

PUBLIC SERVICE COMMISSION OF WISCONSIN

Minutes and Informal Instructions of the Open Meeting of
Wednesday, December 22, 2010

The Public Service Commission of Wisconsin (Commission) met as noticed. Present were Chairperson Callisto, Commissioner Meyer and Commissioner Azar (telephonically).

8198-TI-104 – Application of Wisconsin RSA #7 Limited Partnership for Designation as an Eligible Telecommunications Carrier

The Commission approved the Notice of Investigation and Request for Comments and directed it be signed by the Secretary to the Commission on behalf of the Commission.

5-EI-148 – Investigation on the Commission’s Own Motion Regarding Advanced Renewable Tariff Development**Implementation of Advanced Renewable Tariffs in Wisconsin**

The Commission accepted the final status report regarding the implementation of advanced renewable tariffs in Wisconsin.

5-GF-194 – Electric Provider Renewable Portfolio Standard Compliance for CY2009

The Commission accepted the reports filed on behalf of the Wisconsin retail electric providers and aggregators as to their compliance with the requirements of Wis. Stat. § 196.378(2)(a)(2).

The Commission approved the request made on behalf of Wisconsin Electric Power Company to use renewable resource credits created in 2008 from a pre-2004 facility for compliance with the calendar year 2009 Renewable Portfolio Standard.

The Commission directed the Gas and Energy Division to inform each electric provider of its compliance with the statute.

5-ES-105 – Strategic Energy Assessment for the Years January 1, 2010, through December 31, 2016**1-IC-442 – Application for Intervenor Compensation Filed by Clean Wisconsin to Participate in Docket 5-ES-105**

The Commission modified and approved the request filed on behalf of Clean Wisconsin, awarding the amount of \$12,950 in intervenor compensation.

The Commission directed the Gas and Energy Division to draft an order consistent with its discussion.



PUBLIC SERVICE COMMISSION OF WISCONSIN *TV*

Memorandum

November 2, 2010

FOR COMMISSION AGENDA

TO: The Commission

FROM: Robert Norcross, Administrator *RBN*
Gas and Energy Division

John Shenot, Policy Advisor *JMS*
Commissioners' Office

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Commissioners' Office

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RE: Investigation on the Commission's Own Motion Regarding 5-EI-148
Advanced Renewable Tariff Development

Suggested Minute: The Commission (accepted/rejected) the Final Status Report:
Implementation of Advanced Renewable Tariffs in Wisconsin.

STATUS REPORT:

IMPLEMENTATION OF ADVANCED RENEWABLE TARIFFS IN WISCONSIN

Background

The Governor's Task Force on Global Warming issued a final report in July 2008 that included more than 60 policy recommendations, including a recommendation that the state of Wisconsin develop and implement an Advanced Renewable Tariff (ART) policy by 2009.

In response to the Task Force's recommendation, the Commission issued a Notice of Investigation on January 15, 2009, opening docket 5-EI-148, *Investigation on the Commission's Own Motion Regarding Advanced Renewable Tariff Development*. The stated purpose of the investigation is to examine whether and how to expand the availability and use of ARTs in Wisconsin and promote greater uniformity in the ARTs offered by Wisconsin electric utilities.

The Notice of Investigation included detailed questions on 16 topics related to ARTs for which the Commission requested responses from interested parties. Written responses were

received from more than 30 parties during the public comment period from January 15, 2009, through February 17, 2009. Most of these responses came from electric providers and their trade associations or from agricultural and biogas interests.

Commission staff prepared a Briefing Memorandum which was released on May 22, 2009, with a request for public comments. Once again, a wide variety of comments were received from a diverse set of viewpoints.

The Commission discussed the record in this docket at its Open Meeting of August 27, 2009. Chairperson Callisto and Commissioner Azar concluded that provisions in both state law (specifically, in Wis. Stat. ch. 196) and federal law (specifically, in the Public Utility Regulatory Policy Act, i.e. PURPA, and the Federal Power Act, i.e. FPA) limited their authority to order any Wisconsin utility to offer an ART. Commissioner Meyer did not attempt to reach any conclusions on questions of legal authority because he felt that, as a matter of policy, ARTs should only be voluntarily offered by willing utilities. The Commission was unanimous, however, in its desire to encourage more voluntary experimentation with ARTs and decided to hold a technical conference to move the issue forward.

A Technical Conference was held on October 22, 2009. Oral presentations were made by representatives of the Wisconsin Utilities Association, Madison Gas and Electric Company (MGE), Northern States Power Company–Wisconsin (NSPW), Wisconsin Power and Light Company (WP&L), Wisconsin Public Service Corporation (WPSC), Wisconsin Electric Power Company (WEPCO), Dairyland Power Cooperative (DPC), the Wisconsin Electric Cooperative Association, and Municipal Electric Utilities of Wisconsin. These presentations allowed the Commission to gather up-to-date information on two broad questions: (1) What had each organization (or its members) already done with respect to renewable energy feed-in tariffs, and

how had customers (or members) responded? (2) What future plans did each organization (or its members) have with respect to new or revised voluntary ART offerings?

At the conclusion of the Technical Conference, representatives of three investor-owned utilities (WPSC, WEPCO, and NSPW) confirmed the intention of their respective utilities to develop new or revised biogas tariffs that would be more consistent with the “adequate incentive” ARTs described in Table 3 on Page 18 of the May 22, 2009, Briefing Memorandum. The NSPW representative stated that NSPW intended to add or revise tariffs for other renewable generating technologies as well. All other presenters indicated that their organizations did not have any specific plans or intentions to develop new or revised renewable tariffs.

Update on Commission’s Legal Authority to Order ARTs

Feed-in tariff policies for distributed generation have garnered a great deal of attention since the Commission’s August 27, 2009, open meeting. This memorandum summarizes the most important developments at both the federal and state levels.

On July 15, 2010, the Federal Energy Regulatory Commission (FERC) issued a declaratory order on feed-in tariffs in response to separate petitions from the state of California and California utilities. The FERC order, included as Attachment 1, directly addresses the question of how federal statutes limit a state’s authority to order ARTs.

The basis for the FERC case was a California Public Utilities Commission (CPUC) decision, prompted by state law, to require utilities to *offer to purchase* electricity from combined heat and power generators with a capacity of 20 MW or less *at a price set by CPUC*. In its petition, CPUC argued that their decision did not violate the PURPA/FPA restriction on states setting wholesale prices for electricity, in part because the CPUC decision did not require generators to accept the price offered by the utilities. Generators could instead opt to sell in the broader wholesale electricity market at whatever price the market would pay.

