment because of refusal of the Power Supply Facilities to comply with PURPA and FERC its implementing regulations, and the refusal of CPUC to enforce PURPA and its FERC implementing regulations, despite repeated efforts by Plaintiffs to secure same[3]. [SAC.P.53].

Plaintiffs were offering guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, which would thereby entitle Plaintiffs to avoided renewable energy avoided capacity costs. [SAC.PP.54-55]. Power Supply Facilities do not pay – and have not paid Plaintiffs – avoided capacity costs or avoided renewable energy capacity costs despite the fact that Plaintiffs have supplied, and continue to supply, guaranteed energy supplies from renewable energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy. [SAC.P.56]. Plaintiffs get paid northing for their

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[3] The Court of Appeal ruled that Plaintiffs were herewith making an "as applied" PURPA challenge which requires therm to seek a state court remedy; but it did not hold that these allegations are irrelevant as evidence that in fact NEM suppliers can provide requisite guaranteed deliverability with a QF contract as that applies to the remaining equitable relief claims. *See CARE,* 922 F.3d at 939, n.4.

avoided capacity costs in connection with their guaranteed surplus energy production, in violation of PURPA and its FERC implementing regulations. [SAC.P.57].

On or about July 9, 2011, Plaintiffs petitioned FERC to enforce PURPA and its implementing regulations, and enforce compliance therewith, by CPUC and local power grid providers. [SAC.P.59]. On September 12, 2011, FERC declined to do so [136 FERC ¶ 61,170]. [SAC.P.59]. As a result of the failure and refusal of CPUC Defendants and other relevant local power grid providers to comply with and/or enforce compliance with PURPA and its implementing regulations, Plaintiffs have been prevented from obtaining a reasonable return on their excess energy avoided capacity costs. [SAC.P.60].

The Power Supply Facilities, in turn, do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC. [SAC.P.60d]. The net effect is that there has not been – and are not any available PURPA compliant options within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations. [SAC.P.60e].

CPUC Defendants have generally failed to perform regulatory functions as mandated by PURPA and its FERC adopted implementing regulations; to the contrary, CPUC Defendants have repeatedly approved tariffs, activities and proposals of the IOU's which do not comply nor conform with PURPA and its FERC adopted implementing regulations; [SAC.P.61]; failed to adopt or implement any regulations,

orders or programs which seek to or in fact enforce PURPA compliance by regulated utilities in respect to pricing and tariff terms as mandated by PURPA and its FERC implementing regulations [SAC.P.62]; failed to even determine avoided cost for any utility; and failed to implement any meaningful or effective utility avoided capacity and renewable energy avoided capacity cost rules for small power producers [SAC.P.62].

The IOU's, in turn, do not comply with pricing and tariff terms as mandated by PURPA and its FERC implementing regulations; and utilities seek to justify same on the basis that they are not obliged to comply with PURPA and its FERC implementing regulations (a) when CPUC, by its actions or inactions, authorizes noncompliance, and/or (b) unless and until compelled to do so by CPUC. [SAC.P.63]. The net effect is that there is no available PURPA compliant option within California for small power producing facilities, like Plaintiffs, who have supplied, and continue to supply, guaranteed energy supplies from renewable or other energy sources of sufficient reliability and with sufficient legally enforceable guarantees of deliverability to permit the purchasing electric utility to forgo capital investments specific to renewable energy, at avoided capacity or renewable energy avoided cost pricing, as mandated by PURPA and its FERC implementing regulations. [SAC.P.64].

Plaintiffs have repeatedly and concurrently complained informally and formally about the above-described unlawful acts and omissions of Defendants, and each of them, including without limitation the failure to properly and sufficiently regulate the field and the major utility / power grid owners, as required under PURPA and its FERC adopted implementing regulations, often with detailed cross-references to statutes, regulations and other actions; and in each case, Defendants failed and/or refused to take corrective action, sometimes simply failing to act at all after protracted delays. [SAC.P.65].

The actions of CPUC Defendants have harmed the public interest by undermining the public policy purposes of PURPA, including but not limited to

making available additional energy supplies, utilization of alternative and renewable energy sources, holding down energy costs by increased and broader market competition, and enabling with capacity costs small power production facilities and nontraditional electricity generating facilities. [SAC.P.66]. The people of the State of California and Plaintiffs are and have been materially harmed and damaged by the CPUC failure to enforce PURPA. [SAC.PP.67-68].

In enacting PURPA, Congress made express findings that the federal regulatory scheme was necessary to respond to the existing, persistent and widespread recalcitrance of state regulatory agencies and major utilities / power grid owners to permit small power production facilities and nontraditional electricity generating facilities; or worse, to affirmatively undermine the latter. [SAC.P.69]. The combined efforts of CPUC and other major utilities / power grid owners, as above described, have effectively perpetuated the very conduct of state regulatory agencies and major utilities / power grid owners which Congress found to exist and wished to remedy; and these entities have conspired and colluded to do so. [SAC.P.69].

C. FACTS ALLEGED SPECIFIC TO CLAIM NO. 2: EQUITABLE INJUNCTIVE AND DECLARATORY RELIEF

Under 16 U.S. Code § 824a–3, Plaintiffs are entitled to recover "injunctive or other relief as may be appropriate". [SAC.PP.70-71]. Plaintiffs are entitled to orders declaring the conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, are each and all unlawful; orders enjoining the unlawful conduct, whether by acts or omissions, of CPUC Defendants, its commissioners and agents, and each of them, to remedy each and all of the particulars described herein, and consequences thereof; and temporary, preliminary and injunctive relief. [SAC.PP.72-73]. Plaintiffs, and each of them, are being irreparably harmed by the unlawful conduct, whether by acts or omissions, of CPUC Defendants, and will continue to be so harmed unless and until the requested declaratory and injunctive relief is granted. [SAC.P.73].

At all times the Defendants CPUC intended to do the acts described herein, and/or to fail to do the acts required of them in respect to any omissions described herein; participated in and/or proximately caused the aforementioned unlawful conduct, and acted in concert with the other named Defendant and other persons whose identities and extent of involvement are not yet known. [SAC.PP.74-76].

IV.
LAW OF THE CASE IN LIGHT OF CHANGING LEGAL AND FACTUAL PREDICATES

First, to the extent that the doctrine of the "law of the case" governs on remand, it applies with equal force to both sides. Second, the impact of the doctrine varies if on remand there is new or different evidence. *See Stacy v. Colvin*, 825 F.3d 563, ___ (9th Cir. 2016); *Disimone v. Browner*, 121 F.3d 1262, 1266 (9th Cir. 1997).

V.
REMEDIES FOR PURPA CLAIMS: DECLARATORY AND INJUNCTIVE RELIEF

CPUC Defendants are not contending that a PURPA enforcement petition is barred by 11th Amendment sovereign immunity. Under the 11th Amendment, absent clear statutory restrictions not present in this case, Plaintiffs are entitled to sue individual CPUC commissioners in their official capacity for prospective relief – *i.e.* injunctive or declaratory relief. *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 645, 647-48 (2002). On defense motion, "a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Maryland, Inc.*, 535 U.S. at 645. The "inquiry . . . does not include an analysis of the merits of the claim [citation omitted]. ('An allegation of a ongoing violation of federal law . . . is ordinarily sufficient.)'" *Verizon Maryland, Inc.*, 535 U.S. at 646. Declaratory relief sought for both "*past*, as well as *future*" conduct satisfies the latter criterion. *See Verizon Maryland, Inc.*, 535 U.S. at 646 (emphasis in original). Clearly, Plaintiffs herein have made the requisite allegations.

> "[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. [Citations]. . . . . The defendant is free to return to his old ways. [There is] a public interest in having the legality of the practices settled, ..."

United States v. Grant Co, 345 U.S. 629, 632 (1953). *Accord, City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982). "The purpose of an injunction is to prevent future violations, [citation] . . . . The necessary determination is that there exists some cognizable danger of recurrent violation, something more than **the mere possibility which serves to keep the case alive**." *United States v. Grant Co*, 345 U.S. at 632 (emphasis added). *Accord, City of Mesquite*, 455 U.S. at 289 & n.10. Alternatively, "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974). Individual CPUC Defendants are sued solely in their official capacities, in connection with equitable relief. Any remedial order would necessarily be directed to them.

VI.
PLAINTIFF OBJECTS TO DEFENDANTS' REFERENCE TO ITS OWN VERSION OF THE FACTS

Plaintiffs object to Defendants' reliance on matters extraneous to the SAC to urge its contentions in the Motion to Dismiss, which should be disregarded.

VII.
PLAINTIFFS' AMENDED ALLEGATIONS IN SEVENTH AMENDED COMPLAINT SATISFY ARTICLE III JURISDICTIONAL STANDING

Plaintiffs have now further plead the remaining avoided cost claims to address the matters for which leave to amend was afforded by the District Court. In addition to elaborating on the RPS programs inter-action with avoided capacity cost calculations [SAC.PP.24,24a,42e-42f,60d-60e], they have now made allegations that Plaintiffs' energy resources were actually used to satisfy RPS obligations and that their resources participated in the RPS program, *i.e*. that Plaintiffs have been injured from an incorrect calculation of avoided costs by alleging that their utilities are

fulfilling some of RPS obligations through challenged CPUC programs with energy supplied by Plaintiffs [SAC,PP.36a-36k,38a,42g-42h]; and amplified allegations re guaranteed deliverability requirement [SAC.PP.33-36,36a-36k,37-38,38a, 39, 53-58].

In short, under the claims herein, if Plaintiffs prevail, it will mean that they – like all similar small QF's in the NEM Program providing surplus energy with guaranteed deliverability – are entitled to full avoided cost for 100% of their power production, calculated based on renewable energy capacity costs. So, clearly, they have a stake in the outcome of this action and the remedies sought herein. Since the only means available under PURPA to enforce compliance therewith by regulated utilities which cannot be sued, any such noncompliance is per se traceable to the regulating agency [CPUC], and the sole PURPA remedy is for equitable relief compelling CPUC to perform its required regulatory duty.

To the extent that this requires an evidentiary showing, beyond pleading allegations, Plaintiff provided this with accompanying Declaration of Michael Boyd.

CONCLUSION

The Motion to Dismiss should be denied. However, even if the allegations are in any way deficient, the entire action "should not be [dismissed] unless it is clear that the complaint could not be saved by any amendment," *Kelson,* 767 F.2d at 656, or amendment would be futile given conclusions reached with all facts presumed in favor of plaintiff, *see Las Vegas v. Clark County*,755 F.2d 697, 701 (9th Cir. 1985).

This is so even though Plaintiffs already filed an amended pleading. *See Rutman Wine Co.,* 829 F.2d at 732, 738 (third amendment denied after clear indication from court on pleading deficiencies)*; Vess,* 317 F.3d at 1107 (same); *Keniston,* 717 F.2d at 1300 (denial based on repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant). The issue is not the number of amended complaints, but the number of times Plaintiffs have had to amend as to the matters at issue in this motion.

Defendants have noted that in the Seventh Amended Complaint, at SAC.P.36k, Plaintiffs inartfully plead a supporting fact for the allegations that their surplus energy is in fact being couned toward their utility's RPS obligations, as argued by Defendants in their Memorandum, pp.18-19. Plaintiff Boyd explains this in his accompanying Declaration, pp.2-3, at PP.7-13. If need be, leave to amend same should be afforded as this would be a new issue.

Dated: August 26, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **PLAINTIFFS' RESUBMITTED NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE [PROPOSED] EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [FED.R.CIV.P. 60(b)]; SUPPORTING DECLARATIONS OF MEIR J. WESTREICH AND MICHAEL BOYD** Hearing: October 21, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501 Courtroom 2

Notice is hereby given that on October 21, 2022 at 9:00 a.m. in the above-referenced Courtroom No. 2, all Plaintiffs will and do hereby resubmit its motion for an order authorizing the filing of the [Proposed] Eighth Amended and Third Supplemental Complaint, lodged herewith, by which Plaintiffs seek to supplement the operative complaint herein in accordance with the Order of March 9, 2022, as regards Plaintiff CARE, and on behalf of all Plaintiffs, as regards other late occurring events.

The resubmitted motion is made under Fed.R.Civ.P. 15(a) & (d), on the

grounds that [*see also* below re Fed.R.Civ.P. 60(b)(1) for additional grounds]:

(a) This matter is currently on remand from the Ninth Circuit Order reinstating specified claims and issues from the Fifth Amended and First Supplemental Complaint, under the Public Utility Regulatory Polices Act ["PURPA"] and seeking all forms of equitable relief, by Plaintiffs CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"], Michael E. Boyd and Robert Sarvey ["CARE Plaintiffs" or ""Plaintiff CARE"], against Defendants (a) Public Utilities Commission of California ["CPUC"], a California state agency; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]:Alice Busching Reynolds: December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; Genevieve Shiroma [January 22, 2019 - present]; Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. ["CPUC Defendants" or "Defendant CPUC"].

(b) The Ninth Circuit reversed in part the judgment against the CARE Plaintiffs' PURPA Claims, remanding specified claims and issues, and affirming dismissal of all other claims by CARE Plaintiffs.

(c) The membership ["commissioners"] of Defendant CPUC has [have] changed in the intervening time, and the CARE Plaintiffs' reinstated PURPA Claims for which equitable [*e.g.* injunctive and/or declaratory] relief can only be currently adjudicated against current members [commissioners] of Defendant CPUC.

(d) By stipulation of the parties, CARE Plaintiffs filed a Sixth Amended and Second Supplemental Complaint, without prejudice to any objections of CPUC Defendants to the contents thereof.

(e) Following CPUC Defendants Motions to Dismiss and Strike re Plaintiffs' Sixth Amended and Second Supplemental Complaint, the Court issued an Order on March 9, 2022 granting it in part as to some claims of Plaintiffs Boyd-Sarvey with

leave to amend within a specified time; granting it in part as to some claims of all Plaintiffs without leave to amend; granting it in part as to Plaintiff CARE on jurisdictional grounds with leave to file a Motion to Supplement the complaint within a specified time; and denying as moot the Motion to Strike.

(f) Following an order extending the time to file the Boyd-Sarvey amended pleading, it was timely filed on April 5, 2022, denominated as the Seventh Amended Complaint.

(g) By this Motion to Supplement, Plaintiff CARE seeks to supplement the Seventh Amended Complaint to make requisite supplemental allegations to cure the jurisdictional defects in the Sixth Amended and Supplemental Complaint, cited in the Court's Order of March 9, 2022.

(h) By this Motion to Supplement, all CARE Plaintiffs seek to supplement the Seventh Amended Complaint to make allegations re matters occurring since the Fifth Amended and First Supplemental Complaint, the operative pleading in the prior summary judgment and the Ninth Circuit's Opinion reversing in part and remanding specified claims and issues for determination in this Court, to:

(1) Plead updated relevant events; and

(2) Plead newly occurring events in light of CPUC Defendants changing of the CPUC Programs and related implementing regulations, including in particular the rules for defining and calculating avoid costs, which were the subject of the Ninth Circuit's Opinion.

(i) By making the aforementioned changes, CPUC not only altered the very framework of the matters to be considered on remand, but are acting in open and flagrant defiance of the rulings and orders of the Ninth Circuit in this case, in large part simply ignoring them.

(j) This [Proposed] Eighth Amended and Third Supplemental Complaint deletes former members [commissioners] of Defendant CPUC and adds current members [commissioners] of Defendant CPUC.

The resubmitted motion is also made under Fed.R.Civ.P. 60(b), on the grounds that:

(k) This resubmitted motion differs from its previous submission by the assertion of mistakes made therein by Plaintiffs' counsel by virtue of excusable neglect under Fed.R.Civ.P. 60(b)(1), as delineated in the concurrently filed Supplemental Declaration of Meir J. Westreich and Exhibit 50, and Evidence Summary Chart [Fed.R.Evid. 1006] whose admissibility is stipulated in lieu of submission of the underlying correspondence.

MEET AND CONFER COMPLIANCE

This motion is made following multiple meet and confer conferences of counsel pursuant to L.R. 7-3, with which counsel complied therewith.

This motion is based on the following declaration of Meir J. Westreich; Declaration of Michael Boyd; a concurrently filed Memorandum of Points and Authorities; the lodged [Proposed] Eighth Amended and Third Supplemental Complaint; a concurrently filed Supplemental Declaration of Meir J. Westreich re Fed.R.Civ.P. 60(b) [Excusable Neglect]; and the concurrently filed Exhibit 50, an Evidence Summary Chart [Fed.R.Evid. 1006].

Dated: September 16, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

GROUNDS FOR MOTION

2. This matter is currently on remand from the Ninth Circuit Order reinstating specified claims and issues from the Fifth Amended and First Supplemental Complaint, under the Public Utility Regulatory Polices Act ["PURPA"] and seeking

all forms of equitable relief, by Plaintiffs CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation [“CARE”], Michael E. Boyd and Robert Sarvey [“CARE Plaintiffs” or “”Plaintiff CARE”], against Defendants (a) Public Utilities Commission of California [“CPUC”], a California state agency; (b) current CPUC Commissioner and President in her official capacity [dates of appointment in parenthetical]:Alice Busching Reynolds: December 31, 2021 (President) - present]; and (c) current CPUC Commissioners in their official capacities [dates of appointment in parentheticals]; Clifford Rechtschaffen [January __ 2017 - present]; Genevieve Shiroma [January 22, 2019 - present]; Genevieve Shiroma [January 22, 2019 - present]; Darcie L. Houck [February 9, 2021 - present]; and John Reynolds [December 23, 2021 - present]. [“CPUC Defendants” or “Defendant CPUC”].

3. The Ninth Circuit reversed in part the judgment against the CARE Plaintiffs’ PURPA Claims, remanding specified claims and issues, and affirming dismissal of all other claims by CARE Plaintiffs.

4. The membership [“commissioners”] of Defendant CPUC has [have] changed in the intervening time, and the CARE Plaintiffs’ reinstated PURPA Claims for which equitable [*e.g.* injunctive and/or declaratory] relief can only be currently adjudicated against current members [commissioners] of Defendant CPUC.

5. By stipulation of the parties, CARE Plaintiffs filed a Sixth Amended and Second Supplemental Complaint, without prejudice to any objections of CPUC Defendants to the contents thereof.

6. Following CPUC Defendants Motions to Dismiss and Strike re Plaintiffs’ Sixth Amended and Second Supplemental Complaint, the Court issued an Order or March 29, 2022 granting it in part as to Plaintiffs Boyd-Sarvey with leave to amend within specified time; granting it in part as to some claims of all Plaintiffs without leave to amend; granting in part as to Plaintiff CARE on jurisdictional grounds with leave to file a Motion to Supplement the complaint within a specified time; and denying as moot the Motion to Strike.

7. Following an order extending the time to file the Boyd-Sarvey amended pleading, it was timely filed on April 5, 2022, denominated as the Seventh Amended Complaint.

8. By this Motion to Supplement, Plaintiff CARE seeks to supplement the Seventh Amended Complaint to make requisite supplemental allegations to cure the jurisdictional defects in the Sixth Amended and Supplemental Complaint, cited in the Court's Order of March 9, 2022.

9. By this Motion to Supplement, all CARE Plaintiffs seek to supplement the Seventh Amended Complaint to make allegations re matters occurring since the Fifth Amended and First Supplemental Complaint, the operative pleading in the prior summary judgment and the Ninth Circuit's Opinion reversing in part and remanding specified claims and issues for determination in this Court, to:

a. Plead updated relevant events; and

b. Plead newly occurring events in light of CPUC Defendants changing of the CPUC Programs and related implementing regulations, including in particular the rules for defining and calculating avoid costs, which were the subject of the Ninth Circuit's Opinion.

10. By making the aforementioned changes, CPUC not only altered the very framework of the matters to be considered on remand, but are acting in open and flagrant defiance of the rulings and orders of the Ninth Circuit in this case, in large part simply ignoring them.

11. This [Proposed] Eighth Amended and Third Supplemental Complaint deletes former members [commissioners] of Defendant CPUC and adds current members [commissioners] of Defendant CPUC.

PLEADING HISTORY

12. A Complaint [Dkt 1] was filed on June 10, 2011; a First Amended Complaint [Dkt 20] having been filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re

CAlifornians for Renewable Energy, Inc. ["CARE"] Plaintiffs' [CARE-Boyd-Sarvey] Public Utility Regulatory Policies Act ["PURPA"] Exhaustion of Remedies.

13. The Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, were ordered voluntarily dismissed [Dkt 35] on September 9, 2011.

14. The First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61].

15. A Second Amended Complaint [Dkt 64 & 64-1] was filed pursuant to said leave to amend.

16. Remaining CARE Plaintiffs' claims were dismissed without leave to amend [Dkt 82] from said Second Amended Complaint.

17. The Ninth Circuit reversed the order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61].

18. This Court denied leave to file a proposed Fourth Amended Complaint, without prejudice, but afforded leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184].

19. CARE Plaintiffs filed said revised Fourth Amended Complaint, re-branded as the Fifth Amended and First Supplemental Complaint [Dkt 185] – to avoid having different pleadings with the same name – which remained, without further pleading practice, the operative pleading through judgment in favor of CPUC Defendants.

20. In a second appeal, the Ninth Circuit reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended and First Supplemental Complaint.

21. CPUC Defendants stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended and Second Supplemental Complaint [Dkt 253] – and

the Court ordered leave to file the Sixth Amended and Supplemental Complaint [Dkt 269] which was concurrently filed [Dkt 267].

22. The Court dismissed the Sixth Amended and Second Supplemental Complaint, parts without leave to amend, parts with leave for Plaintiffs Boyd-Sarvey to amend, and parts with leave for Plaintiff CARE to file a motion to supplement [Dkt 287].

23. The filing of each of the aforementioned amended pleadings superseded the previously filed pleading, which then became a nullity [*Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)], thereby leaving the Sixth Amended and Supplemental Pleading as the operative pleading to which the March 9, 2022 Order applied – both explicitly and implicitly, and from which the Seventh Amended Complaint derived with leave of court [Dkt 298].

24. This now [Proposed] Eighth Amended and Third Supplemental Complaint amends and supplements the Seventh Amended Complaint [Dkt 298], to be filed with leave of court following noticed hearing.

25. The factual matters averred in the concurrently filed Memorandum of Points and Authorities are incorporated herein by this reference.

MEET AND CONFER COMPLIANCE

26. This motion is made following multiple meet and confer conferences of counsel pursuant to L.R. 7-3, with which counsel complied therewith.

I declare under penalty of perjury that the above is true and correct. Executed on September 16, 2022 at Los Angeles, California.

S/ Meir J. Westreich

Meir J. Westreich

DECLARATION OF MICHAEL BOYD

1. I, Michael, Boyd, am a Plaintiff herein, and can testify to the following matters of my own personal knowledge.

2. I am a member and President of CAlifornians for Renewable Energy, Inc., a California Non-Profit Corporation ["CARE"], which consists of 358 members throughout California, including two other nonprofit entities.

4. CARE is certified by the Internal Revenue Service as a tax exempt non-profit entity, meeting the legal requirements therefor. References herein to CARE Plaintiffs include Plaintiffs Boyd [myself] and Sarvey, officers of CARE.

5. The public policies pursued by CARE since before the filing of the Complaint herein [Dkt 1] include, as its name signifies, promotion of renewable energy and its sources, but also assisting by collective and corporate efforts the many small – less than one megawatt – QF renewable energy facilities, like Sarvey and myself, who standing alone lack individual resources to meaningfully participate in and advance litigation, rulemaking and litigation related public policies, as well as efforts behalf of their own particular interests.

6. Plaintiff CARE has appeared throughout this litigation commencing with the Complaint [Dkt 1] in its representative capacity for and on behalf of its multiple member small – less than one megawatt – QF and QF-qualified renewable energy member facilities

7. I have been a Qualified Facility under PURPA and related FERC regulations since March 17, 2003. CARE has eight QF members, including myself and co-plaintiff Sarvey.

8. I operate solar panels which generate energy / power and I am connected to the PG&E grid by which I supply all of my generated power to PG&E, which also is available thereby to supply me with power should I require it.

9. I started with renewable energy production in my home when I first started a process in 2000.

10. Commencing in 2003 and since then, I sought to be compensated by PG&E under the PURPA and its investor owned utility avoided cost formula, and through efforts by CARE have unsuccessfully sought a power purchase tariff under which:

(a) I would be compensated for the power I supply by payment of PG&E's "avoided cost" – *i.e.* what it would cost PG&E, including *inter alia* capital costs in connection therewith, to create and operate solar power facilities and then generate power therefrom ["full avoided cost"]; and (b) I would pay PG&E's then prevailing market retail rate for customers in my area for any power I receive from PG&E.

11. Instead, I was involuntarily inserted, by PG&E, into their CPUC approved Net Energy Metering ["NEM"] Program whereby over a 12 month period PG&E "nets" the power I supply and receive – i.e. they pay me in energy units from cheaper, inter alia fossil fuel sources; and then either pays or charges me for the net surplus or deficit, respectively, at PG&E's then prevailing market retail rate for customers in my area who purchase power from PG&E.

12. On August 16, 2021, I amended my QF certification to include CARE, which is located at the same address as myself. [FERC Accession No. 20210816-5028 [08.16.21].

13. CARE has partially paid for the QF facilities, commencing in or about September 2020 and since then.

14. CARE, with its office located at my address, has utilized since before my QF certification in 2003 – and at all times since then – the same QF facilities which inter-connect with the utility.

15. Plaintiff CARE is thus also appearing under the "Boyd QF certificate" to which it has now been appended and merged, with our FERC record.

16. Commencing with the Complaint herein, and throughout this litigation, Plaintiff CARE has also acted in the capacity of a representative entity acting on behalf of its QF and QF-qualified members.

17. In the initial Complaint [Dkt 1], CARE had previously submitted to FERC a Petition for Enforcement ["FERC Petition"] and the 60-day period for response had lapsed, entitling CARE to file this action.

18. When CARE's standing and the procedural validity of its FERC Petition

were challenged, Plaintiffs filed the First Amended Complaint [Dkt 20], alleging that CARE and two of its QF members – Plaintiffs Boyd and Sarvey – had jointly submitted a new FERC a Petition for Enforcement ["Joint FERC Petition"] and the 60-day period for response had not yet lapsed, technically not yet completing the required exhaustion of administrative remedies.

19. By the time that the subsequent motion to dismiss was pending, the latter 60–day period had finally lapsed, but leave to amend to add the latter allegation was denied, on grounds that completed exhaustion of administrative remedies was required as of the date of filing the initial complaint, resulting in dismissal for lack of jurisdiction without leave to amend.

20. On appeal, in *Solutions for Utilities, Inc. v. CPUC*, Case No. 13-55206 (March 6, 2015), the Ninth Circuit addressed this issue as if there was the one Joint FERC Petition whose 60-day period for response had lapsed, *i.e.* "CARE fulfilled the requirement to exhaust administrative remedies," and reversed and remanded on grounds that leave to amend should have been afforded to permit completed compliance with administrative exhaustion requirements while the action was already pending.

21. Plaintiff CARE now includes a total of eight QF members, including Plaintiffs Boyd and Sarvey.

22. On the subsequent remand and second appeal, CARE continued to appear in this action in its representative capacity for its QF members, including but not limited to Plaintiffs Boyd and Sarvey.

23. When CPUC decided in the second remand to challenge standing of CARE, I did and completed what I at all earlier times could have done had it been raised earlier: I amended my QF certification with FERC to include CARE, which at all times has been operating at the same location, participating and exporting with the same power generating facilities that are interconnected with the same utility, to the same effect and with the same interests therein.

24. CARE is entitled and has standing to participate in this action both as a co-equal part of a QF certification, now approved by FERC, and as representative of other QF members.

I declare under penalty of perjury that the above is true and correct. Executed on April 8, 2022 at Soquel, California.

/s/ Michael Boyd

Michael Boyd

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Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **SUPPLEMENTAL DECLARATION OF MEIR J. WESTREICH RE FED.R.CIV.P. 60(b)(1) [EXCUSABLE NEGLECT] IN SUPPORT OF RESUBMITTED MOTION FOR LEAVE TO FILE EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT; EXHIBIT 50 [EVIDENCE SUMMARY CHART]** Hearing: October 21, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501 Courtroom 2

SUPPLEMENTAL DECLARATION OF MEIR J. WESTREICH RE RESUBMITTED MOTION PER FED.R.CIV.P. 60(b)(1)

1. I am attorney of record for Plaintiffs herein.

2. This Supplemental Declaration addresses the additional matters submitted under the Plaintiffs' contention that the denial of the Motion for Leave to file the Eighth Amended and Third Supplemental Complaint was due to failings by Plaintiffs' counsel which constitute excusable neglect under *Fed.R.Civ.P.* 60(b)(1), and not any

actual factual inadequacy given the true course of events between counsel that lead to the recent spate of pleadings and pleading motions, and hence – with this corrected showing [“Rule 60(b)(1) Showing”] – the motion should be granted, or at least not decided based on those ostensible failing of Plaintiffs’ counsel or the erroneous recitation of the events between counsel. *See also* the original Declaration of Meir J. Westreich appended to the separately filed resubmitted motion. This Supplemental Declaration supplements and follows the original declaration.

3. The gravamen of the Court’s order denying the motion was the asserted failure of Plaintiffs’ counsel to adequately address the four *Fohman* factors, followed by the Court’s conclusions that each of the factors – based on the record before the Court, including submissions from Defendants, *sua sponte* assertions of the Court, and again the failures of Plaintiffs’ counsel to adequately refute either of them with a record that was available to do so – dictated denial of the motion.

4. The gravamen of this resubmitted motion and its Rule 60(b)(1) Showing is that I mistakenly assumed that the content of the filings by which the 2020 Scheduling Order was vacated:

a. Had made sufficiently clear that the factors specified in *Fohman*, and in the Ninth Circuit cases applying it, had little or no application because – contrary to the normal circumstances implicit therein – the genesis of the new pleading and case management delay was from Defendants, not Plaintiffs who had abandoned any further notion of filing any pleading motion in order to move the case along; and

b. Had obviated any need to make the following showing, even as both court and Defendants’ counsel were incorrectly citing the latter to blame me – and by extension Plaintiffs – for unwarranted burdening and prejudice to Defendants and the administration of justice.

5. Because of that mistaken assumption, and my resulting failure to counter the erroneous consequences:

a. The Court incorrectly concluded that the origins and causes of the

recent spate of pleadings and pleading motions, and attendant delay in these remand proceedings, derived from the conduct of Plaintiffs' counsel, when in fact it derived from the conduct of Defendants' counsel; and

b. I failed to perceive the impending danger of the latter and, wishing to maintain the professional cordiality the Court expects of counsel, I failed to adequately respond to and defend against it with a demonstrable record that could have foreclosed the erroneous conclusions.

6. Plaintiffs have been unfairly prejudiced thereby, which prejudice can be obviated by this Rule 60(b)(1) Showing.

7. The core evidence for the Rule 60(b)(1) Showing is this Supplemental Declaration and referenced items in the Court record, and attached Exhibit 50 – "Evidence Summary Chart [*Fed.R.Evid.* 1006]" – which is an evidence summary of e-mail communications between counsel herein.

8. In a meet and confer process for this motion, Counsel have agreed to the submission of this evidence summary [Exhibit 50] in lieu of the submission of any or all of the therein referenced e-mails; and contains quoted excerpts therefrom, the whose accuracy and completeness have been confirmed by counsel.

PLEADINGS AND PLEADING MOTIONS IN LIGHT OF STIPULATION TO VACATE RECENT SCHEDULING ORDER

9. In the first remand, the CARE Plaintiffs were the remaining Plaintiffs, having previously been dismissed on Fed.R.Civ.P. 12(b)(6) motions from the Second Amended Complaint; the SFUI Plaintiffs had not appealed the summary judgment against them, under the Second Amended Complaint.

10. In a Joint Scheduling Report, CARE Plaintiffs sought leave to file a Fourth Amended and First Supplemental Complaint, lodging a copy with the Court, and Defendants objected therein. The Court denied leave as to that pleading, but granted leave to file a modified version, which Plaintiff filed in accordance therewith, but

with the title "Fifth" Amended and First Supplemental Complaint [to avoid confusion of having the same name for different versions], deleting SFUI claims, and updating the CARE claims. Defendants answered, without any pleading motions or objections, and this was the operative complaint when summary judgment was granted against CARE Plaintiffs and in the appellate proceedings.

11. In the second remand, in a Joint Scheduling Report, CARE Plaintiffs sought leave to file a Sixth Amended and Second Supplemental Complaint to tailor the pleading to the Ninth Circuit Opinion and reflect events subsequent to the Fifth Amended and First Supplemental Complaint, but without lodging a copy with the Court, and Defendants objected therein. The Court made no reference to the issue, and issued a Scheduling Order [Dkt 247] [July 31, 2020].