FERC rejected CPUC's reasoning, finding that requiring utilities to offer to purchase at a given price was tantamount to establishing a wholesale price. More importantly, FERC sent its clearest signal yet on the general topic of feed-in tariffs. FERC ruled that states may indeed order a utility to purchase electricity at a long-term, fixed price set by the state – i.e. a feed-in tariff – but only if the seller is a PURPA “qualifying facility” and *only if the price is set no higher than the utility's avoided costs*.

On October 21, 2010, FERC issued a clarification of its declaratory order in response to a subsequent petition from CPUC and the California utilities. This clarification is included as Attachment 2. Most significantly, FERC found that limitations imposed by state law can be factored into avoided cost calculations. Specifically, the FERC ruling states: “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.” The FERC clarification thus has potentially significant implications in Wisconsin not just for feed-in tariffs, but also for ordinary parallel generation tariffs, because of Wisconsin's renewable portfolio standards.

Some states have continued to look for ways to get around the PURPA and FPA restrictions on ARTs. The actions of two state commissions are offered here as notable examples.

CPUC has accepted comments on a proposed decision to employ a reverse auction mechanism, i.e. requiring utilities to purchase up to 1000 MW of distributed renewable energy from qualifying facilities, but setting the price through a competitive bidding process. Thus, the market rather than CPUC would set wholesale prices.

The Oregon Public Utilities Commission (OPUC), like CPUC, is working under a state law that requires it to establish what can be characterized as a 25 MW solar ART pilot program. OPUC considered several ways to get around the PURPA/FPA restrictions and found legal merit in three: competitive bidding similar to what CPUC is proposing; a creative form of net metering; and a requirement for utilities to purchase electricity at an avoided cost price but also purchase renewable energy certificates at a price that when added to the avoided cost price equals an ART price. In its October 21, 2010, decision, FERC made clear that such an avoided cost “adder” to provide additional compensation is only allowable if the adder reflects “real costs that would be incurred by utilities.” OPUC ultimately opted to use competitive bidding for 5 MW of solar projects greater than 100 kW and the creative net metering approach for 20 MW of smaller projects. Projects will only qualify for this net metering tariff if they are sited in a location where the amount of energy generated is expected to be less than the average amount of energy consumed. If the project meets that test, the tariff will essentially allow the generator to sell electricity at an ART price while buying electricity at the normal retail rate. OPUC argues that the project size cap makes the tariff a form of net metering that falls under state jurisdiction, and not a wholesale power transaction with a price set by the state (which PURPA forbids).

Regardless of how PURPA and FPA are interpreted by FERC or other states, the existing provisions in Wis. Stat. ch. 196 that were cited by Chairperson Callisto and Commissioner Azar as limiting their authority to order ARTs remain in place today.

Update on Voluntary Implementation of ARTs by Wisconsin Utilities and Cooperatives

Table 1 on page 4 of the May 22, 2009, Briefing Memorandum offered a summary (without details) of all the renewable energy tariffs that were voluntarily offered at that time by Wisconsin utilities and cooperatives. Table 3 on page 18 of the Briefing Memorandum identified tariff prices for 10-year contracts that Commission staff, based on a preliminary

analysis, felt would provide an “adequate incentive” to promote distributed renewable generation. In the year that has passed since the Briefing Memorandum was published, much has changed with respect to the tariffs offered in Wisconsin. Those changes are summarized below.

Consistent with its stated intentions at the Technical Conference, WEPCO filed a request for Commission approval of an amended biogas tariff (CGS 5) on November 24, 2009. This request was approved by the Gas and Energy Division Administrator under delegated authority on January 28, 2010. Compared to WEPCO’s previous biogas tariff, the amended tariff allows for larger projects (now up to 2 MW capacity) and higher purchase prices during off-peak hours (now 6.14 cents/kilowatt hour (kWh)). The on-peak purchase price of 15.50 cents/kWh and the overall program cap of 10 MW were not altered. With these changes, the “blended rate” offered by WEPCO, i.e. the average purchase price based on an assumed mix of on-peak and off-peak generation, is approximately 9.32 cents/kWh. This price is offered for a 15-year contract, rather than the 10 years used in the Briefing Memorandum analysis to calculate “adequate incentive” prices. Using the exact same methods and assumptions, Commission staff re-calculated the “adequate incentive” prices for biogas projects on 15-year contracts. For projects up to 1 MW capacity, the “adequate incentive” price is between 9.3 and 9.4 cents/kWh, equal to what WEPCO is offering. For projects between 1 MW and 2 MW capacity, 8.4 cents/kWh may be all that is necessary to provide an “adequate incentive.”

WPSC also followed through on its stated intentions at the Technical Conference. WPSC filed for approval of a new biogas tariff (PG-BioGas) on March 22, 2010. That request was approved by the Gas and Energy Division Administrator on April 12, 2010. WPSC had not previously offered a biogas tariff. The terms of the new biogas tariff include a cap on individual projects at 2 MW capacity, an overall program cap of 10 MW, and compensation at

8.0 cents/kWh over a 10-year contract period. The purchase price for this tariff is significantly greater than the standard buyback rate offered by WPSC, but clearly less than the “adequate incentive” prices for 10-year contracts suggested by Commission staff in the Briefing Memorandum.

NSPW also stated at the Technical Conference that it intended to file new tariffs, but as of the date of this memorandum it has not yet filed any. MGE, WP&L, and DPC did not express any intention of changing any of their renewable energy tariffs.

As the Briefing Memorandum noted, WPPI Energy has offered to buy a limited amount of customer-generated solar electricity from member utilities at 30 cents/kilowatt-hour for 10-year contracts, which equals the “adequate incentive” price for small solar projects. At the time the Briefing Memorandum was drafted, only River Falls Municipal Utility had accepted the WPPI offer and created a PSC-approved tariff. But since then, 25 municipal utilities have joined River Falls and received PSC approval to offer the same solar tariff.

Commission staff is currently reviewing one renewable energy tariff request that has not yet been approved or denied. Wisconsin Rapids Waterworks and Lighting Commission (Wisconsin Rapids) has requested Commission approval to offer 10-year contracts at 22.5 cents/kWh for solar, and 12.0 cents/kWh on-peak and 7.35 cents/kWh off-peak for non-solar renewable resources. Wisconsin Rapids is one of the five largest municipal electric utilities in Wisconsin, by sales, and is not a customer/member of WPPI Energy or DPC.

Attachment 3 provides a summary table of renewable electricity tariff offerings in Wisconsin as of the date of this memorandum. This information was verified by the listed utilities at the request of Commission staff. The tariff offerings are sorted by resource: biogas, solar, and wind. Within each resource category, the tariffs are sorted by price with the highest-paying tariff listed first and the lowest-paying tariff listed last.

Update on Customer Response to Voluntary Renewable Energy Tariffs

Attachment 3 also provides information on the number of customers and the number of kilowatts of capacity enrolled under each renewable electricity tariff. This information was provided by the utilities and cooperatives between September 27, 2010, and October 19, 2010, in response to a Commission staff request and was accurate as of the date of each utility's response.

Across the state, more than 400 customers have already installed systems under a renewable energy tariff voluntarily offered by their electric provider. These tariffs cover more than 10 MW of installed capacity: 5.1 MW of biogas, 2.6 MW of solar, and 2.5 MW of wind. More than 3.5 MW of installed capacity has been added since January 2009, when the Commission opened this investigation. In addition, new projects totaling more than 8 MW of additional capacity – nearly all of it biogas – are in the development “pipeline” and planning to operate under one of these tariffs.

Several of the tariffs detailed in Attachment 3 are now fully subscribed. Although this is an indicator of success, and an indicator that the offered prices may provide an “adequate incentive” to motivate customers, it also means that new customers will not have the same incentive to install distributed renewable generation.

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Attachments

cc: Lisa Stefanik
Deborah Erwin

I. Background

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

4. In the CPUC’s decision implementing AB 1613 (AB 1613 Decision), which became effective on December 17, 2009, the CPUC stated that it is not setting a price for wholesale power sales, but is requiring California utilities under its jurisdiction to offer to purchase electricity at a CPUC-set price intended to encourage development of highly efficient CHP generators in order to reduce greenhouse gas emissions. The Joint Utilities and Southern California Gas Company⁶ sought rehearing and stay of the CPUC’s AB 1613 Decision, arguing that the CPUC exceeded its authority to set the wholesale price for electric energy in violation of the Supremacy Clause of the United States Constitution and the FPA. The CPUC granted extensions of time to June 21, 2010 for utilities to file AB 1613 feed-in tariffs. The CPUC, however, denied the Joint Utilities’ request for rehearing (AB 1613 Rehearing Order) of the CPUC’s AB 1613 Decision, asserting that, through the AB 1613 program, the CPUC is exercising its jurisdiction over the

³ CPUC Petition at 2-3.

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

⁵ *Id.* § 2841(b)(4).

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

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

II. Filings, Notices of Filings, and Responsive Pleadings

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

5. The CPUC requests that the Commission find that the FPA, PURPA and Commission regulations do not preempt the CPUC's AB 1613 Decision to require California utilities to offer to purchase electricity at a CPUC-set price from CHP generators⁷ of 20 MW or less that meet environmental compliance requirements. The CPUC argues that the purpose of its AB 1613 Decision and AB 1613 Rehearing Order (together, AB 1613 decisions) is environmental protection, particularly the reduction of greenhouse gas emissions. The CPUC states that its decision achieves this goal by requiring California utilities to offer ten-year standard contracts to eligible CHP generators that meet certain environmental requirements as specified in the statute. According to the CPUC, the rates that it requires the California utilities to offer to pay to such CHP generators reflect the additional costs necessary to meet all of the environmental requirements under AB 1613. In addition, the CPUC states that, for CHP generators located in congested areas, there is a ten percent bonus to reflect the avoided cost of the construction of additional distribution and transmission upgrades. The CPUC does not dispute that the Commission has exclusive authority over rates for wholesale sales under the FPA. Rather, the CPUC contends that it has only required that California electric utilities (the buyer) must offer to purchase under contracts with CPUC-set prices to encourage CHP generators to be constructed, but the CPUC does not require a CHP generator (the seller) to accept that offer. The CPUC also explains that, in its AB 1613 Rehearing Order, it recognized that most, if not all CHP generators, could obtain Qualifying Facility (QF) status at the Commission.⁸

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

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

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

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

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

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

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

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

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

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

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

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

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

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

¹⁵ *Id.* at 41.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

²⁰ Joint Utilities' Petition at 2.

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

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

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

²¹ *Id.* at 16-17.

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

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

²⁴ *Id.* at 7.

²⁵ EEI supports the Joint Utilities’ request for expedited action on their petition.

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

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

III. Protests and Comments

A. Joint Utilities' Protest and Answer to CPUC Petition

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

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

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

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

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

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

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

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

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

²⁹ *Id.*

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

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

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

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

B. CPUC Protest to the Joint Utilities' Petition

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

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

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

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

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

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

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

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

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

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

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

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

³⁹ *Id.* at 16.

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

32. Finally, the CPUC argues that the Joint Utilities contradict the main purpose of PURPA by claiming that the CPUC’s decisions, which try to encourage CHP generators, are preempted by PURPA. In this regard, the CPUC argues that the main reason that section 210 of PURPA was enacted was to encourage cogeneration and other small power production facilities. The CPUC also points out that the Joint Utilities’ petition does not address the exemption under Order No. 671 of small QFs of 20 MW or less from FPA sections 205 and 206.⁴² The CPUC disagrees with the Joint Utilities’ argument that the Commission only allows state commissions to set wholesale rates if they exercise their authority under PURPA to set avoided cost prices for small QFs, citing the Commission’s statement in Order No. 671-A “that having QF sales regulated at the state level is sufficient, and will allow us to close the regulatory gap while not dramatically or inappropriately increasing the regulatory burden on QFs....”⁴³ The CPUC also asserts that in Order No. 688 the Commission, in relieving utilities of the obligation to enter into contracts with QFs if it finds that the QFs have nondiscriminatory access to the specified markets, created a rebuttable presumption that utilities should be required to enter into contracts with QFs with 20 MW or less of capacity.⁴⁴

⁴⁰ *Id.* at 19.

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

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

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

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

C. Other Comments and Protests

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

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

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

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

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

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

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

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

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

(continued...)

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

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

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

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

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

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

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

⁵² *Id.* at 5 (citations omitted).

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

(continued...)

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

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

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

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

⁵⁴ *Id.* at 12.

⁵⁵ *Id.* at 14.