12. Although I believed an amended and supplemental pleading would be beneficial, I decided not to pursue by motion the amended or supplemental pleading issue. I elected to rely on discovery, motion practice and the Fed.R.Civ.P. 16 / Local Rule 16 pretrial process ["Rule 16 Pretrial Process"].

13. In late November 2020, after a change in judge and when counsel were discussing whether there would be any expert designations [we ultimately elected not to do so], Defendants' counsel – Christine Hammond [and always accompanied by other counsel] – suggested that they had changed their minds and had come to believe that amendment of the Fifth Amended and First Supplemental Complaint would be beneficial afterall, affording clarity as to Plaintiffs' current positions.

14. Defendants' counsel suggested that we submit a stipulation to: (a) vacate the current scheduling order; and (b) set a status conference at which we would discuss with the Court a possible amended pleading and other steps to promptly address any and all remaining claims, defenses and issues on remand.

15. Defendants' counsel suggested that we submit a stipulation to: (a) vacate the current scheduling order; and (b) set a status conference at which we would discuss with the Court a possible amended pleading and other steps to promptly

address any and all remaining claims, defenses and issues on remand.

16. Although I believed an amended and supplemental pleading would be beneficial, and was amenable to a brief extension of case scheduling dates [to address a new pleading and because I had contracted a staph infection in November 2020, which was particularly problematical in light of pandemic conditions], I was adamantly opposed to vacating the current scheduling order.

17. I specifically and repeatedly stated that I did not want to have the case "go back to square one" which I feared would occur under the plan posed by Defendants' counsel.

18. In series of telephone conferences, some but not all memorialized by e-mail [Exhibit 50], l suggested that the clarifications sought by Defendants' counsel could be obtained by one or more of the following:

a. Contention interrogatories;

b. Motion for Judgment on the Pleadings;

c. Motion for Summary Judgment;

d. Rule 16 Pretrial Process.

19. I even offered to an early conduct of the initial "40-day" pretrial conference of counsel, wherein counsel are required to discuss their respective contentions of fact and law, and to seek to identify areas of agreement and disagreement, with formulations of each of them.

20. Each of my suggestions were rejected as inadequate.

21. I asked for assurances that their program would not result in the case going back to square one. None were then afforded.

22. No agreement was reached.

23. Defendants' counsel then advise me that they intended to file an *ex parte* application seeking an order to: (a) vacate the current scheduling order; and (b) set a status conference at which we would discuss with the Court a possible amended

pleading and other steps to promptly address any and all remaining claims, defenses and issues on remand. [Exhibit 50.1].

24. I was asked to provide my position on the intended application, and whether I would file opposition. [Exhibit 50.1].

25. I asked Defendants' counsel to provide me with a full written statement of what would be their intended relief and grounds, which they then provided by e-mail. [Exhibit 50.2-3].

26. Defendants' counsel provided the full written statement of what would be their intended relief and grounds. [Exhibit 50.2-3].

27. The statement was entirely focused on addressing the substantive scope of the issues on remand, *i.e.*: the contention of Defendants' counsel that only a single issue remained on remand. [Exhibit 50.2-3].

28. Conversely, I contended that the so-called single issue as presented by the Ninth Circuit was framed therein as an issue that needed to be addressed "in the first instance" ["First Instance Issue"] which obviously implicated that:

a. If the First Instance Issue were decided in favor of Defendants, the case would be over, *i.e.* it would in fact be a single issue on remand; and

b. However, if First Instance Issue is decided in favor of Plaintiffs, then the avoided cost claims would be alive for subsequent adjudication on the merits, along with all attendant claims and contentions for relief, including as necessary any claims, defenses or issues which either Defendants were adding to the adjudication, and/or any claims or relief.

29. I also contended that the single First Instance Issue could be addressed in context of up to three different CPUC programs [NEM, RE-MAT, CHP], which the Ninth Circuit left as possibly ripe for decision. *See CARE v. CPUC*, 922 F.3d 929, 939-40 (9^{th} Cir. 2019).

30. Because of the potential that Plaintiffs could prevail in the first instance on the First Instance Issue, any new pleading would have to provisionally articulate

all of Plaintiffs' claims and contentions that would then remain or become in issue if in fact they do prevail; and doing so does not exceed the bounds of the Ninth Circuit decision, it merely and necessarily preserves and defines the conditionally applicable claims and contentions.

31. I also contended that it would probably require, at minimum, a renewed summary judgment motion for the First Instance Issue to be finally adjudicated, if not an actual trial thereon, which again meant that any new pleading would have to provisionally articulate the claims and contentions which come into play if the pleading suffices, and summary judgment is denied, for the First Instance Issue.

32. I informed Defendants' counsel that if the proposed program would be focused on these substantive issues, *i.e.* we are not simply going back to square one, I would be amenable to stipulating to their program. [Exhibit 50.3, 50.9].

33. This concept was no different than what transpired earlier in the case, when no pleading motion was filed at all in response to the Fifth Amended and First Supplemental Complaint on the first remand, when Defendants instead pursued summary judgment proceedings. And they did not require a new pleading or the vacating of the Scheduling Order to file a Motion for Judgment on the Pleadings if they wanted to address other issues.

34. Defendants' counsel then suggested that as part of the joint report that was contemplated, that I provide the draft of the contemplated pleading. [Exhibit 50.4-8].

35. I informed Defendants' counsel that if we are agreeing that the proposed new pleading would actually be filed by this stipulation, I would be amenable to stipulating to their program, including providing the draft pleading. [Exhibit 50.5, 50.9].

36. We then agreed to stipulate to Defendants' counsel's proposed program with the requested assurances and pleading filing proviso [Exhibit 50.4-9], and in fact the Scheduling Order was vacated and the Sixth Amended and Second Supplemental Complaint was filed, both by stipulation and order based thereon.

37. I then expected that Defendants would put into issue the core substantive issues as defined above in Paragraphs 25-31, perhaps by pleading motion only if there were an issue as to the adequacy of pleading the First Instance Issue.

38. Nor did I expect Defendants to repudiate their prior positions on the filing of prior supplemental complaints.

39. Hence, while it is true that Fed.R.Civ.P. 15(d) re supplemental pleadings refers back to the original complaint, I had expected by virtue of agreements of counsel that once a first supplemental complaint is filed with leave of court and without objection [the Fifth Amended and First Supplemental Complaint], and thereafter expressly treated in trial and appellate proceedings as the "operative complaint," then a subsequent further supplemental complaint would relate back to that first supplemental complaint; and that once a second supplemental complaint is filed by stipulation and order [the Sixth Amended and Second Supplemental Complaint], then any subsequent further supplemental complaint would relate back to that second supplemental complaint.

40. Furthermore, when conducting Local Rule 7-3 motion meet and confer efforts, in the belief that the motions would address the substantive First Instance Issues, we agreed that we have exhausted our efforts in our prior joint filings.

41. The dismissal motions though include vehicles for personal attack on me which, if raised in meet and confer could easily be resolved by stipulation, such as the whole first section of the memorandum in support of the Motion to Dismiss Seventh Amended Complaint, *e.g.* a stray mistaken reference to "supplemental" complaint in the redline version alone; and allegations of injury to satisfy Article III standing, not an attempt to allege damages claims.

42. In any event, these allegations are clearly not the substantive First Instance Issue as was sold to me to obtain my concurrence with the CPUC Program and its provision for vacating the Scheduling Order.

43. These Plaintiffs and myself are so thoroughly outstripped in assets and means, it is a mockery of reality to suggest that this state agency is the victim of the prolonged, endless stream of motion and pleading practice, all the while avoiding the trial date which they assiduously insist they should never have to meet.

PURPA AND ARTICLE III STANDING ISSUES

44. In the first CPUC Motion to Dismiss CARE Plaintiffs' claim, Defendants raised two issues: (a) incomplete FERC administrative exhaustion as to all CARE Plaintiffs ["FERC Administrative Exhaustion Issue"]; and (b) lack of PURPA standing of CARE because it was not a QF ["PURPA QF Standing Issue"].

45. In opposition, Plaintiffs contended that: (a) there was no legal bar to allowing the already imminent completion of FERC administrative exhaustion during the action; and (b) by express allegation in the complaint, CARE was pursuing equitable relief claims – renewable energy public policy objectives, true to its name and purposes as a charitable, non-profit entity and long predating these proceedings – on behalf of its numerous QF members, instead of naming all of them as party Plaintiffs, though naming two of them as a hedge in the event that rationale was rejected.

46. The Court then dismissed the CARE Plaintiffs' PURPA claims based on the FERC Administrative Exhaustion Issue, and never reached the PURPA QF Standing Issue. CARE Plaintiffs other claims were also dismissed, and the SFUI claims were litigated alone, until summary judgment.

47. On appeal, the Ninth Circuit reversed on the FERC Administrative Exhaustion Issue, and remanded for further PURPA compliance proceedings.

48. Because Defendants did not raise in the appeal the PURPA QF Standing Issue, it was not addressed in the appellate decision, even though had they done so successfully, the dismissal would instead have then been affirmed on that jurisdictional ground.

49. On the first remand, Defendants again did not raise the PURPA QF

Standing Issue, in any format or at any opportunity, even though had they done so successfully, the dismissal of CARE would have occurred before or with the summary adjudication.

50. Nor did Defendants raise in the second appeal the PURPA QF Standing Issue, and again it was not addressed in the appellate decision, even though had they done so successfully, the judgment against CARE would have then been affirmed on that jurisdictional ground.

51. Nor did Defendants initially raise in the second remand the PURPA QF Standing Issue, even though they could have done so by a variety of means, without need of the new pleadings or vacating the Scheduling Order.

52. Hence, until the current pleading motions, the issue of whether CARE had PURPA standing as a representative of its QF members – and therefore not requiring naming of numerous CARE QF members as party plaintiffs – was never decided. Indeed, even now that issue has not been decided though CARE has been dismissed.

53. Because of the dismissal of all forms of damages claims, leaving only prospective equitable relief, Article III standing has now come into play, by Defendants' invocation thereof. Hence, Plaintiffs continue to allege that they are damaged by CPUC Defendants' failure to enforce PURPA / FERC avoided cost mandates, against regulated utilities which cannot be sued under PURPA when they violate PURPA / FERC avoided cost mandates, *i.e.* not to seek recovery of damages, just to satisfy Article III standing.

54. CARE Plaintiff sought on this occasion to also seek to obtain its own QF approval under the umbrella of the QF status of Plaintiff Michael Boyd, rather than to continue to rely solely on its QF member representative status, because of the concomitant need to satisfy Article III standing; CARE did not waive its contention that at least for PURPA standing, that it complies with its representative capacity.

55. Clearly, this issue has no bearing on adjudicating the First Instance Issue which was supposedly the agreed basis for the CPUC Program that I accepted.

56. Indeed, given that only prospective equitable relief remains, and the presence of two other QF Plaintiffs, dismissal of CARE does not in any way alter the substantive merits of anything; it merely bounces the entity from the case after thousands of dollars and hundreds of hours expended in its behalf; and perhaps opens the door for more of its QF members to seek to be added as party plaintiffs, again taking this case back to square one.

DISCOVERY STIPULATIONS

57. On advent of the first remand, CARE Plaintiffs had not conducted any discovery whatsoever, having been dismissed prior to commencement of discovery.

58. The SFUI Plaintiffs had conducted substantial discovery prior to summary judgment, mostly demands for production and a series of Fed.R.Civ.P. 30(b)(6) [entity / CPUC] depositions.

59. In the Joint Scheduling Report on the first remand, counsel agreed that we would use the SFUI discovery, and limit new discovery to that which was necessary o update the discovery since the end of the prior discovery period, which meant updated demands for production and updated Rule 30(b)(6) depositions.

60. In its Scheduling Order on first remand, the Court included a discovery period based on that agreement of counsel.

61. In the Joint Scheduling Report on the second remand, counsel agreed again to limit new discovery to that which was necessary to update the discovery since the of the most recent discovery period.

62. In its Scheduling Order on second remand, the Court again included a discovery period, also based on that agreement of counsel.

63. There had never been any serious issue between these parties regarding scope or burden of discovery. I even agreed to conduct all of the entity depositions in the CPUC San Francisco offices, which obviously imposed that added expense on Plaintiffs, dutifully raised and paid by CARE; and added time for me, for which I was never compensated.

64. When the CPUC Program was still under discussion, Defendants' counsel insisted that they could not do effective discovery without a new pleading; but when we finally reached agreement, but had yet to obtain the order vacating the Scheduling Order, Defendants issued written discovery requests with the advisory that they were doing do only as a protective measure in case the Court id not vacate the Scheduling Order. [Exhibit 50.3-4, 50.6-7].

65. Once the Scheduling Order was vacated by stipulation and order, that discovery became moot, as Defendants' intent under the CPUC Program is to tailor their discovery to whatever becomes the final operative pleading.

66. Nevertheless, current CPUC trial counsel now peppers his filings with claims that there is outstanding discovery dating back to December 2020, again implying misconduct by myself, and by extension the Plaintiffs.

EXCUSABLE NEGLECT

67. Because of the adverse effects on Plaintiffs deriving from my mistakes, I am beholden to seek this relief under Fed.R.Civ.P. 60(b)(1). If there is a penalty, it should fall on me, not any Plaintiff. Those adverse effects are:

a. Denial of CARE motion to file supplemental complaint and dismissal of CARE from the action, with prejudice; and

b. Denial of remaining Plaintiffs motion to file Eighth Amended and Third Supplemental Complaint, or otherwise further plead as requested therein.

68. I should not have trusted Defendants' counsel to hew to the core substantive issues, at least in the first instance, and should never have agreed to vacate the case management dates, not even in exchange for the stipulation to file the Sixth Amended and Second Supplemental Complaint, because in reality, we have since gone back to square one and hence, 31 months later, we are still in the pleading stage and without a trial date.

69. Ms. Hammond was promoted, and her trial counsel replacement has conducted himself as if any and all pleading attacks are on the table; and once the

Court – not realizing the background – injected pleading issues and assumed that this is a normal circumstance in which a plaintiff is seeking late pleading amendments and concomitant protracted delays in case management dates, current Defendants counsel exploited that by taking full and unfair advantage, legally and rhetorically, rather than acknowledging their true involvement in getting us to this point.

70. I should have left Defendants' counsel to their remaining devices under the original Scheduling Order on second remand.

71. I should have realized that with Defendants' counsel abandoning the limiting and telescoping objectives of my agreement to the CPUC Program, I needed to address the *Fohman* standards, if only to refute their application, as they clearly apply differently in light of the above and Exhibit 50.

72. I should have utilized the e-mail chain now summarized in Exhibit 50 which, though not a complete record of what transpired, sets forth enough to project a totally different picture of what has transpired since entry of the Scheduling Order on July 31, 2022. But, constrained by the Court's rules on professionalism, including the disfavored creation and submission of letters between counsel, I did not do so.

73. Regrettably, it is my clients who have paid the price under the Court's Order previously denying this original motion, leaving CARE dismissed and the remaining Plaintiffs handicapped in their long-standing effort to secure regulated utility compliance with PURPA, which can only be effected by the regulating agency because regulated utilities cannot be sued under PURPA, in federalism deference to the regulating agency [CPUC].

74. Hopefully, by this motion, the harm to Plaintiffs can be rectified; and if any penalty is warranted, that it be imposed on myself.

75. For the meet an confer on this motion, I supplied current CPUC trial counsel with the entire relevant e-mail chain and exchanges between Ms. Hammond myself, and during the meet and confer process we agreed to the excerpting of them, as an agreed admissible Evidence Summary, as set forth in Exhibit 50.

.

MEET AND CONFER COMPLIANCE

76. This motion is made following multiple meet and confer conferences of counsel pursuant to L.R. 7-3, with which counsel complied therewith.

77. This motion is calendared to be heard with Defendants' Motion to Dismiss the Seventh Amended Complaint, as agreed between counsel.

I declare under penalty of perjury that the above is true and correct. Executed on September 16, 2022 at Los Angeles, California.

s/ Meir J. Westreich

Meir J. Westreich

EXHIBIT 50

EVIDENCE SUMMARY CHART[1]
[*Fed.R.Evid.* 1006]

ITEM	DATE	SOURCE	CONTENT
1	12.02.20	CPUC	We would really like to speak with you as soon as possible about making orderly progress in this case. The CPUC sees only a single issue on remand. You informed us yesterday that the Fifth Amended Complaint is not longer valid or effective, and that CARE plaintiffs believe there are two issues on remand and would like to file an amended complaint. Yet the CPUC is unable to meaningfully comply with the Court's discovery deadlines without an operative complaint or an understanding of CARE's issues, so that the CPUC can respond as appropriate. Although previously the CPUC opposed CARE's filing an amended complaint, we now withdraw that opposition because of the clarity such a filing would bring to this case. Afterwards, the CPUC would respond to the amended complaint as in any case, and a new case schedule should be set. We suggest jointly going to the court asking for a new case schedule.
1	12.02.20	CARE	I concur about the amended pleading or some such thing
2	12.07.20	CPUC	May I represent to Judge Holcomb that our call of last Friday constitutes our meet and confer for our forthcoming application or motion to schedule a case management conference? We will represent that the CARE plaintiffs oppose our request and would like to file an opposition.

[1] This Evidence Summary Chart pursuant to *Fed.R.Evid.* 1006 summarizes with excerpted text from the contents of a sequence of e-mail chains / communications between counsel [12.03.20 - 05.06.21], previously supplied in a series of items listed as Items 1-10, 11a-11b, 12- 24 [items not referenced herein are intentionally omitted].

2 cont'd	12.07.20 cont'd	CPUC cont'd	[I]n their Joint Scheduling Conference and Rule 26(f) Report ("Joint Report") filed July 18, 2020 . . . plaintiffs proposed to file an amended complaint to reflect the claims on remand, and defendants opposed this, but requested that parties submit a revised Joint Report if plaintiffs are permitted to amend their complaint. . . . On July 31, 2020, Judge Olguin issued a Scheduling and Case Management Order Re: Jury Trial, setting a schedule for discovery, the filing of dispositive motions, and trial. Judge Olguin did not address two threshold questions: whether plaintiffs may amend their complaint . . . . On September 29, 2020, this case was ordered reassigned to Judge Holcomb. As defendants were considering designating expert witnesses and preparing written discovery, using plaintiffs' Fifth Amended Complaint as the operative complaint, it seemed there were no genuine issues of material fact remaining in this case on remand, and we sincerely did not see any need for a trial. It not efficient or fair for the CPUC to prepare for trial without understanding what plaintiffs' claims are. As it stands, it is unclear from the Fifth Amended Complaint whether there are truly any outstanding facts in dispute or issues in controversy, which would allow this case to proceed. The Fifth Amended Complaint does not allege that any utility has claimed RPS credit for electric generation from plaintiff's generating resources, or even that plaintiffs resources are RPS-eligible. Nor does it identify which program or programs implementing PURPA administered by the CPUC improperly based the contract price on the avoided cost of non-RPS resources, in violation of PURPA as interpreted by the Ninth Circuit. (Although, the CPUC admits and is prepared to state plainly to the Court that the QF Settlement's Standard Contract for QFs 20 MW or Less does not calculate an avoided-cost rate based on RPS resources, it is unclear how this is relevant to plaintiff's claims.) It is also unclear what remedy plaintiffs seek. At the time of plaintiffs' Fifth Amended Complaint, the CPUC had in place four PURPA vehicles: the QF Settlement Standard Contract, the 2012 ReMAT program, the AB 1613 CHP program, and the Net Surplus Compensation for Net Energy Metering customers. Defendants observe that the ReMAT program was revamped in October 2020 to comply with the Ninth Circuit's opinion in this case, and consequently, claims for declaratory

2 cont'd	12.07.20 cont'd	CPUC cont'd	or injunctive relief directed at the 2012 ReMAT program would be moot. Moreover, the District Court's jurisdiction is limited to the matters for which plaintiffs sought FERC's enforcement – exhaustion of administrative remedies being a statutory prerequisite to proceeding in district court. We flagged for you that the CPUC approved a New QF Standard Offer Contract in May 2020, but that the plaintiffs must first exhaust their administrative remedies at FERC before challenging this new QF Standard Offer Contract in district court. Based on our phone conversation last Friday about what is the appropriate scope of the remand, it sounded to us that that plaintiffs were proposing new claims to be pled. As plaintiffs' counsel, you disagreed, saying that these new claims fit within the scope of the Fifth Amended Complaint. From what we heard orally, we disagree and still have not seen a written articulation of CARE's claims on remand beyond the unfortunately over-broad characterization in the Joint Statement, to which we both agreed last July. We had suggested stipulating to the plaintiffs filing an amended complaint, but understand plaintiffs decline this suggestion at this time. When you suggested that parties agree to a final articulation of claims in the pre-trial documents, we explained that such a process would prejudice the CPUC, i.e., plaintiffs should not be allowed to articulate substantively new claims at the pre-trial stage, and that defendants might be forfeiting their rights to discovery, including depositions; or even forfeiting defenses and arguments in dispositive motions. Despite the CPUC's prior opposition, the CPUC believes plaintiffs should now be afforded an opportunity to amend their complaint to articulate claims based on the narrow issue for which this case was remanded. Unfortunately, the operative complaint in this proceeding does not do so. Unless the complaint is amended, the CPUC is considering filing a motion for judgment on the pleadings, on the grounds that the complaint fails to articulate a claim for which relief can be granted as required by FRCP 8, while also considering the option of a motion for summary judgment.
2	12.07.20	CARE	I have an alternative suggestion which may forestall, at least, any conflict on how to proceed.
7	12.28.20	CPUC	[T]hank you again for filing the joint application last week. [G]iven the current discovery schedule we have, we are getting together a few requests for admission and interrogatories.

7	12.29.20	CPUC	I hope you understand the existing discovery schedule compels us to move forward with discovery. Attached please find an electronic copy of the Defendants' First Set of Interrogatories and Second Set of Requests for Admission.
8	01.08.21	CARE	1. I am still struggling with health issues. *See* latest medical letter [attached]. 2. I am working on the amended pleading. New issue: *See* new Supreme Court case: *Tanzin v. Tanvir*. 3. See initial draft of new Joint Report.
9	01.08.21	CPUC	If your heath will prevent you from having a complaint ready to share with us next Monday the 11th, as we discussed last Monday the 4th, the CPUC would support your filing today a request of the court for an extension of the due date for the joint status report. The joint report is due one week from today, and we really would need four or five days after seeing the complaint during which we can work together to draft the joint status report and map out new proposed dates for a scheduling order. Please just let me know the amount of time you think you would like to ask the court to extend the due date of the joint status report and scheduling conference and then feel free to file today your request for extension due to health issues.
9	01.12.21	CPUC	I'm following up on our conversation a week ago yesterday (Jan. 4), when you committed to getting us a draft of your amended complaint by yesterday (Jan. 11). We have not seen anything. Can you please provide an update, since there is much to be done before we file the joint statement on Friday?
11b	01.14.21	CPUC	Please take a look at our redlines in the attached. Is there a reason for me to prepare a declaration? If joint applications typically require both parties to prepare declarations, then I suggest you change the pleading to a "stipulated application," and you can indicate the CPUC supports CARE's application.
11a,12	01.14.21	CPUC	Is there a reason for me to prepare a declaration?
12	01.14.21	CARE	So you can explain why the concurrent lodging of amended pleading is necessary for your input to Joint Report. This part of the intended Joint Report is not standard.

12	01.14.21	CPUC	Hi Meir – Attached is our latest redlines. It looks like more redlines than there really are, because, after we clarified on the phone that we're actually in agreement, I cut and paste some language to make the application more straightforward. Since I refer to the last stipulated application, I don't think I need a declaration.
12	01.15.21	CARE	I made the changes you request, with minor tweaks, but I am not making the changes you request for Par. 3. I would rather not amend the complaint at all. I thought was agreed today that you reserve your right to pursue all motions after the filing of the new pleading, which is itself a concession from my original position last month. What you propose will simply push the judge to order me to file a motion for leave under Fed.R.Civ.P. 15. Let's just delete this amendment / supplement issue from this application, and rely solely on my health issues. This is not helping me follow my doctor's orders. We can argue the issue in the Joint Report.
12	01.15.21	CARE	See attached. This is a shorter, cleaner version. Ready to go is you concur, and will be filed today with my declaration and a proposed order.
13	01.15.21	CPUC	February 15 is President's Day. A new hearing date should be another day in February. Pushing out the Status Conference to a date in February runs the outside risk that the March 1 deadline for dispositive motions remains a court order. Obviously, we think that March 1 deadline should be superseded. Therefore, we ask that the application be further modified to make sure the court cancels the March 1 deadline. We offer some redlines in the attached (going off the application version you emailed at 11:05 this morning). Finally, we're always supportive of you attending to your health. At the same time, we agreed you would forward the proposed pleading in good time for us to fairly prepare our contributions to the Joint Report. You have mentioned in our last couple of conversations that you're near completing the pleading. Will you commit to forwarding to us the proposed pleading you are going to lodge one week before a new deadline for filing the Joint Report? Such an order should also be in the [Proposed] Order. I also have two typo corrections in the attached – including where my middle name is misspelled on the last page.

13	01.15.21	CARE	*See* attached. My method is better. Plus I am in trial in Bishop February 22-26, 2021.
14	01.15.21	CPUC	Meir – two things: 1. This version looks fine. Thanks. 2. Would you please commit to getting us a draft of the [Proposed] pleading you intend to lodge a week before the Joint Status Report is due? Of course we support you taking care of your health; and we want to make sure the proposed status conference date bakes enough time for you to forward us the [Proposed] pleading, without slippage in delivery dates.
14	01.15.21	CARE	Yes on No 2.
15	02.03.21	CPUC	I hope you are doing well. The attached letter follows on the CPUC's First Set of Interrogatories and Second Set of Requests for Admission, served on December 29, 2020, and CARE, et al.'s failure to respond, and the letter requests a meet and confer on the First Set of Interrogatories, as required by the Central District's Local Rules. Would you please confirm the proposed meet and confer date of February 5, or else propose another date in the very near future?
15	02.03.21	CARE	I assumed it was clear that I'm on medical leave and needed an extension on everything, including the responses, which you served in December as a stop gap (as you said) when we were still trying to modify impending case management dates, which is now occurring and there is no looming deadline. As you saw in my away message, my latest leave ends 02.05 and I'm back to work next week. I will send documentation under separate cover. Please extend the dates an additional 30 days from first due date.
16	02.03.21	CARE	I'm rather surprised you did not drop a call to me first, especially given our latest stipulation; and with an agreement to provide an amended pleading also pending. Courts here do not generally favor gotcha approaches. I hope an EPA to extend time will not be required.
17	02.04.21	CARE	Re: Court Refusal to Recognize Waiver of Objections: *Lever Your Business, Inc. v. Sacred Hoops and Hardwood, Inc.*

18	02.04.21	CPUC	Hi Meir – I sincerely hope you're feeling better. I'm dealing with family medical issues myself and know it's tough. And I hope you understand where we are coming from. We have the court-ordered discovery deadline (still unchanged) and the local rules staring at us in the face, and wanted to avoid waiving any rights. Any extension would still need to be approved by the court. Why don't we talk tomorrow afternoon? Your out of office message says you will be back at work tomorrow, the 5th. And we will be looking forward to receiving next Friday the 12th, CARE's draft complaint that you will submit to the Court.
18	02.09.21	CARE	This is to confirm we tele-conferenced on 02.05.21 and agreed to the following: 1. The time for all discovery responses to outstanding defense discovery is extended without prejudice to Plaintiffs to March 5, 2021, with te furher [sic] understanding that c ounsel [sic] will confer further after the March 1, 2021 Status Conference, and anticipated (a) extension of all case management dates and (b) filing of an amended / supplemented complaint, re any further extension of response times in light of the pleading status and schedule. 2. Plaintiffs are supplying a draft amended / supplemented complaint by 02.12.21, and counsel will then confer further, in context of the Joint Report to be filed by 02.19.21.
18	02.11.21	CPUC	Yes, we agreed to March 5 date, subject to court's approval per the local rules, and we'll attend to dates after Judge Holcomb's ruling at or after the March 1 Status Conference. And we look forward to receiving your proposed complaint tomorrow.
18	02.11.21	CARE	I don't understand your first sentence. I reinsured [sic] myself yesterday and was in ER again, so I am a bit unsure about tomorrow
20	03.06.21	CPUC	Hello Meir. I hope you are feeling better. I had budgeted time today to work on this case and had been counting on your providing CARE's amended complaint as you had committed. When will it be forthcoming? Thank you.

20	03.08.21	CPUC	We truly hope you're feeling better and am writing to try to avoid a crunch before the filing deadline. We do need to hear some responsive answer from you. Almost three days have passed since you committed to getting us a final version of your proposed complaint, time which we would have spent reviewing your proposed and complaint and informing the joint statement that is due this Friday.
20	03.09.21	CPUC	As we agreed, and as was communicated to the Court, the CPUC had been expecting your final draft complaint last Friday, in order to meet the March 12 joint report filing deadline. We did receive your auto-response message last Saturday and are sorry to hear of your ongoing and new issues. Unfortunately, apart from the automated message, we have not heard from you, and under these circumstances, it is not possible to file a joint status report by Friday. It is appropriate for you to prepare a request for extension. And of course, we would appreciate hearing from you on the status of CARE's final draft complaint and how much more time might be needed.
20	03.09.21	CARE	I regrettably concur. See attache [sic]. I will forward the stipulation tomorrow.
21	03.09.21	CPUC	Thank you Meir, we wish you well. We have a number of scheduling conflicts in April and we would also like to avoid having to stipulate to additional extensions. Would you be willing to stipulate that the conference be held on May 17th? That would make the Joint Status Report due May 7 with you providing us with your proposed Complaint no later than 5 p.m. on April 30.
21	03.11.21	CARE	OK
23	04.23.21	CPUC	I hope all is well with you. We have reviewed the Plaintiffs' proposed amended and supplemental complaint, and we have made changes to the Joint State [sic] Report accordingly. It is consistent with what we have been communicating for some time. A meet and confer is in order – would you please suggest some days/times for us to consider? The Joint Status Report is due to be filed two weeks from today.

23	05.06.21	CARE	It is clear from our previous filings that we have agreed to disagree as to the scope of the anticipated new pleading and the idea was I lodge the new pleading and we then use it as a basis to address our disagreements. See attached Joint Application for Order Scheduling Status Conference [12.23.20], Pars. 3, 6-7 [listing the disagreements / issues]. In the subsequent Joint Application for Order Continuing Scheduling Status Conference, etc. [01.15.21] [and the succeeding versions] we called it the "new pleading" to preserve our respective positions. Hence, while it is appropriate for you to make all arguments you wish re the pleading and our listed issues, it is not appropriate for you to argue that I have violated our agreement with my draft pleading; and I will not sign such a document. Indeed, I did not change our original agreement, that contemplated concurrent lodging and filing, to provide the pleading in advance so that you can make personal attacks on me. It is impossible to draft a current pleading without addressing the changes since the prior pleading. Do I name the same PUC members? As for the damages issue, I have explained it by reference to the recent Supreme Court *Tanzin* decision [attached]. As for my health, see attached latest on that [corrective vascular surgeries], with disability now extended to June 2, 2021 [Exhibits R, S, T & U].
24	05.06.21	CPUC	Attached are: 1. a clean version of the Joint Status Report, which has the CPUC's changes; and 2. a redline version that shows the changes the CPUC made to CARE's Jan. 8, 2021 version of the document.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' RESUBMITTED MOTION TO FILE EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [Fed.R.Civ.P. 60(b)]** Hearing: October 21, 2022 Time: 9:00 a.m. Courtroom: George E. Brown, Jr. Federal Building 3470 12th Street Riverside, CA 92501 Courtroom 2

I.
PLEADING HISTORY

The filing of an amended pleading supersedes the previously filed pleading, which then becomes a nullity. *See Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. 2012) (*en banc*)].

A Complaint [Dkt 1] was filed on June 10, 2011; a First Amended Complaint [Dkt 20] having been filed by right, *i.e.* without need for leave of Court under Fed.R.Civ.P. 15(a), on August 10, 2011, with curative allegations re CAlifornians for Renewable Energy, Inc. ["CARE"] Plaintiffs' [CARE-Boyd-Sarvey] Public Utility Regulatory Policies Act ["PURPA"] Exhaustion of Remedies. The Fifth Cause of Action of the First Amended Complaint, and Defendant Southern California Edison, were ordered voluntarily dismissed [Dkt 35] September 9, 2011.

The First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies, but with leave to amend as to other claims [Dkt 61]. A Second Amended Complaint [Dkt 64 & 64-1] was filed pursuant to said leave to amend. Remaining CARE Plaintiffs' claims were dismissed without leave to amend [Dkt 82] from said Second Amended Complaint. The Ninth Circuit reversed the order [Dkt 173] under which the First Amended Complaint was dismissed without Leave to Amend as to CARE Plaintiffs' curative allegations re PURPA Exhaustion of Remedies [Dkt 61].