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

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

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

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

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

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

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

43. The Clean Energy Group argues that the Commission should conclude that the CPUC's AB 1613 feed-in tariff does not violate federal law so long as: (1) the CPUC maintains its feed-in tariff as a mandate to utilities to offer to purchase from CHP generators, not a wholesale transaction; and (2) the feed-in tariff applies to QF certified CHP generators of 20 MW or less, which the Clean Energy Group argues are exempt from the rate filings of FPA sections 205 and 206.⁶² The Clean Energy Group contends that the FPA does not preempt states from setting prices for utility offers to purchase that a seller is free to reject, and argues that the feed-in tariff serves as a tool by which states can guide a utility's purchasing decision.⁶³

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

argues that PURPA provides the Commission with a means to support the CPUC's rulings because under PURPA, the CPUC has authority to regulate the avoided cost rates paid to QFs, and that Commission regulations exempt sales of energy or capacity made by QFs 20 MW or smaller from FPA sections 205 and 206.⁷¹ In addition, San Joaquin Refining argues that the Commission may clarify that the CPUC's AB 1613 decisions are consistent with PURPA regardless of whether the CPUC made any such finding.⁷² San Joaquin Refining argues that the record in the CPUC proceeding supports a finding that the AB 1613 adopted pricing option is a measure of the avoided cost of the California utilities insofar as the AB 1613 rate is based on the CPUC's market price referent (MPR), which is the key pricing benchmark used in California's Renewables Portfolio Standard (RPS) program. San Joaquin Refining concludes that because the CPUC has already adopted the use of the MPR as a key measure of the costs that the utilities avoid through their purchase of power from QFs, there is legal authority to support a finding that the MPR is a measure of long-term avoided cost.⁷³

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

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

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

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

⁷³ *Id.* at 7.

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

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

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

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

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

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

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

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

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

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

3. Other Comments

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

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

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

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

⁸⁰ 16 U.S.C. § 824(f) (2006).

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

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

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

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

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

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

IV. Determination**A. Procedural Matters**

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

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

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

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

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

B. Substantive Matters

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

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

to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. We disagree with the characterization of the CPUC's AB 1613 Decisions as merely establishing an "offering price" by the purchaser of power. Rather, we agree with the Joint Utilities that the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.

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

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

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

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

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

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

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

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

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

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

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

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

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

⁹² 16 U.S.C. § 824a-3(h) (2006).

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

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

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

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

⁹⁵ 18 C.F.R. § 292.601(c) (2010).

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

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

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

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

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

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

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

C. Exemption from Filing Fees

73. The Commission's regulations provide that states are exempt from the filing fees required in Part 381.¹⁰¹ The CPUC explains that it is a state administrative agency established under the laws of California. Accordingly, the CPUC is exempt from the filing fee otherwise required for a petition for declaratory order.

The Commission orders:

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

By the Commission. Commissioner LaFleur voting present.

(S E A L)

Kimberly D. Bose,
Secretary.

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

¹⁰¹ 18 C.F.R. § 381.108 (2010).

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require California utilities to offer a certain price to combined heat and power (CHP) generating facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements. On May 11, 2010, in Docket No. EL10-66-000, the Joint Utilities filed a separate petition for declaratory order arguing that the CPUC's decision is preempted by the FPA insofar as it sets rates for electric energy that is sold at wholesale.

4. The California "Waste Heat and Carbon Emissions Reduction Act," Assembly Bill (AB) 1613, amended the California Public Utilities Code to require "electrical corporations" in California (i.e., investor-owned utilities (IOU) regulated by the CPUC) to offer to purchase, at a price to be set by the CPUC, electricity that is generated by certain CHP generators and delivered to the grid.⁴ CHP generators eligible for the price set by the CPUC must have a generating capacity of not more than 20 MW and must meet certain efficiency and emissions standards. The legislation requires CPUC-jurisdictional utilities to file standard ten-year purchase contracts (AB 1613 feed-in tariffs) with the CPUC that require them to offer to purchase at the CPUC-set price electricity generated by eligible CHP generators. As amended, the California Public Utilities Code states that this tariff shall "provide for payment for every kilowatt hour delivered to the electrical grid by the combined heat and power system at a price determined by the commission."⁵ In addition, AB 1613 requires that the CPUC set the rates at which the utilities must offer to purchase from CHP generators at a level that "ensure[s] that ratepayers not using [CHP] systems are held indifferent to the existence of [the AB 1613 feed-in] tariff."⁶

5. The July 15 Order found that the CPUC's decision to require California utilities to offer a certain price to CHP generating facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements would not be preempted by the FPA, PURPA, or Commission regulations, as long as the program meets certain requirements. The Commission explained that a state commission may, pursuant to PURPA, determine avoided cost rates for qualifying facilities (QF). The Commission found that although the CPUC did not argue that its AB 1613 program is an implementation of PURPA, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status pursuant to the Commission's regulations, the CPUC's AB 1613 feed-in tariff would *not* be preempted by the FPA, PURPA, or Commission's

⁴ CPUC May 4, 2010 Petition at 2-3.

⁵ Cal. Pub. Util. Code § 2841(b)(2) (2010). The term "the commission" in the California Public Utilities Code refers to the CPUC.

⁶ *Id.* § 2841(b)(4).

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regulations⁷ as long as: (1) the CHP generators from which the CPUC is requiring the Joint Utilities to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility.⁸ In addition, the July 15 Order explained that there is no record in these proceedings upon which the Commission may determine whether the CPUC's offer price is consistent with the avoided cost rate requirements of section 210 of PURPA.

II. Request for Clarification or Rehearing

6. In its request for clarification, or, in the alternative, rehearing, the CPUC states that, based upon the findings of the Commission in the July 15 Order, the CPUC intends to reexamine the basis of its implementation of AB 1613 by implementing it under section 210 of PURPA. The CPUC therefore requests clarification that the State of California enjoys sufficient flexibility with regard to calculating avoided cost rates so that it can achieve the goals of AB 1613 to promote the development of efficient CHP generation. The CPUC contends that the basic purpose of AB 1613, "to encourage cogeneration by requiring utilities to sign contracts with CHP QFs of 20 MW or less" would be undermined if the Joint Utilities could continue to litigate or attempt to prevent California from implementing AB 1613.⁹ To the extent that the Commission cannot grant the CPUC's request for clarification, the CPUC requests rehearing of the July 15 Order.¹⁰

7. The CPUC requests clarification that: (1) the CPUC can require retail utilities to consider different factors in the avoided cost calculation in order to promote development of more efficient CHP facilities; and (2) "full avoided cost" need not be the lowest possible avoided cost and can properly take into account real limitations on "alternate" sources of energy imposed by state law. The CPUC argues that the answers to these questions are necessary to determine "whether it would violate PURPA if the CPUC were to require a flexible pricing mechanism in contract offers from California retail utilities to potential AB 1613 CHP-QF systems that would entitle the CHP-QF systems to charge full avoided cost rates when the CHP-QF facility is operating at the significantly high

⁷ July 15 Order, 132 FERC ¶ 61,047 at P. 65 (citing 18 C.F.R. § 292.101 *et seq.* (2010)).