This Court denied leave to file a proposed Fourth Amended Complaint, without prejudice, but afforded leave to file a modified version of the proposed Fourth Amended Complaint [Dkt 184]. CARE Plaintiffs filed said revised Fourth Amended Complaint, re-branded as the Fifth Amended and First Supplemental Complaint [Dkt 185] – to avoid having different pleadings with the same name – which remained, without further pleading practice, the operative pleading through judgment in favor of CPUC Defendants. In a second appeal, the Ninth Circuit reversed the order [Dkt 224] under which judgment was entered under the Fifth Amended and First Supplemental Complaint.

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CPUC Defendants stipulated to CARE Plaintiffs filing a further amended pleading – the Sixth Amended and Second Supplemental Complaint [Dkt 253] – and the Court ordered leave to file the Sixth Amended and Supplemental Complaint [Dkt 269] which was concurrently filed [Dkt 267]. The Court dismissed the Sixth Amended and Second Supplemental Complaint, parts without leave to amend, parts with leave for Plaintiffs Boyd-Sarvey to amend, and parts with leave for Plaintiff CARE to file a motion to supplement [Dkt 287].

The filing of each of the aforementioned amended pleadings superseded the previously filed pleading, which then became a nullity. *See Lacey*, 693 F.3d at 928, thereby leaving the Sixth Amended Pleading as the operative pleading to which the March 9, 2022 Order applied, and from which the Seventh Amended Complaint derived with leave of court [Dkt 298]. This now [Proposed] Eighth Amended and Third Supplemental Complaint seeks to amend and supplement the Seventh Amended Complaint [Dkt 298], to be filed with leave of court following noticed hearing.

II.
PLAINTIFF CARE IS ENTITLED TO THIS FIRST OPPORTUNITY TO CURE ANY JURISDICTIONAL PLEADING DEFECTS WHETHER BY AMENDMENT OR SUPPLEMENT OF THE LATEST COMPLAINT

A.
AMENDMENT STANDARD

As applied by this Court in its Order of March 9, 2022, "Courts are free to grant a party leave to amend whenever 'justice so requires,' Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with 'extreme liberality.' *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir.2001) (*quoting Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). In the absence of any case management order specifying a deadline for pleading motions, whether to grant a motion for leave to amend is governed by "the liberal standard" of Fed.R.Civ.P. 15(a).

> "Rule 15(a)'s liberal amendment policy . . . focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the

the opposing party . . . [citation omitted]."

See In re W. States Wholesale Natural Gas Antitrust Litigation, 715 F.3d 716, 737 (9th Cir. 2013). "The court should freely give leave when justice so requires." *In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d at 737 n.16. "Rule 15(a)'s liberal amendment policy . . . focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party . . . [citation omitted]. *See In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d 716, 737 (9th Cir. 2013)."The court should freely give leave when justice so requires." *In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d at 737 n.16.

A Plaintiff is entitled to at least one opportunity to correct defects for which he has received clear notice from the Court. *See Rutman Wine Co. v. E. & J. Gallo Winery,* 829 F.2d 729, 732, 738 (9th Cir. 1987); *Vess,* 317 F.3d at 1107. *Accord, Keniston v. Roberts,* 717 F.2d 1295, 1300 (9th Cir. 1983) (denial of leave to amend only based on undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, futility of amendment, undue prejudice to defendant).

B.
SUPPLEMENT STANDARD

Hence, under Fed.R.Civ.P. 15(d), a plaintiff may cure an Article III standing defect by filing a supplemental complaint alleging facts that arose after the filing of the original complaint, and should also include changes in circumstances based on actions of the Defendant. *See Northstar Financial Advisors Inc. v. Schwab Investors*, 779 F.3d 1036, 1044 (9th Cir. 2015). *See generally Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C. Cir. 2018) (describing split in circuits, and joining 9th Circuit and others in applying this permissive standard). Hence, "a party [may] serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed.R.Civ.P. 15(d). *See also* Section III.B, *infra* [re law of the case and scope of action on remand].

C. AMENDMENT AND SUPPLEMENT STANDARDS APPLIED HEREIN

The Ninth Circuit's first reverse and remand order – on grounds *inter alia* of standing and jurisdiction re CARE Plaintiffs' PURPA claims – applied to a First Amended Complaint that was later superseded by a Second Amended Complaint, and later became the court-approved basis for a Fifth Amended and First Supplemental Complaint implementing the first remand order. The Ninth Circuit's second reverse and remand order applied to the Fifth Amended and First Supplemental Complaint, later superseded by the stipulated and ordered Sixth Amended and Second Supplemental Complaint seeking to implement the second remand order, soon to be at last a Seventh Amended Complaint. [There were no Third or Fourth Amended Complaints filed herein].

Plaintiff CARE now seeks to supplement the current pleading to correct any standing defects to the extent it is based on events occurring since the filing of the Sixth Amended and Second Supplemental Complaint, in particular to correct and update the QF status of CARE based on actions taken since the filing of the latest pleading that merged the Boyd and CARE QF certifications; and correcting the changing personnel on the CPUC for equitable relief issues.

The [Proposed] Eighth Amended and Third Supplemental Complaint lodged herewith also includes the amendments by Plaintiffs, filed with leave of Court in the Seventh Amended Complaint [with a few minor cleanup corrections shown in the former as redline in the lodged redline version], addressing the standing and other issues noted in this Court's Order of March 9, 2022, that being Plaintiffs' first opportunity to make those pleading corrections following clear notice of the purported defects. *Compare* [Proposed] Eighth Amended and Third Supplemental Complaint [clean and redline versions] *with* the previously filed Seventh Amended Complaint [clean and redline versions] [Dkt 298], the latter of which will be superseded and a nullity if the former is ordered filed as requested herein.

Finally, all Plaintiffs now seek to further supplement the Sixth Amended and Second Supplemental Complaint – and any preceding but now superseded version – to add claims and allegations which have arisen since the Fifth Amended and Second Supplemental Complaint, which was the operative pleading in the prior summary judgment reversed in part and remanded in the Ninth Circuit Opinion, from which these current remand proceedings derive.

III.
SUPPLEMENTING THE OPERATIVE COMPLAINT IS PERMITTED TO ADDRESS NEW CLAIMS AND EVENTS SINCE THOSE ADDRESSED IN THE NINTH CIRCUIT OPINION

A.
APPELLATE COURT RULINGS IN LIGHT OF OPERATIVE PLEADING: THE FIFTH AMENDED COMPLAINT

To assess what was ordered by the Ninth Circuit in *CARE, supra*, the starting point of the analysis is the operative pleading on which the district court issued its summary judgment and the Ninth Circuit reversed, in part, and affirmed, in part, the Fifth Amended and Supplemental Complaint.

In the Fifth Amended and Supplemental Complaint, Plaintiffs sought enforcement by CPUC of PURPA requirements in connection with guaranteed IOU (a) avoided cost payments and (b) connectivity. In respect to the former, there were three issues posited in the claims: (1) avoided cost payments by IOU to QF must be exactly that, *i.e.* not more nor less; (2) avoided cost must include capacity costs; and (3) avoided costs must be tier calculated, *i,e.* by like energy source. There is no reference in the Fifth Amended and Supplemental Complaint to any of the CPUC approved IOU programs – *e.g.* NEM, RPS, RE-MAT, CHP or QF Settlement. All of the latter were injected into the case by CPUC as defenses.

On appeal herein, the judgments on all of the damages claims, and the connectivity claims, were affirmed. The appellate court, however, issued nuanced rulings on the defenses to the PURPA avoided cost claims. It did not rule against the avoided costs claims without reference to the CPUC asserted defenses.

Hence, the Court ruled on those affirmative defenses, s*ee CARE,* 922 F.3d at 933-35, as follows: While CPUC has broad discretion to implement "avoided cost" under PURPA, courts must not abdicate responsibility to ensure PURPA compliance. *See CARE,* 922 F.3d at 936. PURPA requires that when avoided cost is calculated, it is the "full avoided cost" standard, *i.e.* a floor as well as a ceiling. *See CARE,* 922 F.3d at 936-37.

In assessing full avoided cost, the Court struck a middle ground between Plaintiffs' position that avoided cost should always be multi-tiered re energy source and the CPUC position that mixed sources are always acceptable. *See CARE,* 922 F.3d at 936-38.

> "Where a state has an RPS [renewable energy requirements] and the utility is using a QF's energy to meet the RPS, the utility cannot calculate avoided cost based on energy sources that would not also meet the RPS. . . . [This is a fact based] examination of the costs that a utility is *actually avoiding* . . . ."

CARE, 922 F.3d at 937 (emphasis in original). Likewise, whether the re-MAT and CHP programs can rely on natural gas sources instead of renewable energy is a fact-based inquiry in connection with whether the utility is using the supplier for meeting RSP requirements. *See CARE,* 922 F.3d at 940.

Again, in assessing full avoided cost, capacity costs must be included where the supplier affords "sufficient legally enforceable guarantees of deliverability" or when the utility knows how much energy the supplier will provide, but not otherwise. *See CARE,* 922 F.3d at 938-39. NEM programs are not "categorically exempt from PURPA." *See CARE,* 922 F.3d at 939.

In summary, the Ninth Circuit herein described "full avoided cost" as a legal mandate under PURPA and FERC rules which require that utilities pay to QF power providers an avoided cost defined as no less than, as well as no more than, their avoided cost. In so doing, the Ninth Circuit has also described when such "full

avoided cost" must include replacement "capacity costs" and when these calculations must employ a multi-tiered formula, i.e. calculating the avoided costs by comparing like sources of power.

The Ninth Circuit also ruled that the District Court, in its earlier rulings, had (a) misinterpreted PURPA'S requirements in connection with avoided cost and multiple sources of power, and (b) did not consider whether utilities are fulfilling any of their RPS obligations through the herein challenged CPUC programs. In light of the aforementioned determinations in the preceding Paragraph, the Ninth Circuit also remanded the matter for the district court to make specified determinations whether the herein challenged CPUC programs: (a) are de facto impermissible under PURPA; and/or (b) comply with the multiple source rules under PURPA. *See CARE,* 922 F.3d at 937-38. These considerations, in turn, impact application of the correct rules for calculation of full avoided cost and when, and under what circumstances, that implicates inclusion of capacity costs.

B.
LAW OF THE CASE AND RULE OF MANDATE IN LIGHT OF CHANGING LEGAL AND FACTUAL PREDICATES

First, to the extent that the doctrine of the "law of the case" and "rule of mandate" govern on remand, they apply with equal force to both sides. Second, the impact of the doctrines vary if on remand there is new or different evidence, and/or the matter is not foreclosed by the mandate. *See Stacy v. Colvin*, 825 F.3d 563, 567-68 (9th Cir. 2016) (holding).

> "A court may have discretion to reopen a previously resolved question only where (1) the first decision was clearly erroneous; (2) an intervening change in the law has occurred; (3) the evidence on remand is substantially different; (4) other changed circumstances exist; or (5) a manifest injustice would otherwise result. *Thomas v. Bible*, 983 F.2d 152, 155 (9th Cir. 1993)."

Disimone v. Browner, 121 F.3d 1262, 1266 (9th Cir. 1997).

C.
CPUC HAS ALTERED THE PROGRAM AND REGULATORY FRAMEWORK WHICH WAS REVIEWED BY THE NINTH CIRCUIT AND ON WHICH ITS REMAND APPLIES

The PUC decried the Ninth Circuit's published Opinion herein, as follows:

> "If [the Opinion is] not remedied through rehearing, this misreading of PURPA will interfere with California's efforts to encourage renewable development and will create confusion on the calculation of avoided cost rates that will stall PURPA implementation and associated renewable development across the country."

CPUC Petition for Rehearing in the Ninth Circuit, p.4. Case No. 55-297 (06.21.19).

> "For RPS states, the [Opinion]'s new rule will interfere with state regulators' discretion over procurement by requiring that any RPS programs implemented under PURPA be RPS-only. . . . Under the [Opinion]'s new rule, this standard offer program would violate PURPA because RPS generators in that program are contributing to the state's RPS, but the avoided cost rate is not based on RPS generation."

CPUC Petition for Rehearing, at p.14.

> "Consequently, if left undisturbed, the . . . [O]pinion will put in question the PURPA programs in all RPS states. Each RPS state – and any other state considering one – will need to review whether its PURPA programs that include RPS resources establish avoided cost rates consistent with the Majority's new rule and modify or terminate those programs that do not."

CPUC Petition for Rehearing, at p.15.

Yet, commencing in August 2020, CPUC has been engaged – at the behest of the IOU's – in a complete revamping effort for the NEM programs December 13, 2021 [Proposed Decision re Net Energy Metering Tariffs and Subtariffs in CPUC Rulemaking (R 20-08-020) (12.13.21)]. Concomitant to that, CPUC has implemented

a new avoided cost protocol, effective June 28, 2021 which adopts updates to the "Avoided Cost Calculator." [CPUC Resolution E-5150 (06.28.21)].

In utter defiance of the Ninth Circuit holdings in the prior appeal herein, and notwithstanding the stated fears of CPUC, that new protocol not only fails to mention that published opinion, but totally ignores – fails to mention – three central holdings: (1) that avoided cost means "full avoided" cost, *i.e.* not less than the avoided cost, as mandated by FERC rules; (2) that whether a utility must include capacity costs in calculating and paying full avoided cost can be made dependant on whether the QF is guaranteeing its energy supply to the IOU, *i.e.* if there is such a guarantee, then capacity costs must be included; and (3) given the state's commitment via its RPS program – under which utilities must and do in fact meet standards of ever-increasing reliance on renewable energy – avoided cost must be tiered so that avoided costs is calculated by reference to the same energy source, *i.e.* renewable for renewable, fossil for fossil.

In the aforementioned new avoided cost protocol, CPUC does not prescribe that inclusion of capacity costs be included when QF supply is guaranteed; nor does it prescribe that avoided costs for renewable energy supplying QF's, or with utilities using QF's for that RPS purpose, be calculated by reference only to like-tiered energy sources; nor does it prescribe that avoided cost payments must be neither less not more than actual avoided cost, instead retaining market based formulae with protections only against payments exceeding actual avoided cost.

If in fact Defendants were / are complying with PURPA and FERC regulations, this protocol would have been the perfect vehicle for demonstrating same with, inter alia, compliance with the Ninth Circuit mandates; and by failing to do so – they do not even reference the decision or its specific provisions – they prove that they do not mean to enforce these PURPA / FERC standards with the utilities, and will not do so unless compelled by this Court.

IV.
STANDARD FOR EXCUSABLE NEGLECT

Fed.R.Civ.P. 60(b)(1) (excusable neglect) implicates an equitable test, *see Briones v. Riviera Hotel Casino*, 116 F.3d 379, 381-82 (9th Cir. 1996), which herein, entails two factors: danger of prejudice to opposing party and good fath of moving party. *See Bateman v. U.S.P.S.*, 231 F.3d 1220, 1223-25 (9th Cir. 2000). The equitable test applies even though clients may be held accountable for acts or omissions of their counsel. *See Bateman*, 231 F.3d at 1224. There is no rigid or per se rule, and the decision must be made in context of the particular case, *see Pincay v. Andrews*, 389 F.3d 853, 859-60 (9th Cir. 2004), requiring exercise of discretion, *see Pincay*, 389 F.3d at 860, considering all relevant circumstances, *see Lemoge v. United States*, 587 F.3d 1188, 1192 (9th Cir. 2009). The Court must consider good faith of movant, *see Lemoge*, 587 F.3d at 1193-94, and must also weigh any prejudice to movant if denied relief, *see Lemoge*, 587 F.3d at 1195-96. Clearly, under this test, and in light of the Supplemental Declaration and Exhibit 50, this resubmission warrants consideration.

Once this Court considers the Supplemental Declaration and Exhibit 50, the record does not support its *Fohman* conclusions that Defendants suffered "undue" delay given their primary role in it; or that the true motive of Plaintiffs is to protract the litigation indefinitely; or that Plaintiffs have had repeated opportunities to address the substantive and standing issues; or that Defendants suffered "undue" prejudice, again given their primary role in it, *i.e.* they did not merely give generous consent for which it would be unfair to hold them broadly accountable.

CONCLUSION

Accordingly, Plaintiffs urge the filing of the Eighth Amended and Third Supplemental Complaint as lodged herewith.

Dated: September 16, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al.

Plaintiffs,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.

Defendants.

Case No: 2:11-cv-04975-JWH

DEFENDANTS' OPPOSITION TO PLAINTIFFS' RESUBMITTED MOTION FOR LEAVE TO FILE [PROPOSED] EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [FED. R. CIV. P. 60(b)]

Date: October 21, 2022
Time: 9:00 a.m.
Courtroom: Hon. John W. Holcomb

Defendants hereby oppose Plaintiffs' Resubmitted Motion for Leave to File [Proposed] Eighth Amended and Third Supplemental Complaint [Fed. R. Civ. P. (60(b)] and the documents filed in support thereof (ECF Nos. 322-), as follows:

I. INTRODUCTION

In Defendants' view, the Court's July 20, 2022, Order Denying Plaintiffs' Motion for Leave to File Their Eighth Amended and Third Supplemental Complaint (ECF No. 315, "Dismissal Order") was correct and need not be revisited. Defendants incorporate by reference as if set forth in full herein their previously filed papers opposing the Plaintiffs' proposed Eighth Amended and Third Supplemental Complaint and objecting to the Declaration of Michael Boyd (ECF Nos. 306-). Despite counsel's supplemental declaration (ECF No. 322-1), which Defendants object to as largely inadmissible for its evidentiary shortcomings,[1] and the exhibit thereto, Defendants see no need to reargue the Motion or reconsider the identical proposed amended and supplemental pleading and therefore confine their comments and opposition to the Rule 60(b)(1) issues Plaintiffs have raised.

II. PLAINTIFFS HAVE NOT SATISFIED THE REQUIREMENTS OF RULE 60(B)

Rule 60(b)(1) provides that the Court may relieve a party from a final order, upon motion and just terms, for the reasons of mistake, inadvertence, surprise, or excusable neglect. The classic example is that of default judgment. The moving party must make a motion made under Rule 60(b) within a reasonable time but ordinarily no more than a year after the entry of the order. Fed. R. Civ. P. 60(c).

A. The Court's Dismissal Order

On July 20, 2022, which by the time of the hearing on this Motion was more than three months ago, this Court (1) denied Plaintiffs' motion for leave to file the proposed Eighth Amended and Third Supplemental Complaint and (2) dismissed

[1] *See* section II. C. herein.

Plaintiff CARE from the action.[2] ECF No. 315. The Court found that all five *Foman* factors weighed against Plaintiffs. *Id.* at 13:11.

Plaintiffs' counsel asserts "the gravamen of the Court's order denying the motion was the asserted failure of Plaintiffs' counsel to adequately address the four *Fohman* [*sic*] factors, followed by the Court's conclusions that each of the factors – based on the record before the Court, including submissions from Defendants, *sua sponte* assertions of the Court, and again the failures of Plaintiffs' counsel to adequately refute either of them with a record that was available to do so – dictated denial of the motion." ECF No. 322-1, ¶ 3.

B. Deliberate Choices Are Not Excusable Neglect within the Meaning of Rule 60(b)

Even if the Court's order was motivated as Plaintiffs believe, counsel's profession of excusable neglect cannot redeem the Motion because strategic litigation decisions do not amount to excusable neglect. *See Latshaw v. Trainer Wortham & Co., Inc.*, 452 F3d 1097, 1101 (9th Cir. 2006) ("Rule 60(b)(1) is not intended to remedy the effects of a litigation decision that a party later comes to regret through subsequently-gained knowledge that corrects the erroneous legal advice of counsel. For purposes of subsection (b)(1), parties should be bound by and accountable for the deliberate actions of themselves and their chosen counsel. This includes . . . an innocent, albeit careless or negligent, attorney mistake[.]"); *Engleson v. Burlington N. R.R. Co.*, 972 F.2d 1038, 1043-44 (9th Cir. 1992); *Allmerica Fin. Life Ins. and Annuity Co. v. Llewellyn*, 139 F.3d 664, 665-66 (9th Cir. 1997); *see also Eskridge v. Cook County*, 577 F3d 806, 809-10 (7th Cir. 2009);

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[2] Defendants question whether Plaintiffs' Motion is ripe, as this Court's July 20 Order (ECF No. 315) was interlocutory only. *See* Fed. R. Civ. P. 60, Notes of Advisory Committee on Rules—1946 Amendment ("interlocutory judgments are not brought within the restrictions of the rule"). By contrast, a Local Rule 7-18 motion for reconsideration could properly be brought to consider an interlocutory order on limited grounds, although none of those grounds are present here. Furthermore, in the absence of good cause, a motion for reconsideration under Local Rule 7-18 must be brought no later than fourteen days post-order.

Ungar v. Palestine Liberation Organization, 599 F3d 79, 85 (1st Cir. 2010); *Federal's Inc. v. Edmonton Inv. Co.*, 555 F.2d 577 (6th Cir. 1977).

Were this not so, one might imagine, taken to its extreme, a party moving under Rule 60(b)(1) on the grounds that said party did not cite to a particular case. But the judicial system is not a casual game of golf between friends at the local municipal course where mulligans are freely allowed. Among other things, the stakes are simply too high in court, and re-dos are inconsistent with an adversarial system.

C. Plaintiffs' Excusable Neglect Evidence Is Inadmissible

Furthermore, the Defendants' hereby object to the Supplemental Declaration of Meir J. Westreich. The bulk of the declaration is argument and legal conclusions inappropriate for inclusion in a declaration.[3] Fed. R. Evid. 602, 701; *see Anhing Corp. v. Thuan Phong Co. Ltd.*, 215 F. Supp. 3d 919, 928 (C.D. Cal. 2015) (observing that under Local Rule 7-7 declarations must contain only factual, evidentiary matter and shall conform as far as possible to the requirements of Fed. R. Civ. P. 56(c)(4), which must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.); *see also In re Marriage of Heggie*, 99 Cal. App. 4th 28, 30 n.3, (2002) ("The proper place for argument is in points and authorities, not declarations.").

Defendants also object to the declarant's characterizations of Exhibit 50 — Exhibit 50 should speak for itself.[4] Finally, to the extent that Plaintiffs' evidence is different from or contradicted by filings on the docket, the latter should control as final expressions of the parties' intent and as docketed filings are subject to Rule 11.

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[3] *See* Paragraphs 2-6, 9-12, 16, 28-31, 33, 37-39, 41-43, 44-56, 65-66, 67-69, 73-74.
[4] Paragraphs 18-36, 64. Fed. R. Evid. 1004.

D. There Is No Need to Recount Counsels' Meet and Confer Efforts

Even if it is admissible, and without unnecessarily bringing additional evidence before the Court, the claim from Paragraph 69 of the Supplemental Declaration that "trial counsel replacement has conducted himself as if any and all pleading attacks are on the table, and . . . current Defendants [sic] counsel exploited that by taking full and unfair advantage, legally and rhetorically, rather than acknowledging their true involvement in getting us to this point" bears some response.

Defendants take the first above allegation to refer to Defendants' renewal of their statutory standing argument, *i.e.,* that Californians for Renewable Energy, Inc. was not at all relevant times certified as a Qualified Facility and therefore are not a proper plaintiff for purposes of PURPA. Plaintiffs, however, assume that the argument was ever off the table or that Defendants are somehow precluded from raising the defense.[5] In the absence of any prohibition, and Plaintiffs have identified no such prohibition, it is no misconduct on the part of Defendants to raise the defense; indeed, as a matter of professional responsibility, counsel are duty-bound to raise meritorious defenses. *See* Cal. Bus. & Prof. Code § 6068(c). As for the second above allegation, Defendants at no point sought to mislead the Court. Defendants submitted no declaration and referred only to matters on the public docket, and Plaintiffs were free on reply to address the delays they believe were occasioned by Defendants, and the Plaintiffs did so.[6]

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[5] Defendants have consistently raised the statutory standing issue. Dismissal Order at 12:6-7; *see also*, *e.g.*, ECF No. 32-1 at 21 (ECF pagination).

[6] *See* Combined Reply re Plaintiffs' Motion to File Eighth Amended and Third Supplemental Complaint and Motion to Reconsider Order of March 29, 2022, and Minute Entry of April 4, 2022 (ECF No. 307), Part I (1:27–4:16).

III. CONCLUSION

For the foregoing reasons, Defendants respectfully ask that this Court deny Plaintiffs' Motion.

Dated: September 30, 2022

Respectfully submitted,

CHRISTINE JUN HAMMOND
STEPHANIE E. HOEHN
GALEN LEMEI
IAN P. CULVER

By: *IAN P. CULVER*
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **PLAINTIFFS' (1) APPLICATION TO RE-OPEN (a) DEFENDANTS' MOTION TO DISMISS RE 7TH AMENDED COMPLAINT; AND (b) PLAINTIFFS' RESUBMITTED MOTION TO FILE 8TH AMENDED AND 3RD SUPPLEMENTAL COMPLAINT; AND (2) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFFS' NEW FERC PETITION PROCEEDINGS AND BRIEFING SCHEDULE; DECLARATION OF MEIR J. WESTREICH**

Plaintiffs hereby submit their applications for orders:

1. Re-opening Defendants' Motion to Dismiss re Seventh Amended Complaint ["Defendants' Motion"], and Plaintiffs' Resubmitted Motion to File Eighth Amended and Third Supplemental Complaint ["Plaintiffs' Motion"], in order to permit hearing on Plaintiffs' Request for Judicial Notice of Plaintiffs' New FERC Petition Proceedings ["Plaintiffs' RJN"] [Table of Exhibits, Nos. 61-68].

2. Setting a briefing schedule for the parties, as agreed by counsel, to address whether judicial notice should be afforded as requested, as follows: (a) that Defendants be afforded fourteen days to file a responsive brief and/or evidence thereon; (b) that Plaintiffs be thereafter afforded fourteen days to file a reply brief

and/or evidence thereon; and (c) after these two filings, the Defendants' Motion and Plaintiffs' Resubmitted Motion will again be under submission.

The applications and requests are submitted on the following grounds:

1. A key and as yet undecided issue in this case in both Defendants' Motion and Plaintiffs' Resubmitted Motion is whether Plaintiff CARE, a non-profit, tax exempt corporation consisting *inter alia* of members who are QF certified and individually have such standing, thereby has PURPA standing to act on their collective behalf, or whether each of the QF members must separately petition FERC and file any resulting federal actions;

2. A key and a yet undecided issue in this case and in both Defendants' Motion and Plaintiffs' Resubmitted Motion is whether Plaintiffs – who have been litigating the "avoided cost" definitions, formulae, criteria, standards and/or calculations ["CPUC Avoided Cost Policies"] – are required to file a new FERC Petition for PURPA Enforcement against regulated power utilities, and a new resulting federal action, each time Defendant CPUC and/or regulated power utilities modify their respective policies and/or practices on "avoided cost" definitions, formulae, criteria, standards and/or calculations [CPUC-Utility Avoided Cost Policies"];

3. Defendants' Motion and Plaintiffs' Resubmitted Motion are under submission.

4. Plaintiffs and other CARE QF members – Doug Macmillan, William and Shona Leroy, Carmela and Rigoberto Garnica and Charles Adams – again petitioned FERC, on August 26, 2022, to again seek PURPA enforcement of avoided cost mandates under PURPA and FERC regulations against regulated power utilities [Exhibit 61], and on October 25, 2022 FERC issued its election not to do so and a concomitant right to sue letter [Exhibit 68].

5. If Plaintiffs' positions in Defendants' Motion and Plaintiffs' Resubmitted Motion are upheld herein – *i.e.* that CARE has standing when acting on behalf of its

QF members, and any changed avoided cost policies are embraced by and may be litigated in the pending avoided cost claims – then the new FERC Petition and Proceedings would have some relevance, but a new federal action by Plaintiffs and the new QF FERC Petitioners would not be required.

6. If Plaintiffs' positions in Defendants' Motion and Plaintiffs' Resubmitted Motion are not upheld herein – i.e. that CARE does not have standing when acting on behalf of its QF members, and any changed avoided cost policies are not embraced by and may not be litigated in the pending avoided cost claims – then the new FERC Petition and Proceedings would require one of the following:

a. The new CARE QF Petitioners can and should be added, by amendment of the currently operative complaint, as new party plaintiffs in this pending action; and/or

b. Plaintiffs' challenges to the newly adopted CPUC Avoided Cost Policies and CPUC-Utility Avoided Cost Policies can and should be added, by amendment of the currently operative complaint, to the pending claims for PURPA enforcement of avoided cost mandates re "avoided cost" definitions, formulae, criteria, standards and/or calculations.

7. Requiring the filing of a new federal action seeking PURPA enforcement of avoided cost mandates re "avoided cost" definitions, formulae, criteria, standards and/or calculations which are substantially related and overlap with those in the current and pending legal action would be a waste of court and party resources, and would raise the risk of inconsistent adjudications.

8. Reopening the submitted motions is necessary to enable the Court to consider, after supplemental briefing, the import and effects of the new FERC Enforcement Petition and concomitant right to sue letter.

9. CPUC Defendants have again displayed their longstanding and ongoing obstructive tactics by seeking to derail the new FERC Petition with the false claim

that they were denied service and adequate notice thereof, and consequently denied a fair opportunity to oppose the new FERC Petition [Exhibit 66]:

a. To the contrary, they received adequate and timely actual written notice of the new FERC Petition on the 5th and 6th dates – out of 60 days – following the filing of the new FERC Petition. [Exhibits 63, 64, 67].

b. The form of the actual notice written notice they received was legally and equitably sufficient, as formal service is not required. [Exhibit 62, 63].

c. CPUC had 55 days to respond [Exhibits 63, 64 67], not the mere 8 days they falsely claimed [Exhibit 66].

This application is based on the following Declarations of Meir J. Westreich and Michael Boyd; concurrently filed Table of Exhibits, Nos. 61-68, for which judicial notice is sought; the pending briefings, evidence and pleadings involved in the Defendants' Motion and Plaintiffs' Resubmitted Motion; and the concurrently filed Memorandum of Points and Authorities.

NOTICE TO DEFENDANTS

Notice was given by e-mail to defense counsel of this intended application on November 7, 2022, with explanation of all grounds and copies of the FERC pleadings on which the RJN applies; and on November 8, 2022 Defendants indicated that they oppose this requested relief and intend to file opposition, and further requested that I relate to this Court that they wish to be allotted time until November 14, 2022 to file said opposition.

Dated: November 7, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

DECLARATION OF MEIR J. WESTREICH

1. I am attorney of record for Plaintiffs herein.

2. Plaintiffs hereby submit their applications for orders:

a. Re-opening Defendants' Motion to Dismiss re Seventh Amended Complaint ["Defendants' Motion"], and Plaintiffs' Resubmitted Motion to File Eighth Amended and Third Supplemental Complaint ["Plaintiffs' Motion"], in order to permit hearing on Plaintiffs' Request for Judicial Notice of Plaintiffs' New FERC Petition Proceedings ["Plaintiffs' RJN"]; and

b. Setting a briefing schedule for the parties, as agreed by counsel, to address whether judicial notice should be afforded as requested, as follows: (a) that Defendants be afforded fourteen days to file a responsive brief and/or evidence thereon; (b) that Plaintiffs be thereafter afforded fourteen days to file a reply brief and/or evidence thereon; and (c) after these two filings, the Defendants' Motion and Plaintiffs' Resubmitted Motion will again be under submission.

3. Judicial notice is requested of Exhibits 61-68 [concurrently filed Table of Exhibits, Nos. 61-68].

4. A key and a yet undecided issue in this case in both Defendants' Motion and Plaintiffs' Resubmitted Motion is whether Plaintiff CARE, a non-profit, tax exempt corporation consisting inter alia of members who are QF certified and individually have such standing, or whether each of them must separately petition FERC and file any resulting federal actions.

5. A key and a yet undecided issue in this case and in both Defendants' Motion and Plaintiffs' Resubmitted Motion is whether Plaintiffs – who have been litigating the "avoided cost" definitions, formulae, criteria, standards and/or calculations ["CPUC Avoided Cost Policies"] – are required to file a new FERC Petition for PURPA Enforcement against regulated power utilities, and a new resulting federal action, each time Defendant CPUC and/or regulated power utilities modify their respective policies and/or practices on "avoided cost" definitions,

formulae, criteria, standards and/or calculations [CPUC-Utility Avoided Cost Policies"].

6. Defendants' Motion and Plaintiffs' Resubmitted Motion are under submission.

7. Plaintiffs and other CARE QF members – Doug Macmillan, William and Shona Leroy, Carmela and Rigoberto Garnica and Charles Adams – again petitioned FERC, on August 26, 2022, to again seek PURPA enforcement of avoided cost mandates under PURPA and FERC regulations against regulated power utilities ["Petition to Enforce"] [Exhibit 61].