⁸ *Id.* P 67 (citing 18 C.F.R. § 292.304 (2010)).

⁹ CPUC Request for Clarification or Rehearing at 16.

¹⁰ *Id.* at 15-16.

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state efficiency standards under AB 1613, but to also entitle the QFs to charge the established short-run avoided cost rate to the extent they were no longer operating at these high state efficiency standards.”¹¹

8. The CPUC asserts that it should be authorized, consistent with Commission regulations, to require retail utilities to offer contracts reflecting avoided cost calculations that promote development of more efficient CHP facilities. The CPUC states that, in order to incentivize deployment of efficient CHP technology, such as those technologies required under AB 1613, it is important that states have flexibility in determining avoided costs under PURPA.

9. The CPUC contends that a short-term avoided cost determination should not set the limit on the price that utilities must offer for CHP systems under AB 1613. The CPUC argues that there could be multiple avoided cost calculations for new CHP facilities to reflect: (1) long-term commitments of five years or more; (2) short-term commitments of less than five years; (3) the efficiency of a new combined cycle gas turbine;¹² and (4) the location of the CHP facility. The CPUC states that in the past, it has required retail utilities to maintain as many as four “standard offer” contracts with different prices for different kinds of products, including a standard offer contract that had a menu of pricing options.¹³ The CPUC also argues that not only do the Commission’s regulations allow states to establish rates for purchases from QFs below full avoided cost,¹⁴ but the Commission’s regulations allow for avoided cost rates that “differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies”¹⁵ and provide that the rates for avoided cost purchases may take into account the time of the delivery, including the availability of capacity or energy during peak periods.¹⁶ The CPUC concludes that

¹¹ *Id.* at 5 (emphasis in original).

¹² The CPUC describes its adopted pricing formula as an all-in price based on a proxy market price for a new combined cycle gas turbine and the monthly price of natural gas with adjustments for time of delivery. CPUC Request for Clarification or Rehearing at 3 (citing 2009 Cal. PUC Lexis 790 at *59) (AB 1613 Decision)).

¹³ *Id.* at 7 (citing *Signal Shasta Energy Co.*, 41 FERC ¶ 61,120, at 61,294 and 61,296 n.4 (1987) (*Signal Shasta*)).

¹⁴ *Id.* at 8 (citing 18 C.F.R. § 292.304(b)(3) (2010)).

¹⁵ *Id.* (citing 18 C.F.R. § 292.304(c)(3)(i) (2010)).

¹⁶ *Id.* (citing 18 C.F.R. § 292.304(d)(1) and (2) (2010)).

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offering a full avoided cost, long-term rate to more efficient CHP facilities is consistent with the purpose of section 210 of PURPA, which is to increase the use of cogeneration and small power production facilities.¹⁷

10. The CPUC also argues that avoided cost rates may take into account requirements imposed by state law, and notes that the Commission affords states wide latitude in developing methodologies to calculate avoided cost.¹⁸ The CPUC argues that, in California, the cost of energy and capacity that the utility would otherwise build or procure is significantly impacted by state laws and regulations that limit the pool of available resources and otherwise direct or constrain utility procurement practices. According to the CPUC, this means that utilities are limited to procuring long term (i.e., five years or longer) commitments for sales of electricity from combined cycle gas turbines, renewable, other non-carbon emitting resources, and CHP facilities. The CPUC adds that taking limitations and costs imposed by state law into account when calculating avoided cost is supported by Commission precedent.¹⁹

11. The CPUC also contends that, although the Commission's determination in *Southern California Edison Co.*,²⁰ which rejected the CPUC's avoided cost determination as being unreasonable, may have applied to short-run avoided cost determinations, "it could not apply to avoided cost determinations over the longer term, or for purchases from QFs of 20 MW or less, which are hardly bulk power suppliers."²¹ The CPUC argues that, as the Commission stated on rehearing in *SoCal Edison*, "'states have numerous ways outside of PURPA to encourage renewable energy resources.'"²²

12. Further, the CPUC contends that state laws, which impose limitations on the pool of alternate sources of electricity available for procurement by retail electric utilities, create real costs for the utilities insofar as they often eliminate the less expensive options that would otherwise be available to the purchasing utilities. In this regard, the CPUC

¹⁷ *Id.* (citing *American Paper Inst. v. American Electric Power Service Corp.*, 461 U.S. 402, 417 (1983)).

¹⁸ *Id.* at 9 (citing *Independent Energy Producers Association, Inc. v. CPUC*, 36 F.3d 848, 856 (9th Cir. 1994)).

¹⁹ *Id.* at 10 (citing *Signal Shasta*, 41 FERC ¶ 61,120 at 61,295).

²⁰ 70 FERC ¶ 61,215 at 61,675-76, *reconsideration denied*, 71 FERC ¶ 61,269 (1995) (*SoCal Edison*).

²¹ CPUC Request for Clarification or Rehearing at 10-11.

²² *Id.* at 11 (citing *SoCal Edison*, 71 FERC ¶ 61,269 at 62,080).

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argues that its AB 1613 Decision properly includes a pricing adder for CHP facilities sited in transmission constrained areas because the adder reflects the avoided cost of distribution and transmission upgrades that would otherwise be necessary. The CPUC asserts that this is a real cost that would be incurred by utilities and their ratepayers but for the development and operation of CHP generation. The CPUC argues that “[n]ot only [is *SoCal Edison*] irrelevant, the wide latitude given to the states to determine avoided cost calculations in order to accommodate local conditions and concerns [is] consistent with the [Commission’s] more recent pronouncements in Order No. 888, acknowledging that with regard to the retail electric market “state regulatory commissions and state legislatures have traditionally developed social and environmental programs suited to the circumstances of their states....”²³

13. To the extent the Commission does not grant the clarifications requested, the CPUC requests rehearing of the July 15 Order. The CPUC argues that Commission regulations allow for avoided cost rates that “differentiate among qualifying facilities using various technologies on the basis of supply characteristics of the different technologies.”²⁴ The CPUC contends that offering a higher avoided cost rate to more efficient CHP facilities is consistent with the stated purpose of section 210 of PURPA, which is to increase the use of cogeneration and small power production facilities and to reduce reliance on fossil fuels.²⁵ The CPUC also argues that the Commission’s determination in *SoCal Edison* is inapplicable to the present situation, where AB 1613 is limited to just CHP systems of 20 MW or less. The CPUC argues that, in *American Ref-Fuel Co.*,²⁶ the Commission found that states do not violate the Commission’s avoided cost regulations by recognizing that utilities can be required to pay additional

²³ *Id.* at 12 (citing *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036, at 31,782 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002)).