8. Under FERC regulations, Petitioners were not required to serve a copy or notice of their new Petition to Enforce [Exhibit 62], as formal public notice was filed by FERC on August 31, 2022 [Exhibit 63].

9. Nevertheless, on September 1, 2022, CARE did provide formal notice to CPUC with a copy of the Petition to Enforce, in a CPUC proceeding involving CPUC consideration of a new CPUC Avoided Cost Policy, in which CARE and CPUC are parties ["CPUC Avoided Cost Policy Proceeding"]. [Exhibit 64]. CARE also requested on October 3, 2022, CPUC Avoided Cost Policy Proceeding, that CPUC take notice of the Court's Order herein on Plaintiffs' Motion to File 8th Amended Complaint and 3rd Supplemental Complaint, mentioning the new FERC administrative exhaustion requirement and the fact that CARE was doing so. [Exhibit 65].

10. Notwithstanding these two different forms of express notice to CPUC, on October 18, 2022 CPUC filed s request that the Petition to Enforce be rejected on ostensible grounds that: (a) lack of service on CPUC; and (b) with allegedly only "recent" discovery of the Petition to Enforce and "only 8 days" to respond, CPUC had insufficient time to respond [Exhibit 66], to which CARE responded that notice was in fact given [as described herein] [Exhibit 67].

11. On October 25, 2022 FERC issued its written election not to initiate any new enforcement action and issued a concomitant right to sue letter to the Petitioners. [Exhibit 68].

12. If Plaintiffs' positions in Defendants' Motion and Plaintiffs' Resubmitted Motion are upheld herein – *i.e.* that CARE has standing when acting on behalf of its QF members, and any changed avoided cost policies are embraced by and may be litigated in the pending avoided cost claims – then the new FERC Petition and Proceedings would have some relevance, but a new federal action by Plaintiffs and the new QF FERC Petitioners would not be required.

13. If Plaintiffs' positions in Defendants' Motion and Plaintiffs' Resubmitted Motion are not upheld herein – i.e. that CARE does not have standing when acting on behalf of its QF members, and any changed avoided cost policies are not embraced by and may not be litigated in the pending avoided cost claims – then the new FERC Petition and Proceedings would require one of the following:

a. The new CARE QF Petitioners can and should be added, by amendment of the currently operative complaint, as new party plaintiffs in this pending action; and/or

b. Plaintiffs' challenges to the newly adopted CPUC Avoided Cost Policies and CPUC-Utility Avoided Cost Policies can and should be added, by amendment of the currently operative complaint, to the pending claims for PURPA enforcement of avoided cost mandates re "avoided cost" definitions, formulae, criteria, standards and/or calculations.

14. Requiring the filing of a new federal action seeking PURPA enforcement of avoided cost mandates re "avoided cost" definitions, formulae, criteria, standards and/or calculations which are substantially related and overlap with those in the current and pending legal action would be a waste of court and party resources, and would raise the risk of inconsistent adjudications.

15. Reopening the submitted motions is necessary to enable the Court to consider, after supplemental briefing, the import and effects of the new FERC Enforcement Petition and concomitant right to sue letter.

16. Under PURPA, Utility Avoided Cost Policies which violate PURPA's avoided cost mandates cannot be directly challenged by legal action against a regulated utility; rather, the action must be against the regulating agency, to compel it to enforce the PURPA avoided cost mandates.

17. The benefit of having Plaintiff CARE in this action is to broaden the scope of the affected regulated utilities beyond those involved with individual QF Plaintiffs Michael Boyd and Robert Sarvey. If that cannot be, an alternative means is to add additional CARE QF members who operate under additional regulated utilities, through a new FERC Petition with new CARE QF member Petitioners. [Exhibit 61].

18. Plaintiff has repeatedly briefed the contention that in an action for injunctive and/or declaratory relief – now the sole remaining claims for relief herein – a Defendant cannot moot the claims merely by changing policies, especially where the likelihood of recurrence remains highly probable, as when the new policies retain key unlawful elements from the prior policies already being challenged. But if these Defendants are allowed to moot the pending avoided cost issues, an alternative means is to add new avoided cost claims against the new legally defective avoided cost policies through a new FERC Petition challenging those new policies. [Exhibit 61].

19. Defendants have again displayed their longstanding and ongoing obstructive tactics by seeking to derail the new FERC Petition with the false claim that they were denied service and adequate notice thereof, and consequently denied a fair opportunity to oppose the new FERC Petition [Exhibit 66]:

a. To the contrary, they received adequate and timely actual written notice of the new FERC Petition on the 5th and 6th dates – out of 60 days – following the filing of the new FERC Petition. [Exhibits 63, 64, 67].

b. The form of the actual notice written notice they received was legally and equitably sufficient, as formal service is not required. [Exhibit 62, 63].

c. CPUC had 55 days to respond [Exhibits 63, 64 67], not the mere 8 days they falsely claimed [Exhibit 66].

20. Exhibits 61, 63 and 66-68 are true and correct conformed copies of filings in the aforementioned Petition to Enforce; and Exhibit 62 is true and correct copy of a policy document currently available on the FERC website. Exhibits 64 and 65 are true and correct conformed copies of filings in the aforementioned CPUC Avoided Cost Policy Proceeding.

21. Upon issuance of the Order to Reopen, the Court is requested to set a briefing schedule for the parties to address whether judicial notice should be afforded as requested, as follows: (a) that Defendants be afforded fourteen days to file a responsive brief and/or evidence thereon; (b) that Plaintiffs be afforded fourteen days to file a reply brief and/or evidence thereon; and (c) after these two filings, the Defendants' Motion and Plaintiffs' Resubmitted Motion will again be under submission.

NOTICE TO DEFENDANTS

22. Notice was given by e-mail to defense counsel of this intended application on November 7, 2022, with explanation of all grounds and copies of the FERC pleadings on which the RJN applies; and on November 8, 2022 Defendants indicated that they oppose this requested relief and intend to file opposition, and further requested that I relate to this Court that they wish to be allotted time until November 14, 2022 to file said opposition.

I declare under penalty of perjury that the above is true and correct. Executed on November 8, 2022 at Los Angeles, California.

s/ Meir J. Westreich

Meir J. Westreich

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **MEMORANDUM OF POINTS AND AUTHORITIES RE PLAINTIFFS' (1) APPLICATION TO RE-OPEN (a) DEFENDANTS' MOTION TO DISMISS RE 7TH AMENDED COMPLAINT; AND (b) PLAINTIFFS' RESUBMITTED MOTION TO FILE 8TH AMENDED AND 3RD SUPPLEMENTAL COMPLAINT; AND (2) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFFS' NEW FERC PETITION PROCEEDINGS AND BRIEFING SCHEDULE**

MEMORANDUM OF POINTS AND AUTHORITIES

I.
THE MATTERS ON WHICH JUDICIAL NOTICE IS SOUGHT INDEPENDENTLY WARRANT LEAVE TO AMEND AND/ OR SUPPLEMENT THE OPERATIVE COMPLAINT

As applied by this Court in its Order of March 9, 2022, "Courts are free to grant a party leave to amend whenever 'justice so requires,' Fed.R.Civ.P. 15(a)(2), and requests for leave should be granted with 'extreme liberality.' *Owens v. Kaiser Found. Health Plan, Inc*., 244 F.3d 708, 712 (9th Cir.2001) (*quoting Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.1990)). *Moss v. U.S. Secret*

Service, 572 F.3d 962, 972 (9th Cir. 2009). In the absence of any case management order specifying a deadline for pleading motions, whether to grant a motion for leave to amend is governed by "the liberal standard" of Fed.R.Civ.P. 15(a).

> "Rule 15(a)'s liberal amendment policy . . . focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party . . . [citation omitted]."

See In re W. States Wholesale Natural Gas Antitrust Litigation, 715 F.3d 716, 737 (9th Cir. 2013). "The court should freely give leave when justice so requires." *In re W. States Wholesale Natural Gas Antitrust Litigation*, 715 F.3d at 737 n.16.

Likewise, under Fed.R.Civ.P. 15(d), a plaintiff may cure an Article III standing defect by filing a supplemental complaint alleging facts that arose after the filing of the original complaint, and should also include change in circumstances based on actions of the Defendant. *See Northstar Financial Advisors Inc. v. Schwab Investors*, 779 F.3d 1036, 1044 (9th Cir. 2015). *See generally Scahill v. District of Columbia*, 909 F.3d 1177, 1183 (D.C.Cir. 2018) (describing split in circuits, and joining 9th Circuit and others in applying this standard). Hence, "a party [may] serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented." Fed.R.Civ.P. 15(d).

The Ninth Circuit's first reverse and remand order – on grounds *inter alia* of standing and jurisdiction re CARE Plaintiffs' PURPA claims – applied to a First Amended Complaint that was later superseded by a Second Amended Complaint, and later became the court-approved basis for a Fifth Amended and First Supplemental Complaint implementing the first remand order. The Ninth Circuit's second reverse and remand order applied to the Fifth Amended and First Supplemental Complaint, later superseded by the stipulated and ordered Sixth Amended and Second Supplemental Complaint seeking to implement the second remand order, followed by a Seventh Amended Complaint. [There were no Third or Fourth Amended Complaints filed herein].

A Defendants' Motion to Dismiss the Seventh Amended Complaint is now pending and under submission, as is a Plaintiffs' Resubmitted Motion to File the Eighth Amended and Third Supplemental Complaint. In the submitted motions, two key issues are:

1. Whether Plaintiff CARE, a non-profit, tax exempt corporation consisting *inter alia* of members who are QF certified and individually have PURPA standing, thereby has PURPA standing to act on their collective behalf, or whether each of the QF members must separately petition FERC and file any resulting federal actions? Plaintiffs have argued in the affirmative in the submitted motions.

2. Whether Plaintiffs – who have been litigating the "avoided cost" definitions, formulae, criteria, standards and/or calculations ["CPUC Avoided Cost Policies"] – are required to file a new FERC Petition for PURPA Enforcement against regulated power utilities, and a new resulting federal action, each time Defendant CPUC and/or regulated power utilities modify their respective policies and/or practices on "avoided cost" definitions, formulae, criteria, standards and/or calculations [CPUC-Utility Avoided Cost Policies"]? Plaintiffs have argued in the negative in the submitted motions.

While these issues have been being briefed and are now pending, Plaintiffs have alternatively sought to respond to these issues by initiating on August 26, 2022 a new FERC Petition, which addresses those issues as follows: (a) the FERC Petition is submitted on behalf of additional CARE QF members, involving more regulated utilities [Exhibit 61]; and (b) the new FERC Petition again seeks PURPA enforcement of avoided cost mandates under PURPA and FERC regulations against regulated power utilities and their newly adopted CPUC-Utility Avoided Cost Policies [Exhibit 61]. On October 25, 2022, FERC issued its election not to initiate an enforcement action and issued a concomitant right to sue letter. [Exhibit 68].

There new events – commencing August 26, 2022 [Exhibit 61] but only ripening on October 25, 2022 [Exhibit 68] – should be considered now by judicial

notice, in context of the pending motions under submission. Failure to do so will only delay the inevitable, in a further motion based on new evidence, or in a new action that largely duplicates the pending action.

II.
IF CURRENT PLEADINGS DO NOT SUFFICE FOR ADDRESSING CHANGES IN THE CPUC-UTILITY AVOIDED COST POLICIES, ADDING THE NEW POLICIES WILL DO SO

Injunctive and declaratory relief may be sought for both "*past*, as well as *future*." *See Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 646 (2002) (emphasis in original). Furthermore,

> "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. [Citations]. . . . . The defendant is free to return to his old ways. [There is] a public interest in having the legality of the practices settled, ..."

United States v. Grant Co, 345 U.S. 629, 632 (1953). *Accord, City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982).

> "The purpose of an injunction is to prevent future violations, [citation] . . . . The necessary determination is that there exists some cognizable danger of recurrent violation, something more than **the mere possibility which serves to keep the case alive**."

United States v. Grant Co, 345 U.S. at 632 (emphasis added). *Accord, City of Mesquite*, 455 U.S. at 289 & n.10. Alternatively, "Congress plainly intended declaratory relief to act as an alternative to the strong medicine of the injunction." *Steffel v. Thompson*, 415 U.S. 452, 466 (1974).

One way or the other, the new CPUC-Utility Avoided Cost Policies are now properly subject to this litigation. Requiring a new action would be a pointless waste of time, effort and cost for all concerned.

CONCLUSION

Plaintiffs urge this Court to re-open the record on the pending motions, and thence take judicial notice of Exhibits 61-68, so that they can be considered fully in connection with both pending motions, after affording Defendants a reasonable opportunity to show why not to do so.

Dated: November 7, 2022

Respectfully submitted,

s/ Meir J. Westreich

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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al. Plaintiffs, vs. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al. Defendants.	Case No: 2:11-cv-04975-JWH Hon. John W. Holcomb, District Judge **DEFENDANTS' OPPOSITION TO PLAINTIFFS' APPLICATION TO RE-OPEN SUBMITTED MOTIONS AND REQUEST FOR JUDICIAL NOTICE OF NEW FERC PETITION PROCEEDINGS**

Defendants hereby oppose the Application of Plaintiffs to Re-Open Submitted Motions and Request for Judicial Notice of New FERC Petition Proceedings.

I. INTRODUCTION

Plaintiffs style their Application as one to "re-open" two submitted motions "in order to permit hearing on Plaintiffs' Request for Judicial Notice of Plaintiffs' New FERC Petition Proceedings." In actuality, Plaintiffs are (1) asking for the last word on Defendants' Motion to Dismiss and (2) prematurely asking the Court to reconsider its Motion for Reconsideration (*i.e.*, Plaintiffs' Renewed Motion for Leave (ECF No. 322)) before the Court has acted on the submitted motions.

Plaintiffs and other alleged CARE QF members could have petitioned FERC at any time prior to August 26, 2022. Plaintiffs' Application (1) fails to explain why the Application could not have been brought sooner or as a noticed motion, (2) does not cite to legal authority allowing the relief Plaintiffs seek, and (3) fails to explain why Plaintiffs did not apprise the Court of their Petition sooner. For these and the other reasons stated herein, the Application should be denied.

II. THE APPLICATION IS EITHER AN IMPROPER SUR-REPLY OR PREMATURE MOTION FOR RECONSIDERATION

On October 18, 2022, this Court issued its Chambers Order vacating the hearings set for October 21, 2022, writing "[t]he motions stand submitted on the papers timely filed." As of the date of this Opposition, the motions have been submitted for twenty-seven (27) days, and Plaintiffs waited twenty-one (21) days to file their Application.

Local Rule 7-10 contemplates a sur-reply by the *opposing party* but only with leave of court. Plaintiffs are opposing only Defendants' Motion to Dismiss (ECF No. 316). With respect to their Renewed Motion for Leave (ECF No. 322), Plaintiffs are the moving parties. Thus, to the extent that Plaintiffs are seeking leave to file a sur-reply, they may hypothetically do so only regarding the Motion to Dismiss. Also, sur-replies are typically allowed only when due process requires the opposing party have the opportunity to address issues or evidence raised for the first

time on reply. *See Afifeh v. Ahmadabadi*, No. 2:22-CV-00928-SB-AFM, 2022 WL 3016147. In their Application, Plaintiffs have identified no such issues or evidence raised by Defendants for the first time on reply, and there are none.

It is also highly-irregular to seek leave to file a sur-reply after the case has been submitted. Local Rule 83-9.1.1(a) defines "submitted" as "the date the last memorandum or other pleading is permitted to be filed." One may read the rule to bar Plaintiffs Application.

Whether to grant or deny leave to file a sur-reply is within the Court's discretion. *Afifeh*, 2022 WL 3016147, at *1. However, that discretion should be exercised only where a valid reason exists for it, such as when the movant raises new arguments in its reply brief, and leave should be denied when a reply neither presents new arguments nor new evidence. *Id.* Precedent in this District requires that the Application be denied.

The FERC Petition (Plaintiffs' Exhibit 61 (ECF No. 328-2, pp. 3-30, Bates FERC PFE 001-028) is dated August 25, 2022, and was filed on August 26, 2022, which significantly ***predates*** Plaintiffs' Renewed Motion for Leave and even predates Plaintiffs' Opposition to Defendants' Motion to Dismiss. Despite this, Plaintiffs waited until November 8, 2022, to notify the Court, and Plaintiffs have not explained why. The issues and evidence that Plaintiffs seek to introduce at this late date could have been introduced long before October 18, the date the motions were submitted.

With respect to motion practice, this Court's Local Rules provide a mechanism to bring to the Court's attention "the emergence of new material facts." However, Local Rule 7-18, setting forth the grounds for a motion for reconsideration, may only be brought "after the Order was entered." Further, the FERC Petition is not new, and of the eight (8) items as to which Plaintiffs request this Court take judicial notice, only two (2) post-date the date the motions were deemed submitted. To follow Local Rule 7-18, Plaintiffs should wait until after this

Court rules on the submitted motions to seek to introduce the exhibits; however, Plaintiffs should also be mindful that not all the exhibits are "new" and perhaps none of them are "material."

Plaintiffs have cited no legal authority for the relief they seek in their Application, whereas there is ample authority to the contrary: (1) Plaintiffs' papers do not qualify as a sur-reply; (2) the local rules preclude the re-opening of a submitted matter; (3) Plaintiffs' Application is a premature motion for reconsideration; and (4) the evidence is not new. For these reasons, the Application should be denied.

III. THERE IS NO REASON TO RE-OPEN THE SUBMITTED MOTIONS

Without explanation, Plaintiffs state that "reopening the submitted motions is necessary to enable the Court to consider, after supplemental briefing, the import and effects of the new FERC Enforcement Petition and concomitant right to sue letter." Plaintiffs do not provide an explanation because there is none. There is a procedure for sur-replies, and there is a procedure for motions for reconsideration, but there is rightfully no procedure for re-opening a submitted motion. There is no reason why the Court cannot and should not consider the exhibits in the procedurally proper context, if indeed they are properly subject to judicial notice, after the Court rules on the submitted motions. Plaintiffs speak repeatedly of their concern for court and party resources, but where were those concerns between August 25 and October 18?

IV. CONCLUSION

For the foregoing reasons, Defendants request that this Court deny Plaintiffs' Application. Nevertheless, and if the Court is inclined to take judicial notice and accept Plaintiffs' Application and memorandum in connection with the submitted

motions, Defendants request, for reasons of due process and pursuant to Federal Rule of Evidence 201(e), that the Court set a briefing schedule in line with Plaintiffs' proposed briefing schedule.

Dated: November 14, 2022

Respectfully submitted,

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By: *Ian P. Culver*

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOLUTIONS FOR UTILITIES, INC., et al., Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION, et al., Defendants.	Case No. 2:11-CV-04975-JWH-JCG **REPLY RE PLAINTIFFS' (1) APPLICATION TO RE-OPEN (a) DEFENDANTS' MOTION TO DISMISS RE 7TH AMENDED COMPLAINT; AND (b) PLAINTIFFS' RESUBMITTED MOTION TO FILE 8TH AMENDED AND 3RD SUPPLEMENTAL COMPLAINT; AND (2) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFFS' NEW FERC PETITION PROCEEDINGS**

If there was previously any doubt that Defendant CPUC is operating in an obstructionist mode, "Defendants' Opposition to Plaintiffs' Application to Re-open Submitted Motions and Request for Judicial Notice of New FERC Petition Proceedings" should remove any remaining vestiges. Despite the fact that they received 3xactly what they were demanding – a new Plaintiffs' FERC Petition and a new FRC Right to Sue Letter addressing CPUC's new versions of the PURPA and avoided cost enforcement formulae – they insist that this Court refuse to acknowledge its existence. For what truly meaningful reason?

Without the new now completed FERC proceedings, CPUC can continue to shield the regulated power utilities from final and governing relief requiring compliance with the PURPA/FERC avoided cost mandates, as now further defined by the second Ninth Circuit opinion herein. How so? By the following sequence:

1. Stall the current federal proceedings herein until they have completed their superseding modifications to their new, non-compliant avoided cost definitions and new NEM and other programs, both of which must comply with PURPA/FERC avoided cost mandates;

2. Insist that any challenges to the newly modified definitions and programs must be brought in a new FERC petition, and in new federal action;

3. Move successfully for summary judgment herein on grounds that the previously plead and now superseded definitions and programs are now moot as they no longer exist; and

4. Resume the dilatory practices of ignoring PURPA/FERC avoided cost mandates, thereby enabling the regulated utilities to do so s well.

From the first salvos of this litigation, Plaintiffs made clear their intent to obtain final adjudication on CPUC/utilities required compliance with PURPA/FERC avoided cost mandates, and partially succeeded in the second appellate opinion# herein, albeit requiring remand to flesh out some issues in light of the particular standards adopted therein. This played out as follows:

a. When CPUC challenged PURPA/FERC standing of CARE, Plaintiffs responded by both arguing that CARE could represent its QF members, and as a protective hedge amending without need for leave or court, to add two of its QF members as new Plaintiffs [Michael Boyd and Robert Sarvey];

b. Initiated new FERC Petitions for the new Plaintiffs, while urging the Court – over CPUF objections – that it can allow the completion of the new FERC proceedings to enable PURPA/FERC compliance by the new Plaintiffs, which was denied by the District Court until later permitted in the first appellate opinion herein;

c. CPUC then dropped its objections to CARE's PURPA/FERC standing, as it did not accomplish anything when CARE QF members can readily be added and the scope of equitable relief is thus preserved;

d. CPUC revived its objections to CARE's PURPA/FERC standing, along with demands for new FERC petitions every time CPUC modifies its avoided cost definitions and accompanying NEM and other programs which rely on the avoided cost definitions, and so thereby enabled their dilatory, obstructionist tactics; and

e. Plaintiffs have plainly and repeatedly stated in current and recent motion practice that they can add new CARE QF members as party Plaintiffs, and file new FERC petitions, if the Court determines against Plaintiffs' threshold contentions that CARE can litigate on behalf of its QF members and that new FERC petitions are not required each time CPUD changes the challenged definitions and programs, so long as the core avoided cost issues remain the same.

CPUC was clearly notified of the new FERC petitions and thereby also the new CARE QF member petitioners on August 31, 2022 and September 1, 2022, respectively. [Exhibits 63 & 64]. CPUC belatedly – on the 57th day following filing of the new FERC Petitions – sought to derail them with a Motion to Reject them based on the false claim that they were not served with the FERC Petitions and only learned of them on the 52nd day [Exhibit 66]; and had they succeeded – they did not [Exhibits 67-68], they would have obviated need for the now pending request for judicial notices for those new FERC proceedings.

The new FERC proceedings ripened when the belated, last minute CPUC request to reject the new petitions were rejected and the new right to sue letter was issued on October 25, 2022. [Exhibit 68]. This is not a sur-reply; rather, it is a request to recognize and address the new right to sue letter. It would be a thorough waste of judicial and party resources to proceed to rule on the pending motions, then have a new round of motions to reconsider based on the new event; and an even greater waste of judicial and party resources to proceed with a new, almost identical lawsuit.

The Court can put an end to this obfuscation by either adopting the Plaintiffs' views that CARE can represent / litigate on behalf of its QF members and that voluntary cessation of the objectionable conduct does not obviate the pending equitable relief claims, *see United States v. Grant Co*, 345 U.S. 629, 632 (1953); *City of Mesquite v. Aladdin Castle, Inc.*, 455 U.S. 283, 289 & n.10 (1982) – repeatedly asserted positions which CPUC hasd so far failed to address even once; or accepting that judicially noticed new FERC petitions and right to sue letter [Exhibits 61 & 68] moot the CPUC objections by enabling Plaintiffs to add the new petitioners as new party Plaintiffs and add new allegations of the new FERC petitions and right to sue letter. Once done, either way, the parties can finalize the pleadings and finally get to the avoided cost issues that will conclude this litigation.

Dated: November 16, 2022

Respectfully submitted,

s/ Meir J. Westreich

Meir J. Westreich
Attorney for Plaintiffs

(JCGx),APPEAL,CLOSED,DISCOVERY,MANADR,PROTORD,REOPENED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA (Western Division - Los Angeles)
CIVIL DOCKET FOR CASE #: 2:11-cv-04975-JWH-JCG

Solutions for Utilities Inc et al v. California Public Utilities Commission et al
Assigned to: Judge John W. Holcomb
Referred to: Magistrate Judge Jay C. Gandhi
Case in other court: 9th CCA, 13-55206
9th Circuit, 17-55297
9th CCA, 23-55291
Cause: 28:1331 Fed. Question

Date Filed: 06/10/2011
Date Terminated: 03/13/2023
Jury Demand: Plaintiff
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

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Mediator (ADR Panel)

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Date Filed	#	Docket Text
06/10/2011	1	COMPLAINT against Defendants California Public Utilities Commission, Southern California Edison Co. Case assigned to Judge S. James Otero for all further proceedings. Discovery referred to Magistrate Judge Jay C. Gandhi.(Filing fee $ 350:PAID) Jury Demanded., filed by plaintiffs Solutions for Utilities Inc, Californians for Renewable Energy Inc.(ghap) (Additional attachment(s) added on 6/14/2011: # 1 Part 2) (mg). (Entered: 06/13/2011)
06/10/2011		21 DAY Summons Issued re Complaint - (Discovery) 1 as to Defendants California Public Utilities Commission, Southern California Edison Co. (ghap) (Entered: 06/13/2011)
06/10/2011	2	CERTIFICATION AND NOTICE of Interested Parties filed by Plaintiffs Californians for Renewable Energy Inc, Solutions for Utilities Inc, identifying Other Affiliate Mary Hoffman for Solutions for Utilities Inc; Other Affiliate Michael Boyd for Californians for Renewable Energy Inc. (ghap) (mg). (Entered: 06/13/2011)
06/10/2011	3	NOTICE TO PARTIES OF ADR PROGRAM filed.(ghap) (Entered: 06/13/2011)
06/20/2011	4	INITIAL STANDING ORDER FOR CASES ASSIGNED TO JUDGE S. JAMES OTERO by Judge S. James Otero, (lc) (Entered: 06/21/2011)
06/28/2011	5	STIPULATION Extending Time to Answer the complaint as to Southern California Edison Co answer now due 8/4/2011, filed by DEFENDANT Southern California Edison Co.(Goldstein, Justin) (Entered: 06/28/2011)
06/28/2011	6	Certification and Notice of Interested Parrties filed by Defendant Southern California Edison Co (Goldstein, Justin) (Entered: 06/28/2011)
06/28/2011	7	NOTICE of Change of Attorney Information for attorney Justin M Goldstein counsel for Defendant Southern California Edison Co. Adding James Polish as attorney as counsel of record for Southern California Edison Company for the reason indicated in the G-06 Notice. Filed by defendant Southern California Edison Company (Goldstein, Justin) (Entered: 06/28/2011)
06/30/2011	8	First STIPULATION Extending Time to Answer the complaint as to California Public Utilities Commission answer now due 8/8/2011, re Complaint - (Discovery), Complaint - (Discovery) 1 filed by Plaintiffs Solutions for Utilities Inc; Californians for Renewable

		Energy Inc; California Public Utilities Commission.(Westreich, Meir) (Entered: 06/30/2011)
08/04/2011	9	***THIS DOCUMENT IS STRICKEN, PURSUANT TO ORDER, DOCUMENT NUMBER 13 ***. AMENDED DOCUMENT filed by Plaintiffs Californians for Renewable Energy Inc, Solutions for Utilities Inc. *First Amended Complaint* (Westreich, Meir). Modified on 8/9/2011 (jp). (Entered: 08/05/2011)
08/05/2011	10	NOTICE of Change of Attorney Information for attorney Harvey Yale Morris counsel for Defendant California Public Utilities Commission. Changing e-mail to hym@cpuc.ca.gov. Adding Harvey Yale Morris as attorney as counsel of record for California Public Utilities Commission for the reason indicated in the G-06 Notice. Filed by Defendant California Public Utilities Commission (Morris, Harvey) (Entered: 08/05/2011)
08/05/2011	11	NOTICE of Change of Attorney Information for attorney Elizabeth M McQuillan counsel for Defendant California Public Utilities Commission. Adding Elizabeth M. McQuillan as attorney as counsel of record for California Public Utilities Commission for the reason indicated in the G-06 Notice. Filed by Defendant California Public Utilities Commission (McQuillan, Elizabeth) (Entered: 08/05/2011)
08/08/2011	12	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Amended Document (Non-Motion) 9 . The following error(s) was found: Incorrect event selected. The correct event is: Amended Complaint. Other error(s) with document(s): Amended Document is an initiating Amended Complaint. Initiating documents are filed manually at the Civil Intake window and not e-filed. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (vh) (Entered: 08/08/2011)
08/08/2011	13	ORDER TO STRIKE ELECTRONICALLY FILED DOCUMENTS by Judge S. James Otero: the following document(s) be STRICKEN for failure to comply with the Local Rules, General Order and/or the Courts Case Management Order: First Amended Complaint 9 , for the following reasons: (1) Incorrect event selected. Correct event is Amended Complaint. (2) Amended Document is an initiating Amended Complaint. Initiating documents are filed manually at the Civil Intake window and not e-file. Counsel is required to strictly comply with this Court's Standing Order regarding Mandatory Chambers copies. (jp) (Entered: 08/09/2011)
08/08/2011	14	MINUTE IN CHAMBERS ORDER TO SHOW CAUSE RE DISMISSAL FOR LACK OF PROSECUTION by Judge S. James Otero: Plaintiff is hereby ordered to show cause in writing by not later than 8/15/2011 why this action should not be dismissed for lack of prosecution. The court will consider the filing of the following as an appropriate response to this Order to Show Cause, on or before the above date: Proof of service of summons and complaint. Failure to respond to the court's Order may result in the dismissal of the action. (jp) (Entered: 08/09/2011)
08/10/2011	20	FIRST AMENDED COMPLAINT against defendants California Public Utilities Commission, Southern California Edison Co, Michael R Peevey, Timothy Alan Simon, Michael R Florio, Catherine J K Sandoval, Mark J Ferron, Rachel Chong, John A Bohn, Dian M Gruenich, Nancy E Ryan amending Complaint - (Discovery) 1 Jury Demand,filed by plaintiffs Solutions for Utilities Inc, Californians for Renewable Energy Inc, Michael E Boyd, Robert Sarvey (lc) (Additional attachment(s) added on 8/15/2011: # 1 issued summons) (lc). (Attachment 1 replaced on 8/15/2011) (lc). (Entered: 08/15/2011)
08/11/2011	15	NOTICE of Manual Filing filed by Plaintiffs Californians for Renewable Energy Inc, Solutions for Utilities Inc of First Amended Complaint for Damages and Equitable Relief.

		(Westreich, Meir) (Entered: 08/11/2011)
08/11/2011	16	*Supplemental* Certification & Notice of Interested Parties filed by Plaintiffs All Plaintiffs, identifying All Plaintiffs and Defendants Named in First Amended Complaint. (Westreich, Meir) (Entered: 08/11/2011)
08/11/2011	17	PROOF OF SERVICE Executed by Plaintiff Solutions for Utilities Inc, Californians for Renewable Energy Inc, upon Plaintiff California Public Utilities Commission served on 6/17/2011, answer due 8/8/2011; Southern California Edison Co served on 6/13/2011, answer due 8/4/2011. Service of the Summons and Complaint were executed upon Substituted Service on California Public Utility Comm'n; Service on Person Authorized to Accept Service for Southern Calif. Edison Co. in compliance with California Code of Civil Procedure by service on a domestic corporation, unincorporated association, or public entitysubstituted service on a domestic corporation, unincorporated association, or public entity. Original Summons returned. (Westreich, Meir) (Entered: 08/11/2011)
08/11/2011	18	RESPONSE filed by Plaintiffs Californians for Renewable Energy Inc, Solutions for Utilities Incto Minutes of In Chambers Order/Directive - no proceeding held, Set/Reset Deadlines,,,, 14 (Attachments: # 1 Exhibit)(Westreich, Meir) (Entered: 08/12/2011)
08/11/2011		21 DAY Summons Issued re First Amended Complaint,, 20 as to defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon, Southern California Edison Co.(Late docketing due to Clerks Office error). (lc) (Entered: 03/12/2012)
08/12/2011	19	NOTICE OF ERRATA filed by Plaintiffs Californians for Renewable Energy Inc, Solutions for Utilities Inc. correcting Response (non-motion) 18 *Omitted Exhibits Inserted* (Westreich, Meir) (Entered: 08/12/2011)
08/16/2011	21	MINUTE ORDER (IN CHAMBERS) by Judge S. James Otero: Scheduling Conference set for 10/3/2011 at 08:30 AM; Rule 26 Meeting Report due by 9/19/2011; in order to assist counsel, court has included a schedule form for pretrial dates to be completed by counsel and submitted in conjunction with their rule 26(f) report; if case is part of ADR program, counsel must confer and jointly complete ADR Pilot Program Questionnaire and to file it concurrently with the Joint Rule 26(f) report; plaintiff counsel directed to give notice of scheduling conferences to all parties. (sch) (Entered: 08/16/2011)
08/18/2011	22	STIPULATION for Extension of Time to File as to Amended Complaint,, 20 filed by defendant Southern California Edison Co. (Attachments: # 1 Proposed Order)(Goldstein, Justin) (Entered: 08/18/2011)
08/24/2011	23	ORDER Approving Stipulation to Extend Time for Defendants to Respond to First Amended Complaint 22 by Judge S. James Otero. IT IS HEREBY ORDERED that the date for Defendants Public Utilities Commission of California and Southern California Edison Company to respond to the First Amended Complaint is extended from August 29, 2011 to and including September 7, 2011. (sch) (Entered: 08/25/2011)
08/25/2011	24	NOTICE of Association of Counsel filed by Defendant Southern California Edison Co. (Polish, James) (Entered: 08/25/2011)
09/01/2011	25	NOTICE of Change of Attorney Information for attorney Harvey Yale Morris counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Adding Harvey Yale Morris as attorney as counsel of record for Peevey, Simon, Florio, Sandoval, Ferron, Chong, Bohn, Grueneich, Ryan for the reason indicated in the G-06 Notice. Filed by defendants Peevey, Simon, Florio, Sandoval, Ferron, Chong, Bohn, Grueneich, Ryan (Morris, Harvey) (Entered: 09/01/2011)

09/01/2011	26	NOTICE of Change of Attorney Information for attorney Harvey Yale Morris counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Adding Elizabeth M. McQuillan as attorney as counsel of record for Peevey, Simon, Florio, Sandoval, Ferron, Chong, Bohn, Grueneich, Ryan for the reason indicated in the G-06 Notice. Filed by defendants Peevey, Simon, Florio, Sandoval, Ferron, Chong, Bohn, Grueneich, Ryan (Morris, Harvey) (Entered: 09/01/2011)
09/01/2011	27	*Certification and Notice* of Interested Parties filed by defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon, identifying Peevey, Simon, Florio, Sandoval, Ferron, Chong, Bohn, Grueneich, Ryan. (Morris, Harvey) (Entered: 09/01/2011)
09/01/2011	28	EX PARTE APPLICATION to Stay pending Court's Ruling on Motions to Dismiss filed by defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Memorandum, # 2 Declaration, # 3 Proposed Order)(Morris, Harvey) (Entered: 09/01/2011)
09/02/2011	29	EX PARTE APPLICATION for Joinder in EX PARTE APPLICATION to Stay pending Court's Ruling on Motions to Dismiss 28 filed by Defendant Southern California Edison Co. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of James Polish, # 3 Proposed Order Granting Ex Parte Application)(Polish, James) (Entered: 09/02/2011)
09/06/2011	30	REQUEST to Dismiss Fifth Claim of First Amended Complaint filed by defendant Southern California Edison Co. (Attachments: # 1 Proposed Order)(Goldstein, Justin) (Entered: 09/06/2011)
09/06/2011	31	OPPOSITION to EX PARTE APPLICATION to Stay pending Court's Ruling on Motions to Dismiss 28 , EX PARTE APPLICATION for Joinder in EX PARTE APPLICATION to Stay pending Court's Ruling on Motions to Dismiss 28 EX PARTE APPLICATION for Joinder in EX PARTE APPLICATION to Stay pending Court's Ruling on Motions to Dismiss 28 29 *PARTIAL OPPOSITION* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Westreich, Meir) (Entered: 09/06/2011)
09/07/2011	32	NOTICE OF MOTION AND MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* filed by defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Motion set for hearing on 10/31/2011 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum, # 2 Declaration, # 3 Request for Judicial Notice, # 4 Proposed Order Granting Request for Judicial Notice, # 5 Proposed Order Granting Motion to Dismiss)(Morris, Harvey) (Entered: 09/07/2011)
09/07/2011	33	NOTICE OF MOTION AND MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)*, MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* filed by Defendant Southern California Edison Co. Motion set for hearing on 10/31/2011 at 10:30 AM before Judge S. James Otero. (Attachments: # 1 Declaration of Justin M. Goldstein, # 2 Exhibit Request for Judicial Notice & Exhs. 1-4, # 3 Exhibit RJN Exhs. 5-10, # 4 Proposed Order Granting SCE's Request for Judicial Notice, # 5 Proposed Order Granting Motion to Dismiss)(Polish, James) (Entered: 09/07/2011)

09/08/2011	34	MINUTES (IN CHAMBERS)ORDER by Judge S. James Otero: ORDER GRANTING DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS' EX PARTE APPLICATION FOR ORDER VACATING SCHEDULING CONFERENCE AND STAYING DISCOVERY 28 ; ORDER GRANTING DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S EX PARTE APPLICATION FOR JOINDER 29 .A Scheduling Conference will be set for December 5, 2011 at 8:30 a.m. before District Judge S. James Otero in Courtroom 1, 312 N. Spring St., Los Angeles, CA 90012. Counsel are directed to comply with Rule 26(f) of the Federal Rules of Civil Procedure in a timely fashion and to file a Joint Rule 26(f) report on or before November 21. For instructions on thecontent of this Joint Rule 26(f) report, the Court directs the parties to the Court's August 16, 2011 Minute order. (lc) (Entered: 09/08/2011)
09/08/2011	35	ORDER by Judge S. James Otero: granting 30 stipulation to dismiss withoutprejudice the Fifth Claim of the First Amended Complaint for Declaratory Reliefagainst Defendant Southern California Edison Company. (lc) (Entered: 09/09/2011)
09/28/2011	36	STIPULATION for Extension of Time to File Defendants' Motions to Dismiss filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc.(Westreich, Meir) (Entered: 09/28/2011)
09/29/2011	37	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Stipulation for Extension of Time to File motions to dismiss 36 . The following error(s) was found: Missing Proposed order which was not submitted as a separate attachment. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 09/29/2011)
10/01/2011	38	MEMORANDUM in Opposition to MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* 32 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Westreich, Meir) (Entered: 10/01/2011)
10/02/2011	39	MEMORANDUM in Opposition to MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* 32 *Errata with Tables* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Declaration re Errata & Oversized Brief)(Westreich, Meir) (Entered: 10/02/2011)
10/03/2011	40	OPPOSITION to MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* 33 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Defendant Southern California Edison Co. (Attachments: # 1 Declaration Meir J. Westreich, # 2 Exhibit)(Westreich, Meir) (Entered: 10/03/2011)
10/04/2011	45	ORDER by Judge S. James Otero: denying 42 Plaintiffs Corrected APPLICATION to Exceed Page Limitation Opposition to CPUC Motion to Dismiss, etc. (lc) (Entered: 10/07/2011)

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10/05/2011	41	APPLICATION to Exceed Page Limitation Oppositiion to CPUC Motion to Dismiss filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. Application set for hearing on 10/31/2011 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Proposed Order)(Westreich, Meir) (Entered: 10/05/2011)
10/05/2011	42	Corrected APPLICATION to Exceed Page Limitation Opposition to CPUC Motion to Dismiss, etc. filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Exhibit, # 2 Proposed Order)(Westreich, Meir) (Entered: 10/05/2011)
10/06/2011	43	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: APPLICATION to Exceed Page Limitation Opposition to CPUC Motion to Dismiss 41 . The following error(s) was found: calendared erroneous Hearing. Clerk Notes application was refiled correctly as docket entry # 42.The Clerk has termed the erroneous filing with hearing # 41 ONLY. # 42 the Corrected application remains the Operative application. Therefore, No response to this notice is required. (lc) (Entered: 10/06/2011)
10/06/2011	44	OPPOSITION to Corrected APPLICATION to Exceed Page Limitation Opposition to CPUC Motion to Dismiss, etc. 42 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (McQuillan, Elizabeth) (Entered: 10/06/2011)
10/07/2011	46	REPLY In Support of Corrected APPLICATION to Exceed Page Limitation Opposition to CPUC Motion to Dismiss, etc. 42 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Exhibit)(Westreich, Meir) (Entered: 10/07/2011)
10/12/2011	47	MEMORANDUM in Opposition to MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* 32 *Errata re Corrected Brief Size* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Memorandum)(Westreich, Meir) (Entered: 10/12/2011)
10/14/2011	48	OPPOSITION to MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* 33 *Errata re Brief Incorporations* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Supplement Opposition to SCE Request for Judicial Notice, # 2 Declaration Re Errata Filing and Reply to SCE Objection)(Westreich, Meir) (Entered: 10/14/2011)
10/17/2011	49	REPLY Support MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* MOTION to Dismiss Case *CV11 04975 SJO (JCGx)* 32 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Exhibit Corrected Request for Judicial Notice)(McQuillan, Elizabeth) (Entered: 10/17/2011)
10/17/2011	50	REPLY in support MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First

		Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* 33 filed by Defendant Southern California Edison Co. (Polish, James) (Entered: 10/17/2011)
10/17/2011	51	DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S OBJECTION TO AND REQUEST TO STRIKE LATE-FILED BRIEFS FILED BY PLAINTIFF SOLUTIONS FOR UTILITIES, INC. IN OPPOSITION TO MOTIONS TO DISMISS AND TO STRIKE re MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* 33 filed by Defendant Southern California Edison Co. (Polish, James) (Entered: 10/17/2011)
10/24/2011	52	MINUTES (IN CHAMBERS): ORDER by Judge S. James Otero. The parties are advised that the MOTION to Dismiss Plaintiff's First Amended Complaint Pursuant to FRCP 12(b)(1), (6) and (9)(b), MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint Pursuant to FRCP 12(f) filed by Defendant Southern California Edison Co. 33 , and the MOTION to Dismiss Case filed by defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. 32 , scheduled for hearing on October 31, 2011, are taken under submission. Accordingly, the hearing date is vacated. Order will issue. (sch) (Entered: 10/24/2011)
10/24/2011	53	MEMORANDUM in Opposition filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Declaration, # 2 Proposed Order)(Westreich, Meir) (Entered: 10/24/2011)
11/09/2011	54	SUPPLEMENT to MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* 33 filed by Defendant Southern California Edison Co. (Polish, James) (Entered: 11/09/2011)
11/10/2011	55	STIPULATION to Continue Scheduling Conference from December 5, 2011 filed by Defendant Southern California Edison Co. (Attachments: # 1 Proposed Order [Proposed] Order on Stipulation to Continue Scheduling Conference)(Goldstein, Justin) (Entered: 11/10/2011)
11/11/2011	56	Objection and Response Objections and Response to Request for Consideration of Supplemental Authority re: MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* MOTION

		to Dismiss Plaintiff's First Amended Complaint *Pursuant to FRCP 12(b)(1), (6) and (9)(b)* MOTION to Strike Paragraphs 44a and 44b of First Amended Complaint *Pursuant to FRCP 12(f)* 33 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Westreich, Meir) (Entered: 11/11/2011)
11/18/2011	57	ORDER by Judge S. James Otero, re Stipulation 55 The Court vacates the Scheduling Conference set 12/5/11, to be reset at a later date. (lc) (Entered: 11/18/2011)
11/29/2011	58	ORDER on Stipulation to Continue Scheduling Conference 55 by Judge S. James Otero. IT IS HEREBY ORDERED that the Scheduling Conference set for December 5, 2011 at 8:30 a.m. is vacated, and to the extent necessary, a new Scheduling Conference shall be set after the Court rules upon the currently pending Motions. (sch) (Entered: 11/30/2011)
12/02/2011	59	MINUTES (IN CHAMBERS) by Judge S. James Otero: the Court GRANTS the CPUC Defendants' Motion to Dismiss 32 and GRANTS SCE's Motion to Dismiss 33 , disposing of the claims as follows: (1) Claim 1 is DISMISSED WITH PREJUDICE as to the CARE Plaintiffs for failure to exhaust administrative remedies; (2) To the extent Claim 1 concerns SCE's alleged 2008 misrepresentations and encouragement that SFUI pursue a CREST contract, the Claim is DISMISSED WITH PREJUDICE; to the extent Claim 1 concerns SFUI's other unsuccessful attempts to obtain PURPA rights, the Claim is DISMISSED WITH LEAVE TO AMEND; (3) Claim 2 is DISMISSED WITH PREJUDICE; (4) To the extent Claim 3 concerns deprivation of PURPA rights, unconstitutional or unlawful takings, or attempts to bar the CARE Plaintiffs from petitioning FERC, Claim 3 is DISMISSED WITH PREJUDICE; to the extent Claim 3 is based on retaliatory fee determinations, the Claim is DISMISSED WITHLEAVE TO AMEND; (5) Claims 4 and 5 are DISMISSED WITH LEAVE TO AMEND; to the extent Claims 4 and 5 rest on the CARE Plaintiffs' allegations of PURPA violations, these Claims are DISMISSED WITH PREJUDICE for failure to exhaustadministrative remedies. Plaintiffs' Second Amended Complaint is due January 9, 2012. Failure to file by this date will result in dismissal with prejudice as to the entire case for failure to prosecute/ (lc) (Entered: 12/02/2011)
12/12/2011	60	Joint STIPULATION to MODIFY Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 filed by Defendant Southern California Edison Co. (Attachments: # 1 Proposed Order Modifying Order Granting Defendant Southern California Edison Company's Motion to Dismiss)(Polish, James) (Entered: 12/12/2011)
12/13/2011	61	MINUTE ORDER IN CHAMBERS by Judge S. James Otero: AMENDED ORDER GRANTING CPUC DEFENDANTS' MOTION TO DISMISS 32 ; AMENDED ORDER GRANTING DEFENDANTSOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO DISMISS 33 .(1) Claim 1 is DISMISSED WITH PREJUDICE as to the CARE Plaintiffs for failure to exhaust administrative remedies; (2) To the extent Claim 1 concerns SCE's alleged 2008 misrepresentations and encouragement that SFUI pursue a CREST contract, the Claim is DISMISSED WITH PREJUDICE; to the extent Claim 1 concerns SFUI's otherunsuccessful attempts to obtain PURPA rights, the Claim is DISMISSEDWITH LEAVE TO AMEND; (3) Claim 2 is DISMISSED WITH PREJUDICE; (4) To the extent Claim 3 concerns deprivation of PURPA rights, unconstitutional or unlawful takings, or attempts to bar the CARE Plaintiffs from petitioning FERC, Claim 3 is DISMISSED WITH PREJUDICE; to the extent Claim 3 is based on retaliatory fee determinations, the Claim is DISMISSED WITH LEAVE TO AMEND; (5) Claim 4 is DISMISSED WITH LEAVE TO AMEND; to the extent Claim 4 rests on the CARE Plaintiffs' allegations of PURPA violations, these Claims are DISMISSED WITH PREJUDICE for failure to exhaust administrative remedies. Plaintiffs' Second Amended Complaint is due January 9, 2012. Failure to file by this date willresult in dismissal with prejudice as to the entire case for failure to prosecute. (lc) (Entered: 12/13/2011)

12/30/2011	62	NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. Motion set for hearing on 2/6/2012 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Exhibit A. CPUC Decision, # 3 Exhibit B. SCE Application for Rehearing, # 4 Proposed Order)(Westreich, Meir) (Entered: 12/30/2011)
01/09/2012	63	DECLARATION of Meir J. Westreich In Support of MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 62 *w/ Proposed Third Amended Complaint* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Exhibit C: [Proposed] Third Amended Complaint, # 2 Exhibit D: [Proposed] Third Amended Complaint [markup]) (Westreich, Meir) (Entered: 01/09/2012)
01/09/2012	64	SECOND AMENDED COMPLAINT against defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon, Southern California Edison Co amending Amended Complaint, Jury Demand 20 filed by plaintiffs Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc, Michael E Boyd (lc) (Additional attachment(s) added on 1/10/2012: # 1 part 2) (lc). (Entered: 01/10/2012)
01/13/2012	65	OPPOSITION to MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 62 *Memorandum of Points and Authorities and Request for Judicial Notice* filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Exhibit Request for Judicial Notice)(McQuillan, Elizabeth) (Entered: 01/13/2012)
01/13/2012	66	Opposition to Plaintiffs' Motion to Reconsider, Modify and/or Clarify Amended Orders; Request for Sanctions opposition re: MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 62 filed by Defendant Southern California Edison Co. (Attachments: # 1 Declaration in Support of Opposition to Motion to Reconsider, # 2 Declaration in Support of Opposition to Motion to Reconsider)(Polish, James) (Entered: 01/13/2012)
01/23/2012	67	NOTICE OF MOTION AND MOTION to Dismiss Case *Second Amended Complaint* filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan,

		Catherine J K Sandoval, Timothy Alan Simon. Motion set for hearing on 3/12/2012 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum Memorandum in Support of Motion to Dismiss, # 2 Declaration Declaration re Local Rule 7-3, # 3 Request for Judicial Notice, Exhs. A-C, # 4 Request for Judicial Notice, Exhs. D-G, # 5 Proposed Order Proposed Order Granting Request for Judicial Notice, # 6 Proposed Order Proposed Order Granting Motion to Dismiss)(McQuillan, Elizabeth) (Entered: 01/23/2012)
01/23/2012	68	REPLY in Support of MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 MOTION for Reconsideration re Order on Motion to Dismiss Case,, Order on Motion to Strike,,,,,,,,,,,,,,,, 59 , Minutes of In Chambers Order/Directive - no proceeding held,,,,, 61 62 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Westreich, Meir) (Entered: 01/23/2012)
01/23/2012	69	EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Sanctions Request *and Enlarge Size of Brief or to Stay Request Pending Ruling on Motion to Reconsider and Reset as Noticed Motion* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Declaration of Meir J. Westreich, # 3 Proposed Order)(Westreich, Meir) (Entered: 01/23/2012)
01/23/2012	70	Corrected EX PARTE APPLICATION for Order for on Ex Parte Application to Stay SCE Sanctions Request and Reset as Noticed Motion; or, Alternatively to Enlarge Time & Size for Response filed by Plaintiff Solutions for Utilities Inc.(Westreich, Meir) (Entered: 01/23/2012)
01/23/2012	71	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Sanctions Request *and Enlarge Size of Brief or to Stay Request Pending Ruling on Motion to Reconsider and Reset as Noticed Motion* 69 *Corrected Proposed Order* (Westreich, Meir) (Entered: 01/23/2012)
01/24/2012	72	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: attachment of proposed order to EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Sanctions Request *and Enlarge Size of Brief or to Stay Request Pending Ruling on Motion to Reconsider and Reset as Noticed Motion* 69 , Corrected EX PARTE APPLICATION for Order for on Ex Parte Application to Stay SCE Sanctions Request and Reset as Noticed Motion; or, Alternatively to Enlarge Time & Size for Response 70 , Errata, 71 . The following error(s) were found: attachment of proposed order to # 69, was not an order, but the memorandum again. # 70 was not a motion, but the proposed order to #69; #71 was not an errata to #69, but the proposed order again. Proposed orders are not e-filed in themselves, but to be submitted as a separate attachment to a main document. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 01/24/2012)
01/24/2012	73	Opposition in opposition to re: EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Sanctions Request *and Enlarge Size of Brief or to Stay Request Pending Ruling on Motion to Reconsider and Reset as Noticed Motion* 69 filed by Defendant Southern California Edison Co. (Polish, James) (Entered: 01/24/2012)
01/27/2012	74	REPLY in Support of Ex Parte Application EX PARTE APPLICATION FOR ENLARGEMENT OF TIME to File Opposition to Sanctions Request *and Enlarge Size of*

		Brief or to Stay Request Pending Ruling on Motion to Reconsider and Reset as Noticed Motion 69 filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 01/27/2012)
01/31/2012	75	MINUTES (IN CHAMBERS): ORDER by Judge S. James Otero. The parties are advised that MOTION for Reconsideration re Order on Motion to Dismiss Case, Order on Motion to Strike, filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. 62 , scheduled for hearing on February 6, 2012, is taken under submission. Accordingly, the hearing date is vacated. Order will issue. (sch) (Entered: 01/31/2012)
02/13/2012	76	MINUTES (IN CHAMBERS) by Judge S. James Otero: ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR RECONSIDERATION 62 ; ORDER DENYINGPLAINTIFFS' EX PARTE APPLICATION TO STAY 69 , 70 . The Court GRANTS IN PART AND DENIES IN PART Plaintiffs' Motion for Reconsideration. The Court will re-issue the December 13, 2011 Order replacing the words "with prejudice" with the words "without leave to amend," and replacing the words "withoutprejudice" with the words "with leave to amend." In all other respects, the Motion for Reconsideration is DENIED. The Court does not impose sanctions and DENIES Plaintiffs' Ex Parte Application. (lc) (Entered: 02/13/2012)
02/13/2012	77	MINUTES held before Judge S. James Otero.AMENDED ORDER GRANTING CPUC DEFENDANTS' MOTION TO DISMISS 32 ; AMENDED ORDER GRANTING DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO DISMISS 33 :(1) Claim 1 is DISMISSED WITHOUT LEAVE TO AMEND as to the CARE Plaintiffs for failure to exhaust administrative remedies; (2) To the extent Claim 1 concerns SCE's alleged 2008 misrepresentations and encouragement that SFUI pursue a CREST contract, the Claim is DISMISSED WITHOUT LEAVE TO AMEND; to the extent Claim 1 concernsSFUI's other unsuccessful attempts to obtain PURPA rights, the Claim isDISMISSED WITH LEAVE TO AMEND; (3) Claim 2 is DISMISSED WITHOUT LEAVE TO AMEND;(4) To the extent Claim 3 concerns deprivation of PURPA rights, unconstitutionalor unlawful takings, or attempts to bar the CARE Plaintiffs from petitioningFERC, Claim 3 is DISMISSED WITHOUT LEAVE TO AMEND; to the extentClaim 3 is based on retaliatory fee determinations, the Claim is DISMISSEDWITH LEAVE TO AMEND; (5) Claim 4 is DISMISSED WITH LEAVE TO AMEND; to the extent Claim 4 rests on the CARE Plaintiffs' allegations of PURPA violations, these Claims are DISMISSED WITHOUT LEAVE TO AMEND for failure to exhaustadministrative remedies. The Court previously gave Plaintiffs until January 9, 2012 to file their Second Amended Complaint. (See Dec. 13, 2012 Order, ECF No. 61.) Plaintiffs met this deadline and filed their Second Amended Complaint on January 9, 2012. This is now the operative complaint. (lc) (Entered: 02/14/2012)
02/17/2012	78	OPPOSITION to MOTION to Dismiss Case *Second Amended Complaint* 67 *and Exhibits re Items for Which Judicial Notice Is Requested* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Westreich, Meir) (Entered: 02/17/2012)
02/24/2012	79	NOTICE OF ERRATA filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. correcting Response in Opposition to Motion, 78 (Westreich, Meir) (Entered: 02/24/2012)
02/27/2012	80	REPLY support MOTION to Dismiss Case *Second Amended Complaint* 67 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (McQuillan, Elizabeth) (Entered: 02/27/2012)

03/08/2012	81	MINUTES (IN CHAMBERS): ORDER by Judge S. James Otero. The parties are advised that the Motion to Dismiss Second Amended Complaint filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon 67 , scheduled for hearing on March 12, 2012, is taken under submission. Accordingly, the hearing date is VACATED and taken off calendar. No appearances are necessary. Order will issue. (sch) (Entered: 03/08/2012)
03/14/2012	82	MINUTES (IN CHAMBERS) by Judge S. James Otero: ORDER GRANTING IN PART AND DENYING IN PART CPUC DEFENDANTS' MOTION TO DISMISS 67 . (1) The Motion is DENIED with respect to Claim No. 1; (2) The Motion is GRANTED with respect to Claim No. 2; the Court Dismisses Claim No. 2 without leave to amend; (3) To the extent Claim No. 3 seeks relief related to the alleged violations of§ 1983, the Motion is GRANTED and the claim is dismissed without leave toamend; to the extent Claim No. 3 seeks relief related to the alleged failure toimplement PURPA, the Motion is DENIED. (lc) (Entered: 03/14/2012)
03/28/2012	83	ANSWER to Amended Complaint,, 64 filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon.(McQuillan, Elizabeth) (Entered: 03/28/2012)
03/29/2012	84	MINUTE ORDER IN CHAMBERS by Judge S. James Otero. Counsel are hereby notified that a Scheduling Conference has been set for Monday, April 30, 2012 at 8:30 a.m. before District Judge S. James Otero. Counsel are directed to comply with Rule 26(f) of the Federal Rules of Civil Procedure in a timely fashion and to file a Joint Rule 26(f) report on or before April 16, 2012. (cch) (Entered: 03/30/2012)
04/16/2012	85	JOINT REPORT Rule 26(f) Discovery Plan *Joint Scheduling and Rule 26(f) Report* ; estimated length of trial 8 days, filed by Plaintiff Solutions for Utilities Inc.. (Westreich, Meir) (Entered: 04/16/2012)
04/30/2012	86	APPENDIX filed by Plaintiff Solutions for Utilities Inc. Re: Joint Report Rule 26(f) Discovery Plan 85 *Schedule of Pretrial Dates by Plaintiff Only* (Westreich, Meir) (Entered: 04/30/2012)
04/30/2012	87	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Appendix 86 . The following error(s) was found: pdf is the form attached to Judges Scheduling minutes, formal Title page is missing. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 04/30/2012)
04/30/2012	88	MINUTES OF Scheduling Conference held before Judge S. James Otero. The Court, held a Scheduling Conference, setting the following dates: Set deadlines and hearings: Discovery Cut-Off: 11/5/2012; Motion Hearing Cut-Off: 12/17/2012 at 10:00 a.m.; Pretrial Conference: 1/28/2013 at 09:00 AM; Jury Trial: 2/5/2013 at 09:00 AM; Settlement Conference: ADR. All discovery dispute to be brought before magistrate judge assigned to the case; parties reminded of requirements of FRCP 26-1(a); counsel are advised all pretrial documents (as listed) must be filed in compliance with Court's Initial Standing Order. Court Recorder: CS 4/30/12. (sch) (Entered: 04/30/2012)
04/30/2012	89	ORDER/REFERRAL to ADR Procedure No 2 by Judge S. James Otero. Case ordered to Court Mediation Panel for mediation. (lc) (Entered: 04/30/2012)
05/07/2012	90	STIPULATION to Amend Answer to Second Amended Complaint filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Proposed Order,

		# 2 Supplement Proposed Amended Answer)(McQuillan, Elizabeth) (Entered: 05/07/2012)
05/14/2012	91	ORDER Granting Stipulation to Amend Answer of Defendants 90 by Judge S. James Otero. IT IS HEREBY ORDERED that the CPUC Defendants shall file their proposed Amended Answer to the Second Amended Complaint to assert the affirmative defenses of legislative immunity and judicial immunity in compliance with the Court's electronic filing rules by Friday, May 18, 2012. (cch) (Entered: 05/14/2012)
05/15/2012	92	AMENDED ANSWER to Amended Complaint,, 64 filed by Defendants Mark J Ferron, Timothy Alan Simon, Michael R Peevey, Michael R Florio, Catherine J K Sandoval, California Public Utilities Commission. (McQuillan, Elizabeth) (Entered: 05/15/2012)
06/22/2012	93	NOTICE OF ASSIGNMENT of Panel Mediator. Mediator (ADR Panel) John Brinsley has been assigned to serve as Panel Mediator. (mb) (Entered: 06/22/2012)
07/19/2012	94	NOTICE Notice of Change of Attorney Information filed by Defendant Southern California Edison Co. (Polish, James) (Entered: 07/19/2012)
07/19/2012	95	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Notice (Other) 94 . The following error(s) was found: Incorrect event selected. The correct event is: Notice of change of attorney information. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (ak) (Entered: 07/25/2012)
07/30/2012	96	COMPACT DISC Order for date of proceedings 04/30/2012 to 04/30/2012 filed by defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. Court will contact Elizabeth McQuillan at emm@cpuc.ca.gov with any questions regarding this order. Transcript portion requested: Pre-Trial Proceeding: 04/30/2012. FEE NOT PAID. (McQuillan, Elizabeth) (Entered: 07/30/2012)
10/01/2012	97	NOTICE OF MOTION AND Monthly MOTION to Produce Documents and Electronic Data *Motion to Compel Production* filed by Plaintiff Solutions for Utilities Inc. Motion set for hearing on 10/22/2012 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum Stipulated Joint, # 2 Declaration Defense Counsel Elizabeth M. MQuillan and Exhibits A - K, # 3 Declaration Defense Counsel Harvey Y. Morris, # 4 Exhibit A - K. Defendants [Morris], # 5 Exhibit L. Defendants [Morris] [Deposition RT], # 6 Exhibit M - Q. Defendants [Morris], # 7 Declaration Defendant CPUC Official Paul Clanon, # 8 Exhibit Plaintiff's [Index of Document Production], # 9 Proposed Order) (Westreich, Meir) (Entered: 10/01/2012)
10/01/2012	98	NOTICE OF MOTION AND MOTION to Compel Production of Documents and Electronic Records *by CPUC Commissioners* filed by Plaintiff Solutions for Utilities Inc. Motion set for hearing on 10/22/2012 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum Stipulated Joint, # 2 Declaration Defense Counsel Elizabeth M. McQuillan and Exhibits A - K, # 3 Declaration Defense Counsel Harvey Y. Morris, # 4 Exhibit Defendants' [Morris] Exhibits A - K, # 5 Exhibit Defendants' [Morris] Exhibits L [Deposition RT], # 6 Exhibit Defendants' [Morris] Exhibits M - Q, # 7 Declaration Defendant CPUC Official Paul Clanon, # 8 Exhibit Plaintiff's Exhibit A [Index of Defendants' Document Production], # 9 Proposed Order)(Westreich, Meir) (Entered: 10/01/2012)
10/01/2012	99	NOTICE OF MOTION AND MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* filed by Plaintiff Solutions for Utilities Inc. Motion set for hearing on 10/22/2012 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum Stipulated Joint, # 2 Exhibit Plaintiff's Exhibit B

		[Excerpted Deposition RT], # 3 Declaration Defense Counsel Elizabeth M. McQyuillan and Exhibits A - K, # 4 Declaration Defense Counsel Harvey Y. Morris, # 5 Exhibit Defendant's [Morris] Exhibits A - K, # 6 Exhibit Defendant's [Morris] Exhibit L [full Deposition RT], # 7 Exhibit Defendant's [Morris] Exhibits M - Q, # 8 Declaration Defendant CPUC Official Paul Clanon, # 9 Proposed Order)(Westreich, Meir) (Entered: 10/01/2012)
10/04/2012	100	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting Monthly MOTION to Produce Documents and Electronic Data *Motion to Compel Production* 97 *Modified Hearing Date and Time* (Attachments: # 1 Proposed Order)(Westreich, Meir) (Entered: 10/04/2012)
10/04/2012	101	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting MOTION to Compel Production of Documents and Electronic Records *by CPUC Commissioners* 98 *Modified Hearing Date and Time* (Attachments: # 1 Proposed Order)(Westreich, Meir) (Entered: 10/04/2012)
10/04/2012	102	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* 99 *Modified Hearing Date and Time. Text Correction* (Attachments: # 1 Proposed Order)(Westreich, Meir) (Entered: 10/04/2012)
10/11/2012	103	EX PARTE APPLICATION for Protective Order for to Quash Deposition Notices *of Commissioners Peevey, Simon, and Florio* filed by defendants California Public Utilities Commission, Michael R Florio, Michael R Peevey, Timothy Alan Simon. (Attachments: # 1 Memorandum of CPUC in support of ex parte application, # 2 Declaration of Elizabeth McQuillan in support of ex parte application, # 3 Proposed Order granting CPUC ex parte application)(McQuillan, Elizabeth) (Entered: 10/11/2012)
10/12/2012	104	Amendment to EX PARTE APPLICATION for Protective Order for to Quash Deposition Notices *of Commissioners Peevey, Simon, and Florio* 103 *Supplemental Declaration of Elizabeth McQuillan* filed by Defendants California Public Utilities Commission, Michael R Florio, Michael R Peevey, Timothy Alan Simon. (McQuillan, Elizabeth) (Entered: 10/12/2012)
10/16/2012	105	OPPOSITION to EX PARTE APPLICATION for Protective Order for to Quash Deposition Notices *of Commissioners Peevey, Simon, and Florio* 103 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit Nos. 1-3, # 2 Exhibit No. 4) (Westreich, Meir) (Entered: 10/16/2012)
10/16/2012	106	REPLY In Support Monthly MOTION to Produce Documents and Electronic Data *Motion to Compel Production* 97 *by CPUC* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Declaration Meir J. Westreich, # 2 Exhibit Nos. 1 - 3, # 3 Exhibit No. 4, # 4 Exhibit No. 5)(Westreich, Meir) (Entered: 10/16/2012)
10/16/2012	107	REPLY In Support MOTION to Compel Production of Documents and Electronic Records *by CPUC Commissioners* 98 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Declaration Meir J. Westreich, # 2 Exhibit Nos. 1 - 3, # 3 Exhibit No. 4)(Westreich, Meir) (Entered: 10/16/2012)
10/16/2012	108	REPLY In Support MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to

		Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* 99 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Declaration of Meir J. Westreich, # 2 Exhibit Nos. 1 - 3, # 3 Exhibit No. 4)(Westreich, Meir) (Entered: 10/16/2012)
10/16/2012	109	REQUEST FOR JUDICIAL NOTICE re MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* 99 , Monthly MOTION to Produce Documents and Electronic Data *Motion to Compel Production* 97 , EX PARTE APPLICATION for Protective Order for to Quash Deposition Notices *of Commissioners Peevey, Simon, and Florio* 103 , MOTION to Compel Production of Documents and Electronic Records *by CPUC Commissioners* 98 filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 10/16/2012)
10/17/2012	110	MINUTE (IN CHAMBERS) ORDER (1) DIRECTING FURTHER MEET AND CONFER EFFORTS; AND (2) REQUIRING STATUS REPORT REGARDING SAME by Magistrate Judge Jay C. Gandhi, The Court has preliminarily reviewed Plaintiffs motions to compel against: 1. Defendant California Public Utilities Commission ("CPUC") regarding Plaintiffs first set of document requests; 2. The Commissioners of the CPUC regarding Plaintiffs first set of document requests; and 3. The Rule 30(b)(6) witness (a/k/a PMK) of the CPUC. [See Dkt. Nos. 97-99, 106-109.] The Court has also preliminarily reviewed Defendants ex parte application for a protective order regarding the noticed depositions of the Commissioners of the CPUC, and Plaintiffs opposition to that application. [See Dkt. Nos. 103-105.] The motions are presently scheduled for hearing on October 30, 2012. The ex parte application shall be decided without oral argument. On its own motion, the Court now DIRECTS the parties to further meet and confer, fully and diligently and in person, on the relief sought by these motions, including whether mutually-acceptable, reasonable compromises cannot be achieved here. The parties shall meet and confer on or before Wednesday, October 24, 2012, and file a joint status report within 48 hours of the conclusion of their diligent efforts, including the reasonable compromises each side made and whether any narrow disputes continue to remain, which the Court does not now anticipate. re: MOTION to Compel Further Deposition 99 , MOTION to Produce Documents 97 , EX PARTE APPLICATION for Protective Order for to Quash Deposition Notices 103 , MOTION to Compel Production of Documents and Electronic Records 98 . (SEE ORDER FOR FURTHER DETAILS) (lmh) (Entered: 10/17/2012)
10/18/2012	111	Amendment to EX PARTE APPLICATION for Protective Order for to Quash Deposition Notices *of Commissioners Peevey, Simon, and Florio* 103 *Amended Proposed Order* filed by Defendants California Public Utilities Commission, Michael R Florio, Michael R Peevey, Timothy Alan Simon. (McQuillan, Elizabeth) (Entered: 10/18/2012)
10/18/2012	112	REQUEST to Clarify Magistrate Judge's Order of 10.17.12 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit Nos. 6 & 7)(Westreich, Meir) (Entered: 10/18/2012)
10/26/2012	113	NOTICE OF MOTION AND First MOTION for Summary Judgment as to Second Amended Complaint filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. Motion set for hearing on 12/17/2012 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Declaration Declaration of Harvey Yale Morris, # 2 Memorandum Memorandum of Points and Authorities, # 3 Memorandum Statement of Uncontroverted Material Facts and Conclusions of Law, # 4 Exhibit Request for Judicial Notice, # 5

		Exhibit Exhibits A-F, # 6 Exhibit Exhibit G part 1 of 10, # 7 Exhibit Exhibit G part 2 of 10, # 8 Exhibit Exhibit G part 3 of 10, # 9 Exhibit Exhibit G part 4 of 10, # 10 Exhibit Exhibit G part 5 of 10, # 11 Exhibit Exhibit G part 6 of 10, # 12 Exhibit Exhibit G part 7 of 10, # 13 Exhibit Exhibit G part 8 of 10, # 14 Exhibit Exhibit G part 9 of 10, # 15 Exhibit Exhibit G part 10 of 10, # 16 Exhibit Exhibits H - I, # 17 Exhibit Exhibit J part 1 of 3, # 18 Exhibit Exhibit J part 2 of 3, # 19 Exhibit Exhibit J part 3 of 3, # 20 Exhibit Exhibit K, # 21 Exhibit Exhibit L, # 22 Exhibit Exhibit M part 1 of 2, # 23 Exhibit Exhibit M part 2 of 2, # 24 Exhibit Exhibit N part 1 of 2, # 25 Exhibit Exhibit N part 2 of 2, # 26 Exhibit Exhibits O - Q, # 27 Exhibit Exhibits R - U, # 28 Exhibit Exhibit V part 1 of 2, # 29 Exhibit Exhibit V part 2 of 2, # 30 Exhibit Exhibits W - Y, # 31 Proposed Order Proposed Judgment)(McQuillan, Elizabeth) (Entered: 10/26/2012)
10/26/2012	114	Joint REQUEST for Extension of Time to File Joint Report re Meet and Confer Efforts Pursuant to Order of October 17, 2012 filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 10/26/2012)
10/26/2012	115	MINUTES (IN CHAMBERS)ORDER CLARIFYING COURT'S MEET-AND-CONFER ORDER OF OCTOBER 17, 2012 by Magistrate Judge Jay C. Gandhi: Pending before the Court is Plaintiff's "request for clarification" of the October 17, 2012 Order regarding Plaintiff's motions to compel. [See Dkt. 112.] From the onset, the Court notes that Plaintiff's request was filed one day after the Court's meet-and-confer Order, and is silent on whether Plaintiff, in fact, met and conferred with Defendants on the discovery issues as instructed to do so. Notwithstanding the above, and in light of Defendants' recent motion for summary judgment, the Court amends its earlier guidance, and suggests that Defendants identify PURPA-complaint programs since 2007, and Plaintiff may select information for three of those programs as indicated earlier (but not information concerning the SCE CREST program at this juncture). It is so ordered. 112 . (bem) (Entered: 10/29/2012)
10/30/2012	116	JOINT STIPULATION to MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* MOTION to Compel Further Deposition Testimony w/o Objections *Pursuant to Fed.R.Civ.P. 30(b)(6)* 99 , Monthly MOTION to Produce Documents and Electronic Data *Motion to Compel Production* 97 , REQUEST to Clarify Magistrate Judge's Order of 10.17.12 112 , MOTION to Compel Production of Documents and Electronic Records *by CPUC Commissioners* 98 *Compromise Agreement re Plaintiff's Motions to Compel* filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 10/30/2012)
10/30/2012	117	Joint REQUEST for Protective Order for Discovery Protective Order *Immediate Attention Required to Implement Compromise Agreement re Motions to Compel Discovery* filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 10/30/2012)
10/30/2012	118	MINUTE ORDER IN CHAMBERS CONTINUING HEARING ON PLAINTIFFS' THREE MOTIONS TO COMPEL by Magistrate Judge Jay C. Gandhi: Per the parties' request, and pursuant to their compromise agreement [see Dkt. No. 116], the Court CONTINUES the hearing on Plaintiffs' three motions to compel to Tuesday, November 20, 2012 at 2:00 p.m. The hearings scheduled for October 30, 2012 at 2 p.m. are VACATED. To the extent any subsequent discovery disputes arise, including under the compromise agreement, the parties may submit a concise joint statement report on or before Friday, November 16, 2012. If no subsequent discovery disputes are anticipated, the parties shall advise the Courtroom Deputy Clerk forthwith, and the hearings for November 20, 2012 shall be vacated. The Court appreciates the diligent efforts of the parties to resolve their discovery disputes, and the reasonable compromises made from each side. It is so ordered. 116 (bem) (Entered: 10/30/2012)

10/30/2012	119	STIPULATION FOR PROTECTIVE ORDER AND PROTECTIVE ORDER REGARDING PRODUCTION OF DOCUMENTS AND INFORMATION by Magistrate Judge Jay C. Gandhi: granting 117 Request for Protective Order re Joint REQUEST for Protective Order for Discovery Protective Order 117 . (See Order for details)[Note Changes Made By The Court] (bem) (Entered: 10/30/2012)
11/16/2012	120	First APPLICATION for Order for To Continue Discovery Compliance Hearing and Extend Time for Joint Report filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit Exhibit A. Medical - Prescription Evidence, # 2 Exhibit Exhibit B. Errata re Entity Deposition, # 3 Proposed Order)(Westreich, Meir) (Entered: 11/16/2012)
11/19/2012	121	First APPLICATION for Extension of Time to File Opposition to Motion for Summary Judgment filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit 16, # 5 Exhibit 75, # 6 Proposed Order)(Westreich, Meir) (Entered: 11/19/2012)
11/19/2012	122	Declaration of Harvey Morris in Opposition to Application to Continue Discovery Hearing Opposition re: First APPLICATION for Order for To Continue Discovery Compliance Hearing and Extend Time for Joint Report 120 filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. (McQuillan, Elizabeth) (Entered: 11/19/2012)
11/19/2012	123	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting First APPLICATION for Extension of Time to File Opposition to Motion for Summary Judgment 121 *Corrected Proposed Order* (Westreich, Meir) (Entered: 11/19/2012)
11/20/2012	124	REPLY In Support First APPLICATION for Order for To Continue Discovery Compliance Hearing and Extend Time for Joint Report 120 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit C)(Westreich, Meir) (Entered: 11/20/2012)
11/20/2012	125	MINUTES (IN CHAMBERS)ORDER VACATING HEARING ON PLAINTIFFS' THREE MOTIONS TO COMPEL by Magistrate Judge Jay C. Gandhi: Per the parties' request, and pursuant to their compromise discovery agreement [see Dkt. No. 116], the Court previously continued the hearing on Plaintiff's three motions to compel to Tuesday, November 20, 2012 at 2 p.m. The Court concurs with Defendants with respect to the substantive dispute. Plaintiff failed to comply with the Court's Order of October 30, 2012. Further, in light of Plaintiff's application, it appears that Plaintiff is unprepared, one way or another, to proceed with any meaningful discussion of the motions to compel or the compromise discovery agreement, or any purported failure of Defendants to comply thereunder, and accordingly any hearing at this juncture would prove unfruitful. Finally, Plaintiffs' ex parte application is procedurally flawed to boot for purposes of seeking a continuance. See Local Rule 37-3; Mission Power Eng'g Co. v. Continental Cas. Co., 883 F. Supp. 488, 492 (C.D. Cal. 1995). The Court now VACATES the November 20, 2012 hearing. It is so ordered. (See Order for details) 116 , 118 , 120 , 124 . (bem) (Entered: 11/20/2012)
11/20/2012	126	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Errata 123 . The following error(s) was found: PDF is not an errata, but a corrected proposed order. Proposed orders are to be submitted as a separate attachment to a main document. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 11/20/2012)

11/20/2012	127	MEMORANDUM in Opposition to First APPLICATION for Extension of Time to File Opposition to Motion for Summary Judgment 121 filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Declaration of Elizabeth McQuillan) (McQuillan, Elizabeth) (Entered: 11/20/2012)
11/21/2012	128	MEMORANDUM in Opposition to Joint REQUEST for Extension of Time to File Joint Report re Meet and Confer Efforts Pursuant to Order of October 17, 2012 114 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Statement of Genuine Issues of Material Fact, # 2 Declaration of Michael Boyd, # 3 Declaration of Mary Hoffman, # 4 Exhibit Index [Exhibits to Follow])(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	129	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Statement of Genuine Issues, # 2 Declaration of Michael Boyd, # 3 Declaration of Mary Hoffman, # 4 Exhibit Index)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	130	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Book of Exhibits. Volume I* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 16, # 2 20, # 3 25, # 4 30, # 5 31, # 6 32, # 7 33, # 8 34, # 9 35, # 10 36)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	131	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Volume II* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit 37, # 2 Exhibit 38, # 3 Exhibit 39, # 4 Exhibit 40, # 5 Exhibit 41, # 6 Exhibit 42, # 7 Exhibit 43, # 8 Exhibit 44, # 9 Exhibit 45, # 10 Exhibit 46)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	132	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Volume III* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit 47, # 2 Exhibit 48, # 3 Exhibit 49, # 4 Exhibit 50, # 5 Exhibit 51, # 6 Exhibit 52, # 7 Exhibit 52A, # 8 Exhibit 53, # 9 Exhibit 54, # 10 Exhibit 55)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	133	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Volume IV* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit 56, # 2 Exhibit 57, # 3 Exhibit 58, # 4 Exhibit 59, # 5 Exhibit 60, # 6 Exhibit 61, # 7 Exhibit 62, # 8 Exhibit 63, # 9 Exhibit 64, # 10 Exhibit 65)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	134	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Volume V* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit 66, # 2 Exhibit 67, # 3 Exhibit 68, # 4 Exhibit 69, # 5 Exhibit 70, # 6 Exhibit 71, # 7 Exhibit 72, # 8 Exhibit 73, # 9 Exhibit 74, # 10 Exhibit 75)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	135	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Volume VI* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Exhibit 76, # 2 Appendix 77, # 3 Appendix 78, # 4 Exhibit 80, # 5 Exhibit 81)(Westreich, Meir) (Entered: 11/21/2012)
11/21/2012	136	OPPOSITION to First MOTION for Summary Judgment as to Second Amended Complaint 113 *Volume VII* filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 90A, # 2 90B, # 3 90C, # 4 91, # 5 92, # 6 93, # 7 94, # 8 95, # 9 96)(Westreich, Meir) (Entered: 11/21/2012)
11/23/2012	137	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting Response in Opposition to Motion, 129 *with Tables [sans Hyperlinks]* (Westreich, Meir) (Entered:

		11/23/2012)
11/23/2012	138	REPLY In Support First APPLICATION for Extension of Time to File Opposition to Motion for Summary Judgment 121 *& Explainting ECF Technical Difficulties w/ Hyperlinks and Related Matters* filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 11/23/2012)
11/26/2012	139	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE:, MEMORANDUM in Opposition to Motion, 128 ; Response in Opposition to Motion, 129 ; Response in Opposition to Motion, 130 , Response in Opposition to Motion, 131 , Response in Opposition to Motion, 132 Response in Opposition to Motion, 133 , Response in Opposition to Motion, 134 , Response in Opposition to Motion, 135 , Response in Opposition to Motion, 136 , The following error(s) was found: Re #128 incorrect pdf attached (pdf was not opposition to request for extension of time to file joint report, but pdf of opposition to S/J motion; Incorrect event selected. The correct event is: memorandum in opposition to motion re #129 and Motion related documents as to # 130-136. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 11/26/2012)
11/28/2012	140	ORDER EXTENDING TIME TO RESPOND TO SUMMARY JUDGMENT MOTION by Judge S. James Otero. Plaintiffs application to extend the time to respond to Defendants Motion for Summary Judgment from November 19, 2012 to November 21, 2012 having been submitted, and good cause showing, is hereby granted. (cch) (Entered: 11/28/2012)
11/29/2012	141	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting Errata 137 , Response in Opposition to Motion, 129 *Correcting Formatting Only of Previously Corrupted Footnotes 2, 3, 4, 6 & 7* (Westreich, Meir) (Entered: 11/29/2012)
12/03/2012	142	NOTICE OF ERRATA filed by Plaintiff Solutions for Utilities Inc. correcting Errata 137 , Errata 141 , Response in Opposition to Motion, 129 *Explaining Corruption Problems and Corrective Errata Filings* (Westreich, Meir) (Entered: 12/03/2012)
12/03/2012	143	REPLY support First MOTION for Summary Judgment as to Second Amended Complaint 113 *and CPUC's Objections to Evidence* filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Memorandum Objections to SFUI's Evidence)(McQuillan, Elizabeth) (Entered: 12/03/2012)
12/07/2012	144	MINUTES (IN CHAMBERS) by Judge S. James Otero: The Court finds these matters suitable for disposition without oral argument and vacates the hearing re the MOTION for Summary Judgment as to Second Amended Complaint filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. 113 , set for December 17, 2012. See Fed. R. Civ. P. 78(b). (lc) (Entered: 12/07/2012)
12/21/2012	145	Joint STIPULATION to Continue Trial from February 5, 2013 to March 5, 2013 filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Proposed Order Approving Stipulation to Continue Pretrial Conference and Trial) (McQuillan, Elizabeth) (Entered: 12/21/2012)
01/03/2013	146	MINUTE ORDER IN CHAMBERS by Judge S. James Otero:Counsel are notified that the Pretrial Conference set for January 28, 2013 and the Jury Trial set for February 5,

		2013 is hereby vacated and taken off calendar. No Appearances are necessary on those dates. (lc) (Entered: 01/03/2013)
01/03/2013	147	MINUTES (IN CHAMBERS) by Judge S. James Otero: Court GRANTS 113 Defendants California Public Utilities Commission and current and former commissioners Michael R. Peevey, Timothy Alan Simon, Michael Peter Florio, Catherine J. K. Sandoval, Mark J. Ferron, Rachel Chong, John A. Bohn, Dian M. Gruenich, and Nancy E. Ryan Motion for Summary Judgment. Plaintiff's claims are DISMISSED for lack of standing. This matter shall close. (lc) (Entered: 01/03/2013)
01/03/2013	148	JUDGMENT by Judge S. James Otero :Defendants of California Public Utilities Commission, Catherine J K Sandoval, Mark J Ferron, Michael R Florio, Michael R Peevey, Timothy Alan Simon Motion for Summary Judgment on Claims 1 and 3 of the Second Amended Complaint is granted. Plaintiffs Solutions for Utilities, Inc., CAlifornians for Renewable Energy, Inc., Michael E. Boyd and Robert Sarvey take nothing, the action be dismissed in its entirety, and thatdefendants recover their costs.(MD JS-6, Case Terminated). (lc) (Entered: 01/03/2013)
01/15/2013	149	Proposed Bill of Costs filed by Defendants California Public Utilities Commission, Mark J Ferron, Michael R Florio, Michael R Peevey, Catherine J K Sandoval, Timothy Alan Simon (McQuillan, Elizabeth) (Entered: 01/15/2013)
01/16/2013	150	BILL OF COSTS DEFICIENCY NOTICE FILED. The following deficiency was noted on the Application for clerk to tax costs. RE: Miscellaneous Document 149 . The following error(s) was found: Incorrect Event and formatting. Pdf is a bill of cost with declaration. Missing formal Application to clerk to tax costs and its telephonic hearing, to which the proposed bill of costs should have been submitted as a separate attachment. Due to wrong event no Hearing was scheduled. Correct event for the Missing application is: Application: Clerk to Tax Cost; follow prompts to schedule hearing and select, Before Clerk of the Court. Refer to Bill of Cost Manual. (lc) Modified on 1/16/2013 (lc). Modified on 1/16/2013 (lc). (Entered: 01/16/2013)
01/16/2013	151	CORRECTED BILL OF COSTS DEFICIENCY NOTICE FILED 150 . The following deficiency was noted on the Application for clerk to tax costs. RE: Miscellaneous Document 149 . The following error(s) was found: Incorrect Event. Pdf is the new CV 59 bill of cost form with a hearing date, however, wrong event did not schedule any hearing before the clerk. Correct event is: Application: Clerk to Tax Cost; follow prompts to schedule hearing and select, Before Clerk of the Court. (lc) (Entered: 01/16/2013)
01/17/2013	152	APPLICATION to the Clerk to Tax Costs against plaintiff Solutions for Utilities Inc re: Judgment,, 148 , filed by defendants Timothy Alan Simon, Michael R Peevey, Michael R Florio, Mark J Ferron, Catherine J K Sandoval, California Public Utilities Commission. Application set for hearing on 2/1/2013 at 09:00 AM before Clerk of Court. (Attachments: # 1 Affidavit Proposed Bill of Costs)(McQuillan, Elizabeth) (Entered: 01/17/2013)
01/17/2013	153	NOTICE OF MOTION AND MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* filed by Defendant Southern California Edison Co. Motion set for hearing on 2/25/2013 at 10:00 AM before Judge S. James Otero. (Goldstein, Justin) (Entered: 01/17/2013)
01/17/2013	154	DECLARATION of James Polish in Support of Southern California Edison Company's Motion for Attorneys' Fees MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Defendant Southern California Edison Co. (Attachments: # 1 Exhibit Exhibits 1-5 to Polish Declaration)(Goldstein, Justin) (Entered: 01/17/2013)
01/17/2013	155	DECLARATION of Justin M. Goldstein in Support of Southern California Edison Company's Motion for Attorneys' Fees MOTION for Attorney Fees *for the Recovery of*

		Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988 153 filed by Defendant Southern California Edison Co. (Attachments: # 1 Exhibit) (Goldstein, Justin) (Entered: 01/17/2013)
01/17/2013	156	DECLARATION of Leon Bass, Jr. in Support of Southern California Edison Company's Motion for Attorneys' Fees MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Defendant Southern California Edison Co. (Goldstein, Justin) (Entered: 01/17/2013)
01/17/2013	157	NOTICE OF LODGING filed *by Southern California Edison Company* re MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 (Attachments: # 1 Exhibit)(Goldstein, Justin) (Entered: 01/17/2013)
01/30/2013	158	APPLICATION to Stay Case pending Staying Final Judgment Pending Ruling on Fee Motion *Action Required before 02.04.13, Pursuant to Fed.R.Civ.P. 58(e)* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Proposed Order)(Westreich, Meir) (Entered: 01/30/2013)
01/31/2013	159	Joint APPLICATION to Continue Hearing on Motion for Attorney Fees from February 25, 2013 to April 1, 2013 Re: Declaration (Motion related), Declaration (Motion related) 156 , Notice of Lodging, 157 , Declaration (Motion related), Declaration (Motion related) 155 , Declaration (Motion related), Declaration (Motion related) 154 , MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 , Joint APPLICATION for Extension of Time to File Oppsition to Motion for Attorney Fees filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Proposed Order, # 2 Declaration w/ Exhibits Submitted Separately, # 3 Exhibit B, # 4 Exhibit C, # 5 Exhibit D, # 6 Exhibit E)(Westreich, Meir) (Entered: 01/31/2013)
02/01/2013	160	ORDER by Judge S. James Otero: granting 159 Joint Application to Continue 159 hearing on the Motion for Attorney Fees by Defendant SouthernCalifornia Edison Company from February 25, 2013 to April 1, 2013, withthe time to file opposition extended to March 4, 2013 [midnight], and the time to reply shall be March 18, 2013. (lc) (Entered: 02/01/2013)
02/04/2013	161	NOTICE OF APPEAL to the 9th CCA filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Appeal of Judgment,, 148 (Appeal fee of $455 receipt number 0973-11613944 paid.) (Westreich, Meir) (Entered: 02/04/2013)
02/05/2013	162	NOTIFICATION by Circuit Court of Appellate Docket Number 13-55206, 9th CCA regarding Notice of Appeal to 9th Circuit Court of Appeals 161 as to Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (mat) (Entered: 02/07/2013)
02/15/2013	163	MINUTES (IN CHAMBERS) by Judge S. James Otero: The Court finds this matter suitable for disposition without oral argument and vacates the hearingre the MOTION for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.s.c. §§ 1983, 1988 filed by Defendant Southern California Edison Co. 153 , set for February 25, 2013. See Fed. R. Civ. P. 78(b). (lc) (Entered: 02/15/2013)
03/04/2013	164	OPPOSITION to MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Plaintiff Solutions for Utilities Inc. (Attachments: # 1 Declaration of Meir J. Westreich, # 2 Declaration of Mary Hoffman, # 3 Exhibit A to Declaration of Mary Hoffman, # 4

		Exhibit SFUI Annotated SCE Exhibit 4, Part I, # 5 Exhibit SFUI Annotated SCE Exhibit 4, Part II)(Westreich, Meir) (Entered: 03/04/2013)
03/05/2013	165	DECLARATION of Meir J. Westreich [Errata. Corrected Caption] In Opposition to MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Plaintiff Solutions for Utilities Inc. (Westreich, Meir) (Entered: 03/05/2013)
03/18/2013	166	REPLY in support of MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Defendant Southern California Edison Co. (Goldstein, Justin) (Entered: 03/18/2013)
03/18/2013	167	DECLARATION of Justin M. Goldstein in support of MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Defendant Southern California Edison Co. (Attachments: # 1 Exhibit)(Goldstein, Justin) (Entered: 03/18/2013)
03/18/2013	168	EVIDENTIARY OBJECTIONSIN SUPPORT OF DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANYS REPLY RE: MOTION FOR THE RECOVERY OF ATTORNEYS FEES FROM PLAINTIFF SOLUTIONS FOR UTILITIES, INC. re MOTION for Attorney Fees *for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983, 1988* 153 filed by Defendant Southern California Edison Co. (Goldstein, Justin) (Entered: 03/18/2013)
04/11/2013	169	BILL OF COSTS. Costs Taxed in amount of $ 3,791.41 in favor of Defendant and against Plaintiffs. RE: 148 , 152 (mb) (Entered: 04/15/2013)
04/23/2013	170	NOTICE OF LODGING filed *for [Proposed] Cost Judgment* re Bill of Costs (CV-59) 169 , APPLICATION to the Clerk to Tax Costs against plaintiff Solutions for Utilities Inc re: Judgment,, 148 , 152 (Attachments: # 1 Proposed Order [Proposed] Cost Judgment in Favor of Public Utilities Commission of California)(Westreich, Meir) (Entered: 04/23/2013)
09/25/2013	171	ORDER from 9th CCA filed re: Notice of Appeal to 9th Circuit Court of Appeals 161 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd CCA # 13-55206. The appellants unopposed motion for a fourth extension of time to file theopening brief is granted. Order received in this district on 9/25/2013. (dmap) (Entered: 09/27/2013)
04/16/2014	172	MINUTES (IN CHAMBERS) by Judge S. James Otero: The Court deems the APPLICATION to Stay Case pending Staying Final JudgmentPending Ruling on Fee Motion Action, Pursuant to Fed.R.Civ.P. 58(e) filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. 158 moot and taken off the Court's calendar. Additionally, the Court Denies without prejudice the MOTION for the Recovery of Attorneys' Fees from Plaintiff Solutions for Utilities, Inc. Pursuant to 42 U.S.C. 1983,1988 filed by Defendant Southern California Edison Co. 153 , to be refiled after the appeal is resolved. (lc) (Entered: 04/16/2014)
03/06/2015	173	MEMORANDUM from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 161 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 13-55206. (mat) (Entered: 03/09/2015)
03/24/2015	174	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th CCA 161 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 13-55206. Appellants' motion to enlarge time to March 27, 2015, to file a petition for rehearing is GRANTED. (mat) (Entered: 03/26/2015)

04/22/2015	175	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal 161 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 13-55206. Allco Renewable Energy Limited's Motion for Leave to File Amicus Brief in Support of the Petition for Panel and En Banc Rehearing Filed by Appellants is GRANTED. (mat) (Entered: 04/23/2015)
04/30/2015	176	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 161 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 13-55206. Appellants' petition for panel rehearing and petition for rehearing en banc are DENIED. (mat) (Entered: 04/30/2015)
05/11/2015	177	MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal 161 CCA # 13-55206. The judgment of the 9th Circuit Court, entered March 06, 2015, takes effect this date. This constitutes the formal mandate of the 9th CCA issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. [See USCA MEMORANDUM 173 AFFIRMED in part, REVERSED in part, and REMANDED. Parties tobear their own costs] (mat) (Entered: 05/13/2015)
03/08/2016	178	First NOTICE OF MOTION AND MOTION for Leave to file Fourth Amended and First Supplemental Complaint *on Remand* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Motion set for hearing on 4/11/2016 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Exhibit Submission of Exhibits, # 2 Exhibit A. Memorandum Decision of Ninth Circuit Court of Appeal [03.08.15], # 3 Exhibit B. Lodging of [Proposed] Fourth Amended and First Supplemental Complaint, # 4 Proposed Order for Leave to File [Proposed] Fourth Amended and First Supplemental Complaint) (Westreich, Meir) (Entered: 03/09/2016)
03/18/2016	179	Notice of Appearance or Withdrawal of Counsel: for attorney James McIntosh Ralph counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Filed by Defendant CPUC Defendants. (Attorney James McIntosh Ralph added to party John A Bohn(pty:dft), Attorney James McIntosh Ralph added to party California Public Utilities Commission(pty:dft), Attorney James McIntosh Ralph added to party Rachel Chong(pty:dft), Attorney James McIntosh Ralph added to party Mark J Ferron(pty:dft), Attorney James McIntosh Ralph added to party Michael R Florio(pty:dft), Attorney James McIntosh Ralph added to party Michael R Peevey(pty:dft), Attorney James McIntosh Ralph added to party Nancy E Ryan(pty:dft), Attorney James McIntosh Ralph added to party Catherine J K Sandoval (pty:dft), Attorney James McIntosh Ralph added to party Timothy Alan Simon(pty:dft))(Ralph, James) (Entered: 03/18/2016)
03/21/2016	180	Memorandum in Opposition re: First NOTICE OF MOTION AND MOTION for Leave to file Fourth Amended and First Supplemental Complaint *on Remand* 178 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Declaration Harvey Y. Morris, # 2 Exhibit CPUC-1, # 3 Exhibit CPUC-2, # 4 Certificate of Service)(Morris, Harvey) (Entered: 03/21/2016)
03/22/2016	181	Opposition re: First NOTICE OF MOTION AND MOTION for Leave to file Fourth Amended and First Supplemental Complaint *on Remand* 178 *NOTICE OF ERRATA TO OPPOSITION* filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Memorandum, # 2 Declaration Harvey Y. Morris, # 3 Exhibit CPUC-1, # 4 Exhibit CPUC-2, # 5 Certificate of Service)(Morris, Harvey) (Entered: 03/22/2016)

03/24/2016	182	The Court finds the following motion suitable for disposition without oral argument and vacates the hearing re the MOTION for Leave to file Fourth Amended and First Supplemental Complaint on Remand filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. [#178], set for hearing on April 11, 2016. See Fed. R. Civ. P. 78(b). No appearance is required. The briefing schedule remains as set by Local Rule. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (vcr) TEXT ONLY ENTRY (Entered: 03/24/2016)
03/28/2016	183	REPLY In Support First NOTICE OF MOTION AND MOTION for Leave to file Fourth Amended and First Supplemental Complaint *on Remand* 178 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 03/28/2016)
03/31/2016	184	MINUTES (IN CHAMBERS) by Judge S. James Otero: ORDER DENYING WITHOUT PREJUDICE MOTION FOR LEAVE TO FILE FOURTH AMENDED COMPLAINT AND FIRST SUPPLEMENTALCOMPLAINT 178 . Should CARE Plaintiffs choose to further amend their pleading, they may do so by filing a Fourth Amended Complaint for enforcement of PURPA pursuant to 16 U.S.C. 824a-3 that is consistent with both this Order and the Court's prior Orders. Such a pleading must be filed within fourteen(14) days of the issuance of this Order. Defendants have fourteen (14) days thereafter to respond. (lc) (Entered: 03/31/2016)
04/14/2016	185	AMENDED COMPLAINT against Defendants California Public Utilities Commission, Michael R Florio, Catherine J K Sandoval amending Amended Complaint,, 20 , Amended Complaint,, 64 (Westreich, Meir) (Entered: 04/14/2016)
04/15/2016	186	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Amended Complaint/Petition 185 . The following error(s) was found: Other error(s) with document(s) are specified below: pdf is a FIFTH amended complaint, the 3/31/16 minutes permitted the filing of a Fourth Amended complaint.. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 04/15/2016)
04/15/2016	187	ORDER SETTING SCHEDULING CONFERENCE by Judge S. James Otero. Rule 26 Meeting Report due by 6/6/2016. Scheduling Conference set for 6/20/2016 at 08:30 AM before Judge S. James Otero. (vcr) (Entered: 04/15/2016)
04/26/2016	188	ANSWER to Amended Complaint/Petition 185 filed by defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon.(Morris, Harvey) (Entered: 04/26/2016)
05/11/2016	189	MINUTE ORDER IN CHAMBERS by Judge S. James Otero: On 5/11/2015, the Ninth Circuit Court of Appeals issued a Mandate AFFIRMING in part, REVERSING in part, and REMANDING this matter back to the District Court 177 . Accordingly, the Court instructs the Clerk's Office to reopen this case. (Case reopened. MD JS-5.) (lc) (Entered: 05/11/2016)
06/06/2016	190	JOINT REPORT Rule 26(f) Discovery Plan *and Joint Scheduling Report* ; estimated length of trial 8 days, filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey.. (Attachments: # 1 Appendix Court's Scheduling Chart. Submitted by Plaintiff Only)(Westreich, Meir) (Entered: 06/06/2016)
06/07/2016	191	EX PARTE APPLICATION for Leave to file Declaration of Harvey Y. Morris and Exhibits 1-6 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey,

		Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Memorandum, # 2 Proposed Order, # 3 Declaration, # 4 Exhibit, # 5 Certificate of Service) (Morris, Harvey) (Entered: 06/07/2016)
06/10/2016	192	Opposition In Opposition and Objection to re: EX PARTE APPLICATION for Leave to file Declaration of Harvey Y. Morris and Exhibits 1-6 191 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 06/10/2016)
06/14/2016	193	ORDER GRANTING EX PARTE APPLICATION TO PROVIDE THE CPUC LEAVE TO FILE THESUPPLEMENTAL DECLARATION OF HARVEY YALE MORRIS IN SUPPORT OF JOINT SCHEDULINGCONFERENCE AND RULE 26(f) REPORT ON BEHALF OF DEFENDANTS PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND COMMISSIONERS 191 by Judge S. James Otero (lc) (Entered: 06/14/2016)
06/17/2016	194	SCHEDULING NOTICE OF CONTINUANCE OF SCHEDULING CONFERENCE by Judge S. James Otero. On the Court's own motion, the Scheduling Conference set for hearing in June 20, 2016 is continued to Friday, 7/8/2016 at 09:00 AM before Judge S. James Otero. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (vcr) TEXT ONLY ENTRY (Entered: 06/17/2016)
06/22/2016	195	APPLICATION to Continue Joint Scheduling Conference from July 8, 2016 to July 22, 2016 Re: Text Only Scheduling Notice, 194 filed by Defendants California Public Utilities Commission, Michael R Florio, Catherine J K Sandoval. (Attachments: # 1 Declaration, # 2 Proof of Service) (Ralph, James) (Entered: 06/22/2016)
06/23/2016	196	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: APPLICATION to Continue Joint Scheduling Conference from July 8, 2016 to July 22, 2016 Re: Text Only Scheduling Notice, 194 195 . The following error(s) was found:Missing Proposed order which was not submitted as separate attachment. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 06/23/2016)
06/24/2016	197	NOTICE OF LODGING filed re APPLICATION to Continue Joint Scheduling Conference from July 8, 2016 to July 22, 2016 Re: Text Only Scheduling Notice, 194 195 (Attachments: # 1 Proposed Order)(Ralph, James) (Entered: 06/24/2016)
06/24/2016	198	NOTICE Notice of Errata filed by Defendants California Public Utilities Commission, Michael R Florio, Catherine J K Sandoval. (Attachments: # 1 Proposed Order Corrected [Proposed] Order)(Ralph, James) (Entered: 06/24/2016)
06/28/2016	199	CORRECTED ORDER GRANTING APPLICATION FOR CONTINUANCE OF SCHEDULING CONFERENCE BY DEFENDANTS PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA AND COMMISSIONERS 195 by Judge S. James Otero: the Court hereby orders the Joint Scheduling Conference scheduled for July 8, 2016, to be continued to July 20, 2016 at 9:00 a.m. (vv) (Entered: 06/28/2016)
06/28/2016	200	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Notice (Other) 198 . The following error(s) was found: Incorrect event selected. The correct event is: Errata. In response to this notice the court may order (1) an amended or correct document to be filed (2) the document stricken or (3) take other action as the court deems appropriate. You need not take any action in response to this notice unless and until the court directs you to do so. (lc) (Entered: 06/28/2016)

07/18/2016	201	RESPONSE filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarveyto Order on Motion for Leave to File Document, 193 , EX PARTE APPLICATION for Leave to file Declaration of Harvey Y. Morris and Exhibits 1-6 191 , Joint Report Rule 26(f) Discovery Plan, 190 *by Plaintiffs* (Attachments: # 1 Exhibit Plaintiffs' Responsive Exhibits A - G re Scheduling Conference)(Westreich, Meir) (Entered: 07/18/2016)
07/20/2016	202	MINUTES OF Scheduling Conference held before Judge S. James Otero. Hearing held. The Court and counsel confer. The Court Orders that there will be no duplicative discovery allowed. The Court advises the parties that once discovery has been completed that they may then move for summary judgment or for any appropriate judgment. The Court sets the following schedule: Jury Trial: Tuesday, February 7, 2017 @ 9:00 a.m. Pretrial Conference: Monday, January 23, 2017 @ 9:00 a.m. Motion Hearing Cutoff: Monday December 5, 2016 @ 10:00 a.m. Discovery Cutoff: Monday, October 17, 2016. See minute order for further details. Court Reporter: Carol Zurborg. (jy) (Entered: 07/20/2016)
08/23/2016	203	Notice of Appearance or Withdrawal of Counsel: for attorney Christine Jun Hammond counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Adding Christine Jun Hammond as counsel of record for California Public Utilities Commission, et al. for the reason indicated in the G-123 Notice. Filed by Defendants California Public Utilities Commission, et al.. (Attorney Christine Jun Hammond added to party John A Bohn(pty:dft), Attorney Christine Jun Hammond added to party California Public Utilities Commission(pty:dft), Attorney Christine Jun Hammond added to party Rachel Chong(pty:dft), Attorney Christine Jun Hammond added to party Mark J Ferron(pty:dft), Attorney Christine Jun Hammond added to party Michael R Florio(pty:dft), Attorney Christine Jun Hammond added to party Dian M Gruenich(pty:dft), Attorney Christine Jun Hammond added to party Michael R Peevey(pty:dft), Attorney Christine Jun Hammond added to party Nancy E Ryan(pty:dft), Attorney Christine Jun Hammond added to party Catherine J K Sandoval (pty:dft), Attorney Christine Jun Hammond added to party Timothy Alan Simon(pty:dft))(Hammond, Christine) (Entered: 08/23/2016)
09/02/2016	204	TRANSCRIPT for proceedings held on 7/20/16 9:02 a.m. Court Reporter: Carol Jean Zurborg, phone number (213) 894-3539. Transcript may be viewed at the court public terminal or purchased through the Court Reporter before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 9/23/2016. Redacted Transcript Deadline set for 10/3/2016. Release of Transcript Restriction set for 12/1/2016. (Zurborg, Carol) (Entered: 09/02/2016)
09/02/2016	205	NOTICE OF FILING TRANSCRIPT filed for proceedings 7/20/16 9:02 a.m. re Transcript 204 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (Zurborg, Carol) TEXT ONLY ENTRY (Entered: 09/02/2016)
10/27/2016	206	NOTICE OF MOTION AND MOTION for Summary Judgment as to Motion for Summary Judgment filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Motion set for hearing on 12/5/2016 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Memorandum, # 2 Declaration Harvey Y. Morris, # 3 Exhibit Exhibit 100-Decl of HYM, # 4 Exhibit Exhibit 101-Decl of HYM, # 5 Exhibit Exhibit 102-Decl of HYM, # 6 Exhibit Exhibit 103-Decl of HYM, # 7 Exhibit Exhibit 104-Decl of HYM, # 8 Exhibit Exhibit 105-Decl of HYM, # 9 Exhibit Exhibit 106-Decl of HYM, # 10 Exhibit Exhibit 107-Decl of HYM, # 11 Exhibit Exhibit 108-Decl of HYM, # 12 Exhibit Exhibit 109-Decl of

		HYM, # 13 Exhibit Exhibit 110-Decl of HYM, # 14 [Proposed] Statement of Uncontroverted Material Facts, # 15 Proposed Order [Proposed] Judgment, # 16 Certificate of Service) (Morris, Harvey) (Entered: 10/27/2016)
11/01/2016	207	NOTICE TO PARTIES by District Judge S. James Otero. Effective November 7, 2016, Judge Otero will be located at the 1st Street Courthouse, COURTROOM 10C on the 10th floor, located at 350 W. 1st Street, Los Angeles, California 90012. All Court appearances shall be made in Courtroom 10C of the 1st Street Courthouse, and all mandatory chambers copies shall be hand delivered to the judge's mail box outside the Clerk's Office on the 4th floor of the 1st Street Courthouse. The location for filing civil documents in paper format exempted from electronic filing and for viewing case files and other records services remains at the United States Courthouse, 312 North Spring Street, Room G-8, Los Angeles, California 90012. The location for filing criminal documents in paper format exempted from electronic filing remains at Edward R. Roybal Federal Building and U.S. Courthouse, 255 East Temple Street, Room 178, Los Angeles, California 90012. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (rrp) TEXT ONLY ENTRY (Entered: 11/01/2016)
11/14/2016	208	First APPLICATION for Extension of Time to File Opposition to CPUC Motion for Summary Judgment Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Exhibit A, # 2 Exhibit B.1, # 3 Exhibit B.2, # 4 Exhibit B.3, # 5 Exhibit C, # 6 Exhibit D, # 7 Exhibit E, # 8 Exhibit F, # 9 Proposed Order) (Westreich, Meir) (Entered: 11/14/2016)
11/15/2016	209	MINUTES (IN CHAMBERS) by Judge S. James Otero: This matter is before the Court on Plaintiff Californians for Renewable Energy Inc.'s Application for Order Extending Time to File Opposition to CPUC Motion for Summary Judgment filed November 14, 2016 208 .The Court will permit CARE Plaintiffs to file their opposition papers on or before Thursday, November 17, 2016, and will permitDefendants to file their reply papers on or before Thursday, November 24, 2016. This order does not impact the December 5, 2016 hearing date. (lc) (Entered: 11/15/2016)
11/17/2016	210	MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION for Summary Judgment as to Motion for Summary Judgment 206 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Supplement Statement of Genuine Issues of Material Fact and Law, # 2 Declaration of Meir J. Westreich, # 3 Declaration of Michael Boyd #1, # 4 Declaration of Michael Boyd #2)(Westreich, Meir) (Entered: 11/17/2016)
11/18/2016	211	OPPOSITION to NOTICE OF MOTION AND MOTION for Summary Judgment as to Motion for Summary Judgment 206 *Second Attempt* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Exhibit List of Exhibits, # 2 Exhibit 43, # 3 Exhibit 81, # 4 Exhibit 90a, # 5 Exhibit 90b, # 6 Exhibit 90c, # 7 Exhibit 91, # 8 Exhibit 92, # 9 Exhibit 93, # 10 Exhibit 94, # 11 Exhibit 95, # 12 Exhibit 96, # 13 Exhibit 225, # 14 Exhibit 226, # 15 Exhibit 228, # 16 229, # 17 230, # 18 231, # 19 232, # 20 233, # 21 234, # 22 235, # 23 236, # 24 237, # 25 238)(Westreich, Meir) (Entered: 11/18/2016)
11/18/2016	212	OPPOSITION to NOTICE OF MOTION AND MOTION for Summary Judgment as to Motion for Summary Judgment 206 *Second Attempt* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Exhibit 227a, # 2 Exhibit 227b)(Westreich, Meir) (Entered: 11/18/2016)
11/18/2016	213	OPPOSITION to NOTICE OF MOTION AND MOTION for Summary Judgment as to Motion for Summary Judgment 206 *Explanatory Declaration & Once Posssibly DPO Covered Exhibits* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy

		Inc, Robert Sarvey. (Attachments: # 1 Exhibit Exhibit List, # 2 Exhibit 240, # 3 Exhibit 241)(Westreich, Meir) (Entered: 11/18/2016)
11/21/2016	214	NOTICE OF ERRATA filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. correcting Response in Opposition to Motion, 212 , MEMORANDUM in Opposition to Motion, 210 , Response in Opposition to Motion,, 211 , Response in Opposition to Motion, 213 *Provision of Missing Pages* (Attachments: # 1 Exhibit 227a, # 2 Exhibit 227b [Errata])(Westreich, Meir) (Entered: 11/21/2016)
11/23/2016	215	REPLY Support of Motion NOTICE OF MOTION AND MOTION for Summary Judgment as to Motion for Summary Judgment 206 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Evidentiary Objection and Reply to SGIMF, # 2 CPUC Exhibit List, # 3 Declaration Declaration of Sara Kamins, Exs. 111 - 113, # 4 Declaration Declaration of Cheryl Lee, Ex. 114, # 5 Certificate of Service)(Morris, Harvey) (Entered: 11/23/2016)
11/29/2016	216	The Court finds the following motion suitable for disposition without oral argument and vacates the hearing re Motion for Summary Judgment filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon [ECF #206], set for hearing on December 5, 2016. See Fed. R. Civ. P. 78(b). No appearance is required. The briefing schedule remains as set by Local Rule.THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (vcr) TEXT ONLY ENTRY (Entered: 11/29/2016)
12/28/2016	217	MINUTES (IN CHAMBERS) by Judge S. James Otero: ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT 206 . (lc) (Entered: 12/29/2016)
12/28/2016	218	JUDGMENT by Judge S. James Otero: The CPUC Defendants Motion forSummary Judgment on Claims 1 and 2 of the Fifth Amended Complaint is granted.IT IS HEREBY FURTHER ORDERED THAT plaintiffs Californians for Renewable Energy, Inc., Michael E. Boyd and Robert Sarvey take nothing, the action be dismissed in its entirety, and that defendants recover their costs. (MD JS-6, Case Terminated). (lc) (Entered: 12/29/2016)
01/25/2017	219	First NOTICE OF MOTION AND MOTION to Alter Judgment re Judgment, 218 . filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Motion set for hearing on 3/6/2017 at 10:00 AM before Judge S. James Otero. (Attachments: # 1 Proposed Order) (Westreich, Meir) (Entered: 01/25/2017)
02/13/2017	220	MEMORANDUM in Opposition to First NOTICE OF MOTION AND MOTION to Alter Judgment re Judgment, 218 . 219 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Certificate of Service)(Morris, Harvey) (Entered: 02/13/2017)
02/15/2017	221	MINUTES (IN CHAMBERS) by Judge S. James Otero: The Court DENIES Plaintiffs' Motion to Amend or Alter Judgment 219 . (SEE DOCUMENT FOR SPECIFICS)/ (lc) (Entered: 02/15/2017)
03/07/2017	222	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Appeal of Order on Motion to Alter Judgment 221 , Order on Motion for Leave to File Document,, 184 , Judgment, 218 , Order on Motion for Summary Judgment 217 . (Appeal Fee - $505 Fee Paid, Receipt No. 0973-19470411.) (Attachments: # 1 Appendix Judgment, # 2 Appendix

		Memorandum Decision, # 3 Appendix Order Denying Leave to Amend, # 4 Appendix Order Denying Motion to Modify Judgment)(Westreich, Meir) (Entered: 03/07/2017)
03/07/2017	223	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 17-55297 assigned to Notice of Appeal to 9th Circuit Court of Appeals 222 as to Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc. (mat) (Entered: 03/08/2017)
04/24/2019	224	OPINION from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 222 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 17-55297. DISTRICT COURT DECISION AFFIRMED IN PART AND REVERSED IN PART (SEE DOCUMENT FOR DETAILS) (lc) Modified on 9/23/2019 (lc). (Entered: 04/24/2019)
04/25/2019	225	Notice of Electronic Filing re USCA Memorandum/Opinion/Order, 224 e-mailed to emm@cpuc.ca.gov bounced due to 550 5.1.1 RESOLVER.ADR.RecipNotFound; not found. The primary e-mail address associated with the attorney record has been deleted. Pursuant to Local Rules it is the attorneys obligation to maintain all personal contact information including e-mail address in the CM/ECF system. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (ew) TEXT ONLY ENTRY (Entered: 04/25/2019)
05/02/2019	226	Notice of Appearance or Withdrawal of Counsel: for attorney Christine Jun Hammond counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Elizabeth M. McQuillan is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant Christine J. Hammond. (Hammond, Christine) (Entered: 05/02/2019)
05/02/2019	227	Notice of Appearance or Withdrawal of Counsel: for attorney Christine Jun Hammond counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Harvey Yale Morris is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant Christine J. Hammond. (Hammond, Christine) (Entered: 05/02/2019)
05/02/2019	228	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals 222 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 17-55297.Appellees motion to extend the deadline to file a petition for rehearing or petition for rehearing en banc to June 7, 2019 is GRANTED. (lc) (Entered: 05/03/2019)
05/08/2019	229	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 222 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 17-55297.The time for any party to file any Petition for Rehearing and/or Rehearing En Banc is extended to June 7, 2019. (lc) (Entered: 05/10/2019)
06/04/2019	230	ORDER from Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals,, 222 filed by Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd. CCA # 17-55297. Appellants motion to further extend time to file petition for rehearing andrehearing en banc is GRANTED. The time for any party to file any Petition forRehearing and/or Rehearing En Banc is extended to June 21, 2019.(lc) (Entered: 06/06/2019)

09/23/2019	231	MANDATE of Ninth Circuit Court of Appeals filed re: Notice of Appeal to 9th Circuit Court of Appeals, 222 , CCA # 17-55297. The judgment of this Court, entered April 24, 2019, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure. [See USCA Opinion 224 , This case is reversed and remanded on that issue. In all otherrespects, the decision below is affirmed.AFFIRMED IN PART and REVERSED IN PART.] (mat) (Entered: 09/23/2019)
09/25/2019	232	MINUTE ORDER IN CHAMBERS by Judge S. James Otero: The Court having received the Ninth Circuits mandate filed on September 23, 2019,AFFIRMING in part and REVERSING in part 231 . The Court sets a scheduling conferenceMonday, October 28, 2019 8:30 a.m. The parties shall file a joint status report by October 15, 2019.(Case reopened. MD JS-5.) (lc) (Entered: 09/25/2019)
10/08/2019	233	STIPULATION for Order Approving Stipulated Application to Postpone Scheduling Conference and for Extension of Time to File Joint Status Report, STIPULATION for Extension of Time to File Joint Status Report filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Proposed Order, # 2 Certificate of Service)(Hammond, Christine) (Entered: 10/08/2019)
10/16/2019	234	ORDER APPROVING STIPULATED APPLICATION TO POSTPONE SCHEDULING CONFERENCE AND EXTENSION OF TIME TO FILE JOI STATUS REPORT 233 by Judge S. James Otero ; Status Report due by 12/10/2019; Scheduling Conference set for 1/6/2020 at 08:30 AM. (lc) (Entered: 10/17/2019)
12/10/2019	235	Second STIPULATION to Continue Scheduling Conference from January 6, 2020 to At Least 4 Months Re: Minutes of In Chambers Order/Directive - no proceeding held,, Set/Reset Deadlines/Hearings,, Case Reopened, 232 , Order, Set/Reset Deadlines/Hearings 234 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Proposed Order)(Westreich, Meir) (Entered: 12/10/2019)
12/12/2019	236	ORDER APPROVING STIPULATED APPLICATION TO POSTPONE SCHEDULING CONFERENCE TO JUNE 8, 2020 8:30 AM AND FOR EXTENSION OF TIME TO FILE JOINT STATUS REPORT TO MAY 18, 2020 235 by Judge S. James Otero (lc) (Entered: 12/13/2019)
04/02/2020	237	ORDER OF THE CHIEF JUDGE (#20-050) approved by Judge Virginia A. Phillips. IT IS ORDERED, with the concurrence of the Case Management and Assignment Committee, that the following cases be reassigned from the calendar of Judge S. James Otero to the Calendar of Judge Fernando M. Olguin for all futher proceedings. The case number will now reflect the initials of the transferee Judge 2:11-cv-04975 FMO(JCGx). (rn) (Entered: 04/02/2020)
04/06/2020	238	TEXT ONLY ENTRY by Chambers of Judge Fernando M. Olguin. This matter has been assigned to District Judge Fernando M. Olguin. The Court refers counsel to the Court's Initial Standing Order found on the Court's Website under Judge Olguin's Procedures and Schedules. Please read this Order carefully. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (vdr) TEXT ONLY ENTRY (Entered: 04/06/2020)
04/09/2020	239	First NOTICE of Appearance filed by attorney Stephanie Hoehn on behalf of Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon (Attorney Stephanie Hoehn added to party John A Bohn(pty:dft), Attorney Stephanie Hoehn added to party California Public Utilities

		Commission(pty:dft), Attorney Stephanie Hoehn added to party Rachel Chong(pty:dft), Attorney Stephanie Hoehn added to party Mark J Ferron(pty:dft), Attorney Stephanie Hoehn added to party Michael R Florio(pty:dft), Attorney Stephanie Hoehn added to party Dian M Gruenich(pty:dft), Attorney Stephanie Hoehn added to party Michael R Peevey(pty:dft), Attorney Stephanie Hoehn added to party Nancy E Ryan(pty:dft), Attorney Stephanie Hoehn added to party Catherine J K Sandoval (pty:dft), Attorney Stephanie Hoehn added to party Timothy Alan Simon(pty:dft))(Hoehn, Stephanie) (Entered: 04/09/2020)
04/10/2020	240	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Notice of Appearance,,, 239 . The following error(s) was/were found: Incorrect event selected. Correct event to be used is: Notice of Appearance or Withdrawal of Counsel G123. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (ak) (Entered: 04/10/2020)
04/16/2020	241	Notice of Electronic Filing re Text Only Scheduling Notice, 238 , Deficiency in Electronically Filed Documents (G-112A) - optional html form,, 240 , Notice of Appearance,,, 239 , Chief District Judge Transferring Case, 237 e-mailed to James Murray Polish at jpolish@carlsmith.com bounced due to No such email box. The primary e-mail address associated with the attorney record has been deleted. Pursuant to Local Rules it is the attorneys obligation to maintain all personal contact information including e-mail address in the CM/ECF system. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (ir) TEXT ONLY ENTRY (Entered: 04/16/2020)
04/16/2020	242	Notice of Electronic Filing re Text Only Scheduling Notice, 238 e-mailed to James McIntosh Ralph at james.ralph@cpuc.ca.gov bounced due to No such email box. The primary e-mail address associated with the attorney record has been deleted. Pursuant to Local Rules it is the attorneys obligation to maintain all personal contact information including e-mail address in the CM/ECF system. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (ir) TEXT ONLY ENTRY (Entered: 04/16/2020)
04/22/2020	243	MINUTE ORDER(In Chambers) Order Re: Scheduling Conference by Judge Fernando M. Olguin. On the court's own motion, the scheduling conference set for June 8, 2020 at 8:00 a.m. is continued to August 5, 2020, at 10:00 a.m. (lom) (Entered: 04/22/2020)
04/30/2020	244	Notice of Appearance or Withdrawal of Counsel: for attorney Stephanie Hoehn counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. James McIntosh Ralph is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by defendant California Public Utilities Commission. (Hoehn, Stephanie) (Entered: 04/30/2020)
07/18/2020	245	JOINT REPORT Rule 26(f) Discovery Plan *and Case Management Report* ; estimated length of trial none estimated yet, filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey.. (Westreich, Meir) (Entered: 07/18/2020)
07/20/2020	246	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Joint Report Rule 26(f) 245 . The following error(s) was/were found: Case number is incorrect. Case number should read CV 11-04975-FMO-JCG. Filer should use correct Judge's initials. See order Reassigning Dkt. 237. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in

		response to this notice unless and until the Court directs you to do so. (iv) (Entered: 07/20/2020)
07/31/2020	247	SCHEDULING AND CASE MANAGEMENT ORDER RE: JURY TRIAL by Judge Fernando M. Olguin. The court deems a Scheduling Conference unnecessary and hereby vacates the hearing. Jury Trial set for 6/1/2021 at 8:45 AM before Judge Fernando M. Olguin. *See order for dates, deadlines and requirements.* (vdr) (Entered: 07/31/2020)
07/31/2020	248	ORDER RE: SUMMARY JUDGMENT MOTIONS by Judge Fernando M. Olguin. (vdr) (Entered: 07/31/2020)
09/29/2020	249	ORDER OF THE CHIEF JUDGE (#20-141) approved by Judge Philip S. Gutierrez. Pursuant to the recommended procedure adopted by the Court for the CREATION OF CALENDAR of Judge John W. Holcomb, this case is transferred from Judge Fernando M. Olguin to the calendar of Judge John W. Holcomb for all further proceedings. The case number will now reflect the initials of the transferee Judge 2:11-cv-04975 JWH(JCGx). (rn) (Entered: 09/30/2020)
10/05/2020	250	This action has been reassigned to the Honorable John W. Holcomb, United States District Judge. Judge Holcomb is located in Courtroom 2, on the 2nd Floor of the George E. Brown, Jr. Federal Building and United States Courthouse at 3470 Twelfth Street, Riverside, California 92501. Additional information regarding Judge Holcomb's procedures and schedules is available on the court's website at www.cacd.uscourts.gov. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (iva) TEXT ONLY ENTRY (Entered: 10/05/2020)
10/17/2020	251	STANDING ORDER by Judge John W. Holcomb. (iva) (Entered: 10/17/2020)
10/23/2020	252	Mail Returned addressed to James Murray Polish re Deficiency in Electronically Filed Documents (G-112A) -, 240 (yl) (Entered: 10/23/2020)
12/23/2020	253	First APPLICATION for Hearing Special Status Conference to Consider New Case Management Dates, etc., re Generic Text Only Entry,, 250 , Initial Order upon Filing of Complaint - form only 248 , *Joint Application* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Declaration of Christine Hammond, # 2 Declaration of Meir J. Westreich. Exhibits, # 3 Proposed Order) (Westreich, Meir) (Entered: 12/23/2020)
12/28/2020	254	ORDER APPROVING JOINT APPLICATION FOR SCHEDULING STATUS CONFERENCE AND ORDERING FILING OF A JOINT STATUS REPORT PROPOSING NEW SCHEDULING ORDER 253 by Judge John W. Holcomb: IT IS HEREBY ORDERED that the parties appear before the court for scheduling status conference on January 25, 2021, at 2:00 p.m., and file a joint status report proposing a new scheduling order no later than January 15, 2021. (yl) (Entered: 12/29/2020)
01/15/2021	255	First APPLICATION to Continue Status Conference for New Scheduling Order from January 25, 2021 to March 1, 2021 Re: Order on Motion for Hearing, 254 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Declaration of Meir J. Westreich. Exhibits A-K, # 2 Proposed Order) (Westreich, Meir) (Entered: 01/15/2021)
01/19/2021	256	ORDER CONTINUING STATUS CONFERENCE FOR NEW SCHEDULING ORDER AND DEADLINE FOR FILING OF JOINT STATUS REPORT 255 by Judge John W. Holcomb. IT IS HEREBY ORDERED that the parties appear before the court for scheduling status conference on March 1, 2021 at 2:00 p.m. and file a jointstatus report proposing a new scheduling order no later than February 19, 2021. (lom) (Entered: 01/19/2021)

02/19/2021	257	Second APPLICATION to Continue Status Conference from March 1, 2021 to March 22, 2021 Re: Order on Motion for Hearing, 254 , Order on Motion to Continue, 256 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Proposed Order) (Westreich, Meir) (Entered: 02/19/2021)
02/22/2021	258	DECLARATION of Meir J. Westreich Second APPLICATION to Continue Status Conference from March 1, 2021 to March 22, 2021 Re: Order on Motion for Hearing, 254 , Order on Motion to Continue, 256 257 *Supporting Declaration. Exhibits A-N Attached* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 02/22/2021)
02/23/2021	259	ORDER CONTINUING STATUS CONFERENCE AND FILING OF A JOINT STATUS REPORT PROPOSING NEW SCHEDULING ORDER 257 by Judge John W. Holcomb: IT IS HEREBY ORDERED that the parties appear before the court for scheduling status conference on March 22, 2021, at 2:00 p.m., and file a joint status report proposing a new scheduling order no later than March 12, 2021. (yl) (Entered: 02/23/2021)
03/13/2021	260	Third APPLICATION to Continue Status Conference from March 22, 2021 to May 17, 2021 Re: Order on Motion for Hearing, 254 , Order on Motion to Continue, 259 , Order on Motion to Continue, 256 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Declaration of Meir J. Westreich. Exhibits, # 2 Proposed Order) (Westreich, Meir) (Entered: 03/13/2021)
03/16/2021	261	ORDER FURTHER CONTINUING STATUS CONFERENCE AND FILING OF A JOINT STATUS REPORT PROPOSING NEW SCHEDULING ORDER by Judge John W. Holcomb granting 260 APPLICATION to Continue: IT IS HEREBY ORDERED that the parties appear before the court for scheduling status conference on May 17, 2021, at 2:00 p.m., and file a joint status report proposing a new scheduling order no later than May 7, 2021. (bm) (Entered: 03/16/2021)
04/19/2021	262	SCHEDULING NOTICE AND ORDER by Judge John W. Holcomb: In view of the Status Conference set for May 17, 2021, the Court hereby VACATES the Final Pretrial Conference set for May 14, 2021, and the Jury Trial set for June 1, 2021. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (iva) TEXT ONLY ENTRY (Entered: 04/19/2021)
04/19/2021	263	Notice of Appearance or Withdrawal of Counsel: for attorney Ian P Culver counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Adding Ian P. Culver as counsel of record for Defendant California Public Utilities Commission for the reason indicated in the G-123 Notice. Filed by Defendant California Public Utilities Commission. (Attorney Ian P Culver added to party John A Bohn(pty:dft), Attorney Ian P Culver added to party California Public Utilities Commission(pty:dft), Attorney Ian P Culver added to party Rachel Chong(pty:dft), Attorney Ian P Culver added to party Mark J Ferron(pty:dft), Attorney Ian P Culver added to party Michael R Florio(pty:dft), Attorney Ian P Culver added to party Dian M Gruenich(pty:dft), Attorney Ian P Culver added to party Michael R Peevey(pty:dft), Attorney Ian P Culver added to party Nancy E Ryan(pty:dft), Attorney Ian P Culver added to party Catherine J K Sandoval (pty:dft), Attorney Ian P Culver added to party Timothy Alan Simon(pty:dft))(Culver, Ian) (Entered: 04/19/2021)
04/26/2021	264	Notice of Appearance or Withdrawal of Counsel: for attorney Galen Duke Lemei counsel for Defendant California Public Utilities Commission. Adding Galen D Lemei as counsel of record for California Public Utilities Commission for the reason indicated in the G-123 Notice. Filed by Defendant California Public Utilities Commission. (Attorney Galen

		Duke Lemei added to party California Public Utilities Commission(pty:dft))(Lemei, Galen) (Entered: 04/26/2021)
05/07/2021	265	STATUS REPORT *Joint Status Report. Appendices A & B* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 05/07/2021)
05/07/2021	266	NOTICE OF LODGING filed *re Proposed SIXTH AMENDED AND SECOND SUPPLEMENTAL COMPLAINT FOR EQUITABLE RELIEF AND DAMAGES* re Status Report 265 , Order on Motion for Hearing, 254 , First APPLICATION for Hearing Special Status Conference to Consider New Case Management Dates, etc., re Generic Text Only Entry,, 250 , Initial Order upon Filing of Complaint - form only 248 , *Joint Application* 253 , Amended Complaint/Petition 185 (Attachments: # 1 Supplement Lodged Sixth Amended and Second Supplemental Complaint for Equitable Relief and Damages, # 2 Proposed Order)(Westreich, Meir) (Entered: 05/07/2021)
05/17/2021	267	Sixth Amended and Second Supplemental AMENDED COMPLAINT against Defendants California Public Utilities Commission amending Amended Complaint/Petition 185 , filed by Plaintiffs Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd(Westreich, Meir) (Entered: 05/17/2021)
05/17/2021	269	MINUTES OF Video Hearing RE: Status Conference held before Judge John W. Holcomb: Plaintiffs are DIRECTED to file their proposed Sixth Amended and Second Supplemental Complaint, attached to the Notice of Lodging [ECF No. 266], on or before May 19, 2021. Motion and Status Conference set for 9/10/2021 at 09:00 AM before Judge John W. Holcomb. SEE DOCUMENT FOR FURTHER INFORMATION. Court Reporter: Miriam Baird. (twdb) (Entered: 05/19/2021)
05/19/2021	268	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Amended Complaint/Petition, 267 . The following error(s) was/were found: Leave of court was not granted for such filing. In response to this notice, the Court may: (1) order an amended or correct document to be filed; (2) order the document stricken; or (3) take other action as the Court deems appropriate. You need not take any action in response to this notice unless and until the Court directs you to do so. (yl) (Entered: 05/19/2021)
06/16/2021	270	Mail Returned addressed to James Murray Polish re Text Only Scheduling Notice, 262 (yl) (Entered: 06/21/2021)
07/09/2021	271	NOTICE OF MOTION AND MOTION to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint , NOTICE OF MOTION AND MOTION to Strike Amended Complaint/Petition, 267 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. Motion set for hearing on 9/10/2021 at 09:00 AM before Judge John W. Holcomb. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Proposed Order, # 3 Proposed Order (Alternative)) (Culver, Ian) (Entered: 07/09/2021)
08/03/2021	272	Mail Returned addressed to James Polish re Status Conference 269 (yl) (Entered: 08/09/2021)
08/05/2021	273	Mail Returned addressed to James Polish re Order on Motion to Continue 256 (yl) (Entered: 08/10/2021)
08/11/2021	274	STATEMENT of Plaintiffs' Failure to Oppose Motion NOTICE OF MOTION AND MOTION to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint NOTICE OF MOTION AND MOTION to Strike Amended Complaint/Petition, 267 271 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan,

		Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 E-mail Included at Plaintiffs' Request)(Culver, Ian) (Entered: 08/11/2021)
08/17/2021	275	First APPLICATION to Continue Motion to Dismiss from 09/10/2021 to 10/01/2021 Re: NOTICE OF MOTION AND MOTION to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint NOTICE OF MOTION AND MOTION to Strike Amended Complaint/Petition, 267 271 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Proposed Order) (Westreich, Meir) (Entered: 08/17/2021)
08/18/2021	276	ORDER ON APPLICATION FOR ORDER CONTINUING HEAZRING ON MOTION TO DISMISS AND EXTENDING BRIEFING SCHEDULE by Judge John W. Holcomb: IT IS HEREBY ORDERED that the hearing on the Motion to Dismiss is continued from September 10, 2021, to October 1, 2021, at 9:00 a.m. The deadlines for filing opposition and reply papers shall be calculated in accordance with L.R. 7-11. IT IS SO ORDERED. 275 (yl) (Entered: 08/19/2021)
08/19/2021	277	Mail Returned addressed to James Murray Polish re Order on Motion to Continue, 261 (yl) (Entered: 08/25/2021)
08/30/2021	278	SCHEDULING NOTICE AND ORDER by Judge John W. Holcomb: On its own motion, the Court CONTINUES the Status Conference set for September 10, 2021, to Friday, October 1, 2021, at 9:00 a.m. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (npo) TEXT ONLY ENTRY (Entered: 08/30/2021)
09/10/2021	279	MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint NOTICE OF MOTION AND MOTION to Strike Amended Complaint/Petition, 267 271 *Additional Document. RJN with Exhibits Pending. ECF Rejection ["Malformed"].Served* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 09/10/2021)
09/13/2021	280	REQUEST FOR JUDICIAL NOTICE re NOTICE OF MOTION AND MOTION to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint NOTICE OF MOTION AND MOTION to Strike Amended Complaint/Petition, 267 271 *In Support of Opposition to Motion to Dismiss, etc.* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey, Solutions for Utilities Inc. (Attachments: # 1 Declaration re Delayed Corrected Filing of Request for Judicial Notice with Exhibits) (Westreich, Meir) (Entered: 09/13/2021)
09/17/2021	281	REPLY NOTICE OF MOTION AND MOTION to Dismiss Plaintiffs' Sixth Amended and Second Supplemental Complaint NOTICE OF MOTION AND MOTION to Strike Amended Complaint/Petition, 267 271 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Culver, Ian) (Entered: 09/17/2021)
09/17/2021	282	OBJECTIONS to Request for Judicial Notice,, 280 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Attachments: # 1 Proposed Order)(Culver, Ian) (Entered: 09/17/2021)
09/27/2021	283	SCHEDULING NOTICE AND ORDER by Judge John W. Holcomb: The hearing on Defendants' Motion to Dismiss and Motion to Strike [ECF No. 271] and the Status Conference, are ordered CONTINUED from Friday, October 1, 2021 to Monday, October 4, 2021, at 11:00 a.m., via video conference. To obtain the video conference link for the scheduled hearing, the parties are directed to Judge Holcomb's Procedures and Schedules page on the Court's website: http://www.cacd.uscourts.gov/honorable-john-w-holcomb.