²⁴ *Id.* at 19 (citing 18 C.F.R. § 292.304(c)(3)(i) (2010)).

²⁵ *Id.* (citing *American Paper Inst. v. American Electric Power Service Corp.*, 461 U.S. 402, 417 (1983)).

²⁶ 105 FERC ¶ 61,004 (2003), *reh’g denied*, 107 FERC ¶ 61,016 (2004), *appeal dismissed*, *Xcel Energy Servs., Inc. v. FERC*, 407 F.3d 1242 (D.C. Cir. 2005) (*American Ref-Fuel*).

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compensation for the environmental attributes of the QF.²⁷ The CPUC claims that this finding supports granting rehearing. The CPUC also contends that the Commission failed to address the CPUC's argument that "full avoided cost" need not be the lowest possible avoided cost and should properly take into account real limitations on "alternate" sources of energy imposed by state law.

14. The CPUC also argues that, to the extent the Commission's July 15 Order did not grant the CPUC's request for official notice, the Commission's decision was arbitrary and capricious because: (1) the CPUC's request was unopposed; (2) the documents met the Commission's criteria and judicial precedent for officially and judicially noticeable documents; (3) the Commission relied on certain documents, such as the CPUC's and the California Energy Commission's decisions, and other documents were simply admissions of the utilities that provided a basis for a judicial estoppel argument; and (4) the Commission has no basis to deprive the CPUC of using the documents in the event there are any petitions for review filed, even if certain documents are intended to support the environmental arguments advanced by the CPUC in support of its petition.²⁸ Therefore, the CPUC concludes that the Commission should have granted the CPUC's request for official notice.²⁹

15. Finally, the CPUC contends that the Commission erred in finding that the CPUC's AB 1613 Decision set rates for wholesale sales in interstate commerce, and is therefore preempted by the FPA because, according to the CPUC, it only required retail utilities, which are under the CPUC's jurisdiction pursuant to section 201(b) of the FPA, to offer CHP contracts. The CPUC contends that it "never regulated" the potential CHP generators, which have the following choices: (1) to construct new CHP facilities of 20 MW or less in compliance with Commission QF regulations and AB 1613 (in order to meet PURPA's requirement that the retail utilities must contract with them); (2) to construct larger CHP facilities in order to sell energy or capacity in the open market; or (3) to not construct CHP facilities at all.³⁰ The CPUC therefore contends that it is not requiring wholesale generators to do anything or refrain from doing anything, and "is merely ordering its retail utilities to offer ... standardized contracts with a specific price

²⁷ CPUC Request for Clarification or Rehearing at 21-22 (citing *American Ref-Fuel Co.*, 107 FERC ¶ 61,016 at P 2-3).

²⁸ *Id.* at 24-25 (citing July 15 Order, 132 FERC ¶ 61,047 at P 63).

²⁹ *Id.* at 17 (citing 18 C.F.R. § 385.508(d) (2010); *Mack v. South Bay Beer Distributors, Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986)).

³⁰ *Id.*

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for the purpose of promoting more efficient CHP generation.”³¹ According to the CPUC, the Commission also failed to address the CPUC’s arguments, and did not address Supreme Court precedent and Commission precedent concerning the jurisdiction of the state over retail utilities’ purchases in the wholesale market.³²

16. On August 25, 2010, the National Association of Regulatory Utility Commissioners (NARUC) submitted a motion to intervene out-of-time and an answer in support of the CPUC’s request for clarification.

17. On August 31, 2010, the Joint Utilities filed an answer to the CPUC’s request for clarification of the July 15 Order. The Joint Utilities oppose the CPUC’s request for clarification, and argue that, because the CPUC’s AB 1613 proceeding was not a proceeding to determine the avoided cost rate, the CPUC’s request for clarification should be denied until the CPUC establishes a record concerning what avoided cost price it is adopting for CHP QF generators. The Joint Utilities also suggest that the CPUC is limited to one of its current avoided cost rates in establishing an avoided cost rate for CHP QFs.³³

³¹ *Id.* at 27.

³² *Id.* at 17-18 (citing *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 512 (1989); *Ameren Energy Marketing Co.*, 96 FERC ¶ 61,306, at 62,189 n.18 (2001); *Central Vermont Pub. Serv. Corp.*, 84 FERC ¶ 61,194, at 61,974-75 (1998)). The CPUC maintains that SCE and PG&E have taken the position that the CPUC has authority over the procurement practices of the retail utilities in other CPUC rulemaking proceedings. Therefore, the CPUC contends that SCE and PG&E should be estopped from taking a contrary position here. *Id.* at 28.

³³ Joint Utilities Answer at 4 (citing *Opinion on Future Policy and Pricing for Qualifying Facilities*, CPUC Decision 07-09-040 (CPUC 2007), *modified*, CPUC Decision 08-07-048 (CPUC 2008)). The CPUC has not argued that its AB 1613 program is an implementation of PURPA. July 15 Order, 132 FERC ¶ 61,047 at P 65. There is nothing, we note, that bars the CPUC from making new avoided cost determinations in a future CPUC proceeding. In this regard, the CPUC could re-calculate the avoided costs for not only the QFs selling pursuant to the implementation of AB 1613, but for all new QFs. In fact, to the extent that the CPUC finds that the next capacity to be acquired by purchasing utilities must be from higher-cost facilities based on new resource requirements established by the California legislation or by the CPUC, the CPUC may base the avoided cost rate for all new QFs on that higher-cost state resource requirement. Of course, any new calculation must comply with the requirements of PURPA.

III. Discussion

A. Procedural Matters

18. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. NARUC has met this higher burden. Accordingly, we will grant NARUC's motion to intervene out of time. We will also accept the answers to the CPUC's request for clarification submitted by NARUC and the Joint Utilities.

B. Commission Determination

19. We will grant the CPUC's request for clarification by providing guidance as to whether the conceptual framework discussed in the CPUC's request for clarification is consistent with the avoided cost requirements set forth in section 210 of PURPA. As we grant clarification below, the CPUC's request for rehearing is moot and is dismissed.³⁴

20. With respect to the CPUC's request for clarification, as discussed below, we find that the concept of a multi-tiered avoided cost rate structure is consistent with the avoided cost requirements set forth in section 210 of PURPA and in the Commission's regulations.

21. The CPUC requests clarification that: (1) the CPUC may require retail utilities to consider different factors in the avoided cost calculation in order to promote development of more efficient CHP facilities; and (2) "full avoided cost" need not be the lowest possible avoided cost and can properly take into account real limitations on "alternate" sources of energy imposed by state law. More specifically, the CPUC asks whether it may implement a two-tiered rate structure, where AB 1613-compliant QFs receive rates based on higher, long-run avoided cost rates reflecting more stringent efficiency standards, and non-AB 1613 compliant QFs continue to receive rates based on lower

³⁴ With respect to the CPUC's argument on rehearing that the Commission should grant the CPUC's request for official notice, we note that the documents filed in Docket Nos. EL10-64-000 and EL10-66-000 by the CPUC are part of the record in these proceedings. The Commission merely explained in the July 15 Order that the Commission's analysis of the CPUC's petition was based on a comparison of the CPUC's AB 1613 program with the federal statutes that the Commission is charged with implementing, and thus did not depend upon the documents that the CPUC, in particular, asked that the Commission take notice of in this proceeding. *Id.*

short-run avoided costs.³⁵ In addition, the CPUC states that, for CHP systems located in transmission-constrained areas, there should be a 10 percent price adder to reflect the avoided costs of the construction of distribution and transmission upgrades that would otherwise be needed.³⁶

22. Pursuant to section 210(a) of PURPA, the Commission prescribed rules imposing on electric utilities the obligation to offer to purchase electric energy from QFs. Section 210(b) of PURPA provides that such purchases must be at rates that are: (1) just and reasonable to electric consumers and in the public interest; (2) not discriminatory against QFs; and (3) not in excess of “the incremental cost to the electric utility of alternative electric energy.” Section 210(d) of PURPA, in turn, defines “incremental cost of alternative electric energy” as “the cost to the electric utility of the electric energy which, but for the purchase from [the QF], such utility would generate or purchase from another source.”³⁷

23. The Commission implemented this so-called mandatory purchase obligation set forth in PURPA in section 292.303 of its regulations, which provides that “[e]ach electric utility shall purchase, in accordance with § 292.304, ... any energy and capacity which is made available from a qualifying facility....”³⁸ Section 292.304, in turn, requires that the rates for such purchases shall: (1) be just and reasonable to the electric consumer of the electric utility and in the public interest; and (2) not discriminate against qualifying cogeneration and small power production facilities.³⁹ The regulation further provides that nothing in the regulation requires any electric utility to pay more than the “avoided costs for purchases.”⁴⁰ “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

³⁵ CPUC Request for Clarification or Rehearing at 13-14.

³⁶ *Id.* at 6-7.

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

³⁸ 18 C.F.R. § 292.303(a) (2010).

³⁹ 18 C.F.R. § 292.304(a)(1) (2010).

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

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source.”⁴¹ The factors to be considered in determining avoided costs include: (1) the utility’s system cost data; (2) the terms of any contract including the duration of the obligation; (3) the availability of capacity or energy from a QF during the system daily and seasonal peak periods; (4) the relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs; and (5) the costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from the QF.⁴² Avoided cost rates may also “differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies.”⁴³

24. As the Commission has previously explained, “states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations. Similarly, with regard to review and enforcement of avoided cost determinations under such implementation plans, we have said that our role is generally limited to ensuring that the plans are consistent with section 210 of PURPA....”⁴⁴ In this regard, the determinations that a state commission makes to implement the rate provisions of section 210 of PURPA are by their nature fact-specific and include consideration of many factors, and we are reluctant to second guess the state commission’s determinations; our regulations thus provide state commissions with guidelines on factors to be taken into account, “to the extent practicable,”⁴⁵ in determining a utility’s avoided cost of acquiring the next unit of generation.

25. Accordingly, in the July 15 Order, the Commission did not rule whether the rates established by the CPUC to implement its AB 1613 program would either satisfy or violate the avoided cost rate requirements set forth in section 210 of PURPA and the Commission’s regulations, and we did not rule -- and are not ruling herein -- whether the CPUC’s offer price is consistent with the avoided cost rate requirements of PURPA.⁴⁶ As we explained in the July 15 Order, there was no record in these proceedings on which

⁴¹ 18 C.F.R. § 292.101(b)(6) (2010).

⁴² See 18 C.F.R. § 292.304(e) (2010).

⁴³ 18 C.F.R. § 292.304(c)(3)(ii) (2010).

⁴⁴ See *American REF-FUEL Company of Hempstead*, 47 FERC ¶ 61,161, at 61,533 (1989); *Signal Shasta*, 41 FERC ¶ 61,120 at 61,295; see also *LG&E Westmoreland Hopewell*, 62 FERC ¶ 61,098, at 61,712 (1993).

⁴⁵ 18 C.F.R. § 292.304(e) (2010).

⁴⁶ July 15 Order, 132 FERC ¶ 61,047 at P 68.

the Commission could determine whether the CPUC's offer price under its AB 1613 program was consistent with the avoided cost rate requirements of section 210 of PURPA. Thus, nothing in the July 15 Order, or in this order, should be read as the Commission ruling on whether the CPUC's offer price under its AB 1613 program is consistent with the avoided cost rate requirements of PURPA.⁴⁷

26. The CPUC, in its request for clarification, seeks guidance on a proposal to explicitly implement AB 1613 pursuant to the provisions of PURPA, and, in particular, a proposal to explicitly set new avoided cost rates using a multi-tiered avoided cost rate structure. We find that the concept of a multi-tiered avoided cost rate structure can be consistent with the avoided cost rate requirements set forth in PURPA and our regulations.⁴⁸ Both section 210 of PURPA and our regulations define avoided costs in terms of costs that the electric utility avoids by virtue of purchasing from the QF.⁴⁹ The question, then, is what costs the electric utility is avoiding. Under the Commission's regulations, a state may determine that capacity is being avoided, and so may rely on the cost of such avoided capacity to determine the avoided cost rate.⁵⁰ Further, in

⁴⁷ *Id.* Similarly, while we address below a new approach that the CPUC proposes to take, i.e., a multi-tiered approach, we do not have a record to decide, and thus do not decide, whether any particular offer price that the CPUC ultimately may develop using a multi-tiered approach will be consistent with the avoided cost rate requirements of section 210 of PURPA.