		Please follow the instructions listed under "Zoom Webinar Hearings." IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (iva) TEXT ONLY ENTRY (Entered: 09/27/2021)
10/04/2021	284	MINUTES OF VIDEO HEARING RE: DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS MOTION TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT [ECF No. 271] & STATUS CONFERENCE By Judge John W. Holcomb. For the reasons stated on the record, the Court takes Defendants' motion [ECF No. 271] under submission. The Court will reset the Status Conference after it issues its ruling on the motion. IT IS SO ORDERED. Court Reporter: Courtsmart RS-10-4-21. (yl) (Entered: 10/05/2021)
10/22/2021	285	Mail Returned addressed to James Murray Polish re Order on Motion to Dismiss, Order on Motion to Strike, Motion Hearing, Status Conference - optional html form, 284 (mrgo) (Entered: 10/28/2021)
02/11/2022	286	Joint REQUEST for Ruling on Submitted Matter filed by Defendant California Public Utilities Commission. (Culver, Ian) (Entered: 02/11/2022)
03/09/2022	287	ORDER GRANTING IN PART AND DENYING IN PART THE MOTION OF CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SIXTH AMENDED COMPLAINT AND MOTION TO STRIKE REFERENCES TO SECOND SUPPLEMENT FROM SIXTH AMENDED COMPLAINT [ECF No. 271] by Judge John W. Holcomb. The Motion of Defendant CPUC to dismiss Plaintiffs' Sixth Amended Complaint is GRANTED in substantial part, as follows: All claims of Plaintiff CARE are DISMISSED without prejudice for lack of standing. Plaintiffs Boyd and Sarvey's PURPA implementation claim is DISMISSED with leave to amend. If Boyd and Sarvey fail to file their amended pleading by March 25, 2022, then the Court will DISMISS Boyd and Sarvey from this action with prejudice. IT IS SO ORDERED. (See document for further details) (yl) (Entered: 03/09/2022)
03/25/2022	288	First APPLICATION for Extension of Time to Amend Amended Complaint/Petition, 267 , Order on Motion to Dismiss,,,, Order on Motion to Strike,,, 287 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Appendix Lodged Combined Redline-Blueline Version of Intended Proposed Seventh Amended and Third Supplemental Complaint, # 3 Proposed Order to Modify Sequence of Pleading Filings and Extend Time to Do So) (Westreich, Meir) (Entered: 03/25/2022)
03/26/2022	289	MEMORANDUM in Opposition to First APPLICATION for Extension of Time to Amend Amended Complaint/Petition, 267 , Order on Motion to Dismiss,,,, Order on Motion to Strike,,, 287 288 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon. (Hoehn, Stephanie) (Entered: 03/26/2022)
03/28/2022	290	REPLY in support First APPLICATION for Extension of Time to Amend Amended Complaint/Petition, 267 , Order on Motion to Dismiss,,,, Order on Motion to Strike,,, 287 288 *with Exhibits A & B* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 03/28/2022)
03/28/2022	291	TRANSCRIPT for proceedings held on 10/4/2021. Court Reporter/Electronic Court Recorder: EXCEPTIONAL REPORTING SERVICES, INC., phone number (361) 949-2988. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact

		due within 7 days of this date. Redaction Request due 4/18/2022. Redacted Transcript Deadline set for 4/28/2022. Release of Transcript Restriction set for 6/27/2022. (aa) (Entered: 03/29/2022)
03/28/2022	292	NOTICE OF FILING TRANSCRIPT filed for proceedings 10/4/2021 re Transcript 291 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (aa) TEXT ONLY ENTRY (Entered: 03/29/2022)
03/29/2022	293	TRANSCRIPT ORDER as to Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Michael R Peevey, Nancy E Ryan, Catherine J K Sandoval, Timothy Alan Simon for Court Reporter. Court will contact Ian Culver at ian.culver@cpuc.ca.gov with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the court reporter. (Culver, Ian) (Entered: 03/29/2022)
03/29/2022	294	ORDER REGARDING PLAINTIFFS APPLICATION TO MODIFY SEQUENCE OF NEW PLEADING FILINGS AND EXTEND TIME TO DO SO [ECF NO. 288] (IN CHAMBERS)(IN CHAMBERS) by Judge John W. Holcomb. The Court hereby ORDERS as follows: Plaintiffs' Application is GRANTED in part and DENIED in part. The deadline for Boyd and Sarvey to file an amended complaintbut only as it relates to their PURPA implementation claim within the scope of the Ninth Circuits remandis EXTENDED to no later than April 5, 2022. If Boyd and Sarvey choose to file an amended pleading, then they are also DIRECTED to file contemporaneously therewith a Notice of Revisions to the Sixth Amended Complaint that provides the Court with a redline version that shows the amendments. The deadline for CARE to file a motion pursuant to Rule 15(d) for leave to file a supplemental complaint is EXTENDED to April 8, 2022. Any pleading that contains material concerning any transaction, occurrence, or event that happened after the date of the filing of the complaint will be STRICKEN unless the Court has granted a motion to supplement. IT IS SO ORDERED. (SEE DOCUMENT FOR FURTHER DETAILS) (yl) (Entered: 03/29/2022)
04/01/2022	295	First REQUEST to Supplement Clarify Order of March 29, 2022 re Order on Motion for Extension of Time to Amend,,,, 294 *Urgent Attention Required Due 04.05.22 Filing Deadline* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Proposed Order) (Westreich, Meir) (Entered: 04/01/2022)
04/04/2022	296	(IN CHAMBERS) ORDER by Judge John W. Holcomb: In response to Plaintiff's Request for Clarification [ECF No. 295], the Court provides the following clarification of its Minute Order (the "Order") [ECF No. 294]: (1) The "Complaint" refers to Plaintiffs' Complaint for Damages and Equitable Relief (the "Complaint") [ECF No. 1]. (2) Plaintiffs Boyd and Sarvey need not delete references to CARE in their anticipated amended complaint, so long as (a) those allegations are relevant to the sole claim for which they have been granted leave to amend; and (b) the allegations do not concern transactions, occurrences, or events that happened after the date of the filing of the Complaint. See Fed. R. Civ. P. 15(d). The Court reminds Plaintiffs that it denied their only prior motion to file a supplemental pleading, albeit without prejudice. See Order Den. Without Prejudice Mot. for Leave to File Fourth Am. Compl. and First Suppl. Compl. [ECF No. 184]. (3) Plaintiffs are not barred from making allegations in an amended or supplemental pleading, so long as (b) those allegations are related to claims asserted in that particular amended or supplemental pleading; and (b) those allegations otherwise comport with the Federal Rules of Civil Procedure and Local Rules. CARE's anticipated supplemental pleading (which CARE must obtain leave to file) should not contain any claims that are asserted in Boyd and Sarvey's anticipated amended pleading. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (iva) TEXT ONLY ENTRY (Entered: 04/04/2022)

04/04/2022	297	DECLARATION of Meir J. Westreich in Support of Request for Clarification First REQUEST to Supplement Clarify Order of March 29, 2022 re Order on Motion for Extension of Time to Amend,,,, 294 *Urgent Attention Required Due 04.05.22 Filing Deadline* 295 *Errata Declaration* filed by Plaintiff Robert Sarvey. (Westreich, Meir) (Entered: 04/04/2022)
04/05/2022	298	Seventh AMENDED COMPLAINT against Defendants California Public Utilities Commission, Alice Busching Reynolds, Clifford Rechtschaffen, Genevieve Shiroma, Darcie L Houck, John Reynolds amending Amended Complaint/Petition, 267 , filed by Plaintiffs Robert Sarvey, Californians for Renewable Energy Inc, Michael E Boyd (Attachments: # 1 Supplement Seventh Amended Complaint [redline], # 2 Declaration of Meir J. Westreich)(Westreich, Meir) (Entered: 04/05/2022)
04/08/2022	299	First NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Motion set for hearing on 5/20/2022 at 09:00 AM before Judge John W. Holcomb. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Proposed Order, # 3 Supplement [Proposed] Eighth Amended and Third Supplemental Complaint [clean], # 4 Supplement [Proposed] Eighth Amended and Third Supplemental Complaint [redline]) (Westreich, Meir) (Entered: 04/08/2022)
04/09/2022	300	NOTICE OF ERRATA filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. correcting First NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint 299 (Attachments: # 1 Memorandum of Points and Authorities, # 2 Proposed Order for Leave to File Eighth Amended and Third Supplemental Complaint [lodged herewith], # 3 Supplement [Proposed] Eighth Amended and Third Supplemental Complaint[clean], # 4 Supplement [Proposed] Eighth Amended and Third Supplemental Complaint [redline]) (Westreich, Meir) (Entered: 04/09/2022)
04/13/2022	301	First NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion for Extension of Time to Amend,,,, 294 *To Be Heard in Conjunction with Motion for Leave to File Eighth Amended and Third Supplemental Complaint* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Motion set for hearing on 5/20/2022 at 09:00 AM before Judge John W. Holcomb. (Attachments: # 1 Memorandum, # 2 Proposed Order) (Westreich, Meir) (Entered: 04/13/2022)
04/15/2022	302	Joint APPLICATION to Continue Motion Hearings from May 20, 2022 to June 17, 2022 Re: First NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint 299 , Amended Complaint/Petition, 298 , Errata,, 300 , First NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion for Extension of Time to Amend,,,, 294 *To Be Heard in Conjunction with Motion for Leave to File Eighth Amended and Third Supplemental Complaint* 301 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Declaration of Defendants' Counsel Ian Culver, # 2 Declaration of Plaintiffs' Counsel Meir J. Westreich, # 3 Proposed Order) (Westreich, Meir) (Entered: 04/15/2022)
04/18/2022	303	ORDER RE JOINT APPLICATION FOR ORDER CONTINUING PLEADING MOTION HEARINGS WITH REVISED BRIEFING SCHEDULE; AND EXTENDING TIME TO RESPOND TO SEVENTH AMENDED COMPLAINT 302 by Judge John W. Holcomb. The hearings on Plaintiffs' Motion for Leave to File Eighth Amended and Third Supplemental Complaint [ECF No. 299] and Motion to Reconsider Order of March 29, 2022, and Minute Entry of April 4, 2022 [ECF No. 301] are continued from May 20, 2022, to June 17, 2022, at 9:00 a.m. The time for Defendants to file any opposition to the

		Pleading Motions is EXTENDED to May 20, 2022, and the time for Plaintiffs to file any reply in support of the Pleading Motions is likewise EXTENDED to June 3, 2022. The time for Defendants to file their response to the Seventh Amended Complaint is EXTENDED to July 8, 2022. IT IS SO ORDERED. (See document for further details) (yl) (Entered: 04/19/2022)
05/19/2022	304	TEXT ONLY ENTRY: NOTICE TO PARTIES by District John W. Holcomb. Effective Monday, May 23, 2022, Judge John W. Holcomb will be located in the Ronald Reagan Federal Building and U.S. Courthouse, Courtroom 9D, on the 9th Floor, located at 411 W. 4th Street, Santa Ana, California 92701-4516. All Court appearances shall be made in Courtroom 9D of the Ronald Reagan Federal Building and U.S. Courthouse unless otherwise ordered by the Court. All required mandatory chambers copies shall be delivered and placed in the drop box located on the 9th Floor of the Ronald Reagan Federal Building and U.S. Courthouse. Judge Holcomb's Courtroom Deputy Clerk, may be reached at JWH_Chambers@cacd.uscourts.gov. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (cbr) TEXT ONLY ENTRY (Entered: 05/19/2022)
05/20/2022	305	MEMORANDUM in Opposition to First NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion for Extension of Time to Amend,,,, 294 *To Be Heard in Conjunction with Motion for Leave to File Eighth Amended and Third Supplemental Complaint* 301 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Attachments: # 1 Proposed Order)(Attorney Ian P Culver added to party Darcie L Houck(pty:dft), Attorney Ian P Culver added to party Clifford Rechtschaffen(pty:dft), Attorney Ian P Culver added to party Alice Busching Reynolds(pty:dft), Attorney Ian P Culver added to party John Reynolds(pty:dft), Attorney Ian P Culver added to party Genevieve Shiroma(pty:dft))(Culver, Ian) (Entered: 05/20/2022)
05/20/2022	306	MEMORANDUM in Opposition to First NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint 299 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Attachments: # 1 Proposed Order, # 2 Objection to Declaration of Michael Boyd, # 3 Proposed Order on Objection)(Culver, Ian) (Entered: 05/20/2022)
05/31/2022	308	Mail Returned addressed to James M. Polish re Generic Text Only Entry 304 (yl) (Entered: 06/06/2022)
05/31/2022	309	Mail Returned addressed to Elizabeth Dean re Amended Document (Non-Motion) 9 (yl) (Entered: 06/06/2022)
06/03/2022	307	REPLY in Support First NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint 299 , First NOTICE OF MOTION AND MOTION for Reconsideration re Order on Motion for Extension of Time to Amend,,,, 294 *To Be Heard in Conjunction with Motion for Leave to File Eighth Amended and Third Supplemental Complaint* 301 *Combined Reply* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 06/03/2022)
06/15/2022	310	(IN CHAMBERS) ORDER by Judge John W. Holcomb: The Court finds that the Motion for Leave to File [Proposed] Eighth Amended [ECF No. 299] and the Motion to Reconsider Order and Minute Entry [ECF No. 301], are appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. Accordingly, the Court vacates the hearing

		set on June 17, 2022. The motion stands submitted on the papers timely filed. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (eva) TEXT ONLY ENTRY (Entered: 06/15/2022)
07/01/2022	311	Joint STIPULATION for Extension of Time to File Response to Seventh Amended Complaint filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Attachments: # 1 Proposed Order)(Culver, Ian) (Entered: 07/01/2022)
07/05/2022	312	MINUTE ORDER REGARDING THE MOTION FOR RECONSIDERATION (ECF No. 301] (IN CHAMBERS) by Judge John W. Holcomb. The Court finds ample reason to DENY Plaintiffs' Motion. IT IS SO ORDERED. (See document for further details) (yl) (Entered: 07/05/2022)
07/06/2022	313	ORDER ON JOINT STIPULATION TO CONTINUE DEADLINE TO RESPOND TO PLEADING by Judge John W. Holcomb 311 . The last day for the Defendants to move or plead in response to the Plaintiff's Seventh Amended Complaint (Dkt. 298) is EXTENDED from July 8, 2022 to July 22, 2022. IT IS SO ORDERED. (yl) (Entered: 07/06/2022)
07/11/2022	314	Notice of Appearance or Withdrawal of Counsel: for attorney Ian P Culver counsel for Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. Arocles Aguilar is no longer counsel of record for the aforementioned party in this case for the reason indicated in the G-123 Notice. Filed by Defendant California Public Utilities Commission. (Culver, Ian) (Entered: 07/11/2022)
07/20/2022	315	ORDER DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE THEIR EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [ECF No. 299] by Judge John W. Holcomb. For the foregoing reasons, the Court hereby ORDERS as follows: The Motion is DENIED. Plaintiff CARE is DISMISSED from this action. IT IS SO ORDERED. (See document for further details) (yl) (Entered: 07/21/2022)
07/22/2022	316	NOTICE OF MOTION AND MOTION to Dismiss Seventh Amended Complaint *or to Strike Portions Thereof* filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. Motion set for hearing on 9/16/2022 at 09:00 AM before Judge John W. Holcomb. (Attachments: # 1 Memorandum, # 2 Proposed Order) (Culver, Ian) (Entered: 07/22/2022)
07/25/2022	317	ORDER SETTING SCHEDULING CONFERENCE by Judge John W. Holcomb. Scheduling Conference set for 9/16/2022 at 9:00 AM before Judge John W. Holcomb. (dgo) (Entered: 07/25/2022)
08/26/2022	318	MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION to Dismiss Seventh Amended Complaint *or to Strike Portions Thereof* 316 filed by Plaintiffs Michael E Boyd, Robert Sarvey. (Attachments: # 1 Declaration of Michael Boyd and Exhibits 250-251)(Westreich, Meir) (Entered: 08/26/2022)
08/27/2022	319	MEMORANDUM in Opposition to NOTICE OF MOTION AND MOTION to Dismiss Seventh Amended Complaint *or to Strike Portions Thereof* 316 *Errata. Corrected*

		Documents filed by Plaintiffs Michael E Boyd, Robert Sarvey. (Attachments: # 1 Declaration of Michael Boyd. Errata)(Westreich, Meir) (Entered: 08/27/2022)
08/29/2022	320	First STIPULATION to Continue Motion Hearing from September 16, 2022 to October 7, 2022 Re: NOTICE OF MOTION AND MOTION to Dismiss Seventh Amended Complaint *or to Strike Portions Thereof* 316 filed by Plaintiffs Michael E Boyd, Robert Sarvey. (Attachments: # 1 Proposed Order, # 2 Declaration)(Westreich, Meir) (Entered: 08/30/2022)
08/31/2022	321	ORDER: (a) CONTINUING HEARING ON CPUC DEFENDANTS' MOTION TO DISMISS SEVENTH AMENDED COMPLAINT OR, ALTERNATIVELY, TO STRIKE PORTIONS THEREOF; AND (b) SCHEDULING CONFERENCE 320 by Judge John W. Holcomb. IT IS HEREBY ORDERED: (a) The in-person hearing on CPUC Defendants Motion to Dismiss Seventh Amended Complaint Or, Alternatively, to Strike Portions Thereof, is continued to October 21, 2022, at 9:00 a.m., and the time for CPUC Defendants to file a Reply is extended to September 30, 2022; and (b) The in-person Scheduling Conference is continued to October 21, 2022, at 9:00 a.m. (lom) (Entered: 08/31/2022)
09/16/2022	322	Renewed NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint *Resubmitted [Fed.R.Civ.P. 60(b(1)]* filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Motion set for hearing on 10/21/2022 at 09:00 AM before Judge John W. Holcomb. (Attachments: # 1 Declaration Supplemental Declaration of Meir J. Westreich [Fed.R.Civ.P. 60(b)(1)] and Exhibit 50, # 2 Memorandum in Support of Resubmitted Motion [Fed.R.Civ.P. 60(b)(1)], # 3 Appendix [Proposed] Eighth Amended and Third Supplemental Complaint [clean], # 4 Appendix [Proposed] Eighth Amended and Third Supplemental Complaint [redline], # 5 Proposed Order Granting Leave to File Eighth Amended and Third Supplemental Complaint) (Westreich, Meir) (Entered: 09/16/2022)
09/30/2022	323	REPLY in Support of NOTICE OF MOTION AND MOTION to Dismiss Seventh Amended Complaint *or to Strike Portions Thereof* 316 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Attachments: # 1 Objection to Declaration of Michael Boyd, # 2 Proposed Order on Objection)(Culver, Ian) (Entered: 09/30/2022)
09/30/2022	324	MEMORANDUM in Opposition to Renewed NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint *Resubmitted [Fed.R.Civ.P. 60(b(1)]* 322 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Culver, Ian) (Entered: 09/30/2022)
10/07/2022	325	JOINT REPORT Rule 26(f) Discovery Plan *Trial Estimate Length for Plaintiffs' Case Only* ; estimated length of trial 3 days, filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey.. (Westreich, Meir) (Entered: 10/07/2022)
10/07/2022	326	REPLY In Support of Resubmitted Motion for Leave to File 8th Amended and 3rd Supplemental Complaint Renewed NOTICE OF MOTION AND MOTION for Leave to file [Proposed] Eighth Amended and Third Supplemental Complaint *Resubmitted [Fed.R.Civ.P. 60(b(1)]* 322 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 10/07/2022)

10/18/2022	327	(IN CHAMBERS) ORDER by Judge John W. Holcomb: The Court finds that the Defendants Motion to Dismiss Seventh Amended Complaint and Renewed Motion for Leave to File Eighth Amended and Third Supplemental Complaint [ECF Nos. 316 & 322] are appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. Accordingly, the Court VACATES the hearing set on October 21, 2022. The motions stand submitted on the papers timely filed. The Court has considered the parties' Joint Rule 16(b)/26(f) Report with respect to the Scheduling Conference and has concluded that the hearing on October 21, 2022 is not necessary. Accordingly, the Scheduling Conference is taken off calendar. No appearance by counsel is necessary. A separate order will issue setting the deadlines and dates for this case. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (dgo) TEXT ONLY ENTRY (Entered: 10/18/2022)
11/08/2022	328	APPLICATION for Order for RE-OPEN (a) DEFENDANTS MOTION TO DISMISS RE 7TH AMENDED COMPLAINT; AND (b) PLAINTIFFS RESUBMITTED MOTION TO FILE 8TH AMENDED AND 3RD SUPPLEMENTAL COMPLAINT; AND (2) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFFS NEW FERC PETITION PROCEEDINGS AND BRIEFING SCHEDULE filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Attachments: # 1 Memorandum of Points and Authorities, # 2 Exhibit Book of Exhibits, Nos. 61-68, # 3 Proposed Order) (Westreich, Meir) (Entered: 11/08/2022)
11/09/2022	329	SCHEDULING NOTICE AND ORDER by Judge John W. Holcomb: The deadline for Defendants to respond to Plaintiff's Application [ECF No. 328] is extended to Monday, November 14, 2022. IT IS SO ORDERED. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (dgo) TEXT ONLY ENTRY (Entered: 11/09/2022)
11/14/2022	330	MEMORANDUM in Opposition to APPLICATION for Order for RE-OPEN (a) DEFENDANTS MOTION TO DISMISS RE 7TH AMENDED COMPLAINT; AND (b) PLAINTIFFS RESUBMITTED MOTION TO FILE 8TH AMENDED AND 3RD SUPPLEMENTAL COMPLAINT; AND (2) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFFS NEW FERC PETITION 328 filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Culver, Ian) (Entered: 11/14/2022)
11/16/2022	331	REPLY In Support APPLICATION for Order for RE-OPEN (a) DEFENDANTS MOTION TO DISMISS RE 7TH AMENDED COMPLAINT; AND (b) PLAINTIFFS RESUBMITTED MOTION TO FILE 8TH AMENDED AND 3RD SUPPLEMENTAL COMPLAINT; AND (2) REQUEST FOR JUDICIAL NOTICE OF PLAINTIFFS NEW FERC PETITION 328 filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (Westreich, Meir) (Entered: 11/16/2022)
02/27/2023	332	Joint REQUEST for Ruling on Submitted Motions filed by Defendants John A Bohn, California Public Utilities Commission, Rachel Chong, Mark J Ferron, Michael R Florio, Dian M Gruenich, Darcie L Houck, Michael R Peevey, Clifford Rechtschaffen, Alice Busching Reynolds, John Reynolds, Nancy E Ryan, Catherine J K Sandoval, Genevieve Shiroma, Timothy Alan Simon. (Culver, Ian) (Entered: 02/27/2023)
03/13/2023	333	MEMORANDUM OPINION AND ORDER (1) GRANTING MOTION OF DEFENDANTS CALIFORNIA PUBLIC UTILITIES COMMISSION AND COMMISSIONERS TO DISMISS SEVENTH AMENDED COMPLAINT [ECF No. 316]; and (2) DENYING PLAINTIFFS' RENEWED MOTION FOR LEAVE TO FILE EIGHTH AMENDED AND THIRD SUPPLEMENTAL COMPLAINT [ECF No. 322] by Judge John W. Holcomb. For the foregoing reasons, the Court hereby orders as follows:

		Defendants' Motion to Dismiss is GRANTED, and the Seventh Amended Complaint is DISMISSED without leave to amend. Defendants' request to strike portions of the Seventh Amended Complaint, presented in the alternative, is DENIED as moot. Boyd and Sarvey's Renewed Motion for Leave is DENIED. Boyd and Sarvey's Application to Reopen is DENIED. Judgment shall issue accordingly. IT IS SO ORDERED. (SEE JUDGMENT FOR FURTHER DETAILS) (yl) (Entered: 03/14/2023)
03/13/2023	334	JUDGMENT by Judge John W. Holcomb. It is hereby ORDERED, ADJUDGED, and DECREED as follows. The Seventh Amended Complaint is DISMISSED without leave to amend. Defendants California Public Utilities Commission and the current Commissioners of the CPUC shall have JUDGMENT in their favor, and AGAINST Plaintiffs. Plaintiffs shall take nothing by way of their Seventh Amended Complaint. This action is DISMISSED. Other than potential post- judgment remedies (including those provided in Rule 54(d) of the Federal Rules of Civil Procedure), to the extent that any party requests any other form of relief, such request is DENIED. IT IS SO ORDERED. (MD JS-6, Case Terminated). (See Judgment for further details) (yl) (Entered: 03/14/2023)
03/29/2023	335	NOTICE OF APPEAL to the 9th Circuit Court of Appeals filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Appeal of Order on Motion for Leave to File Document, 315 , Order on Motion for Extension of Time to Amend,,,, 294 , Order on Motion to Dismiss,,,, Order on Motion for Leave to File Document,,, 333 , Order on Motion to Dismiss,,,, Order on Motion to Strike,,, 287 , Judgment,, 334 , Order on Motion for Reconsideration 312 . (Appeal Fee - $505 Fee Paid, Receipt No. ACACDC-35043608.) (Westreich, Meir) (Entered: 03/29/2023)
03/31/2023	336	NOTIFICATION from Ninth Circuit Court of Appeals of case number assigned and briefing schedule. Appeal Docket No. 23-55291 assigned to Notice of Appeal to 9th Circuit Court of Appeals,, 335 as to Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. (mat) (Entered: 04/03/2023)
04/07/2023	337	First AMENDED NOTICE OF APPEAL to 9th CIRCUIT filed by Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey. Amending Notice of Appeal to 9th Circuit Court of Appeals,, 335 Filed On: 03/29/2023; Entered On: 03/29/2023; (Westreich, Meir) (Entered: 04/07/2023)
04/14/2023	338	TRANSCRIPT ORDER re: Court of Appeals case number 23-55291, as to Plaintiff Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey for Court Smart (CS). Court will contact Meir J. Westreich at meirjw@aol.com with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the transcription company. (Westreich, Meir) (Entered: 04/14/2023)
04/14/2023	339	TRANSCRIPT ORDER re: Court of Appeals case number 23-55291, as to Plaintiff Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey for Court Reporter. Court will contact Meir J. Westreich at meirjw@aol.com with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the court reporter. (Westreich, Meir) (Entered: 04/14/2023)
04/17/2023	340	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Transcript Order Form (G-120), 338 . The following error(s) was found: TRANSCRIPT FOR HEARING DATE 10-4-21 IS ON PACER - SEE DOCKET # 291.You must electronically refile the above referenced Request for Transcript in this case to correct this deficiency. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (ha) TEXT ONLY ENTRY (Entered: 04/17/2023)
04/18/2023	341	TRANSCRIPT ORDER re: Court of Appeals case number 23-55291, as to Plaintiffs Michael E Boyd, Californians for Renewable Energy Inc, Robert Sarvey for Court Smart

		(CS). Court will contact Meir J. Westreich at meirjw@aol.com with further instructions regarding this order. Transcript preparation will not begin until payment has been satisfied with the transcription company. (Westreich, Meir) (Entered: 04/18/2023)
04/18/2023	342	NOTICE TO FILER OF DEFICIENCIES in Electronically Filed Documents RE: Transcript Order Form (G-120), 341 . The following error(s) was found: THIS TRANSCRIPT IS AVAILABLE ON PACER - SEE DOCKET #291. PRINT FROM YOUR COMPUTER OR CONTACT THE TRANSCRIPTION COMPANY LISTED IN THE DOCKET ENTRY FOR A COPY. THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (ha) TEXT ONLY ENTRY (Entered: 04/18/2023)
05/11/2023	343	TRANSCRIPT for proceedings held on 5/17/21. Court Reporter/Electronic Court Recorder: MIRIAM BAIRD, phone number MVB11893@AOL.COM. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Electronic Court Recorder before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Notice of Intent to Redact due within 7 days of this date. Redaction Request due 6/1/2023. Redacted Transcript Deadline set for 6/12/2023. Release of Transcript Restriction set for 8/9/2023. (Baird, Miriam) (Entered: 05/11/2023)
05/11/2023	344	NOTICE OF FILING TRANSCRIPT filed for proceedings 5/17/21 re Transcript 343 THERE IS NO PDF DOCUMENT ASSOCIATED WITH THIS ENTRY. (Baird, Miriam) TEXT ONLY ENTRY (Entered: 05/11/2023)

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CERTIFICATION OF SERVICE

I hereby certify that on December 22, 2023 I electronically filed the foregoing Appellants Opening Brief, and concurrently filed Excerpts of Record, Volumes 1-4, with the Clerk of the Court for the Ninth Circuit by using the CM/ECF system.

I certify that all parties of record to this appeal either are registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system.

I hereby certify that I served the attached document by mail on the following, who are not registered participants of the CM/ECF System: NONE.

Dated: December 22, 2023

s/ Meir J. Westreich

_____

Meir J. Westreich
Attorney for Plaintiffs-Appellants