⁴⁸ The Commission is charged by section 210 of PURPA with prescribing rules to encourage cogeneration and small power production, and those rules must ensure that the rates are, generally speaking, just and reasonable and in the public interest, do not discriminate, and also do not require a rate which exceeds the incremental cost of alternative electric energy. 16 U.S.C. § 824a-3(a), (b) (2006); *accord* 18 C.F.R. § 292.304(a) (2010).

⁴⁹ 16 U.S.C. § 824a-3(b), (d) (2006); 18 C.F.R. §§ 292.101(b)(6), 292.304 (2010).

⁵⁰ *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,884-85 (1980) (stating that "the value of service from the qualifying facility to the electric utility may be affected by the degree to which the qualifying facility ensures by contract or other legally enforceable obligation that it will continue to provide power" and that "[i]f purchases from qualifying facilities enable a utility to defer or avoid these new planned capacity additions, the rate for such purchases should reflect the avoided costs of these additions"), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part and vacated in part*, *American Electric Power Service Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd*

(continued...)

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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.⁵¹ Therefore, the CPUC may take into account actual procurement requirements, and resulting costs, imposed on utilities in California.

27. In *SoCal Edison*, the Commission stated that, regardless of how the state determines avoided cost, it must in its process reflect prices available from “all sources able to sell to the utility whose avoided cost is being determined.”⁵² Thus, under *SoCal Edison*, if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source “able to sell” to that utility for the specified renewable resources segment of the utility’s energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility’s energy needs. Stated more generally, *SoCal Edison* supports 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

in part, American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402 (1983).

⁵¹ See *SoCal Edison*, 70 FERC ¶ 61,215 at 61,676 (acknowledging a state’s ability to favor particular generation technologies is the prerogative of the states, and explaining that “a state may choose to require a utility to construct ... or to purchase power from ... a particular type of resource” and that the state can take such action consistent with PURPA “so long as such action does not result in rates above avoided cost”); *accord id.*, 71 FERC ¶ 61,269 at 62,080 (explaining that a state may, through state action, influence what costs are incurred by the utility in order to encourage renewable generation, and that a state may, in fact, “order utilities to purchase renewable generation”).

⁵² See *id.*, 70 FERC ¶ 61,215 at 61,677 (emphasis added); *accord id.* (referring to “potential sources of capacity from which the utilities could purchase”); *id.*, 71 FERC ¶ 61,269 at 62,078 (referring to “potential sources of capacity from which the utilities could purchase”); *id.* at 62,079-80 (referring to “the cost the utility would have incurred for the power if it had not purchased the QF’s energy and/or capacity, i.e., would have generated itself or purchased from another source”); *id.* at 62,080 (referring to “the cost of all alternative sources of power available to the utility”); *id.* at 62,080 (referring to accounting for “costs which actually would be incurred by utilities”); *id.* at 62,080 (describing avoided cost rates as “based on real costs that would be incurred by utilities”).

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constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement.⁵³

28. On reconsideration in the *SoCal Edison* proceeding, however, the Commission also stated that “[w]hether a benchmark process alone, a bidding process alone, or a combination benchmark-bidding process is used to establish the actual price paid for QF power, it must take in account all sources, i.e., all technologies and all types of sellers.”⁵⁴ Thus, 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” (the latter being unmodified by the phrase “able to sell to the utility” used elsewhere). That we did not expressly include that phrase in every instance in *SoCal Edison* is of no moment; to the extent it was not express, it was there implicitly. The focus of *SoCal Edison* was on what sources were able to sell to the utility. It would be illogical to read *SoCal Edison* as authorizing consideration for purposes of setting a utility's avoided costs of sources that are, in fact, not able to sell to that utility.

29. Furthermore, irrespective of the various phrasings that appear in *SoCal Edison*, permitting a state to set a utility's avoided costs based on all sources able to sell to that utility is consistent with the language of section 210(b) of PURPA⁵⁵ (requiring that a state commission may not “provide for a rate which exceeds the incremental cost to the electric utility of alternative electric energy”) and of section 210(d) of PURPA⁵⁶ (defining “incremental cost of alternative electric energy” as “the cost to the electric utility of the electric energy, which, but for the purchase from such cogenerator or small power producer, such utility would generate or purchase from another source.”). This

⁵³ Thus, a state may appropriately recognize procurement segmentation by making separate avoided cost calculations. *Accord Signal Shasta*, 41 FERC ¶ 61,120 at 61,294 and 61,296, n. 4 (the Commission declined to find that the CPUC's implementation of PURPA consisting of four standard offer contracts containing different avoided costs for the different types of QF sales that are subject to each of the standard offer contracts was inconsistent with PURPA or the Commission's regulations.).

⁵⁴ See *SoCal Edison*, 71 FERC ¶ 61,269 at 62,078; *accord id.* at 62,075 (referring to consideration of “all sources of generation capacity”), 62,077 (referring to “all sources of capacity”), 62,078 (referring to taking account of “all sources, i.e., all technologies and all types of sellers”), 62,080 (referring to inclusion of “all sources” in determining avoided cost rates).

⁵⁵ 16 U.S.C. § 824a-3(b) (2006).

⁵⁶ 16 U.S.C. § 824a-3(d) (2006).

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approach is also consistent with the Commission's implementation of PURPA sections 210(b) and (d) in Order No. 69, where the Commission defined "avoided costs."⁵⁷ As discussed above, permitting states to set a utility's avoided costs based on all sources able to sell to that utility means that where a state requires a utility to procure a certain percentage of energy from generators with certain characteristics, generators with those characteristics constitute the sources that are relevant to the determination of the utility's avoided cost for that procurement requirement.

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

31. Turning to the second issue raised in the CPUC's request for clarification, the CPUC states that, for CHP systems located in transmission-constrained areas, a permissible component of avoided cost consideration should be a 10 percent price "adder" (or location "bonus") to reflect the avoided costs of the construction of distribution and transmission upgrades that would otherwise be needed.⁵⁸ The Commission has previously found that an avoided cost rate may not include a "bonus" or "adder" above the calculated full avoided cost of the purchasing utility, to provide additional compensation for, for example, environmental externalities above avoided costs.⁵⁹ But, if the environmental costs "are real costs that would be incurred by utilities," then they "may be accounted for in a determination of avoided cost rates."⁶⁰ Accordingly, if the CPUC bases the avoided cost "adder" or "bonus" on an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to avoid, such an "adder" or "bonus" would constitute an actual avoided cost determination and would be consistent with

⁵⁷ Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,865-66 (defining avoided costs in terms of costs, both energy and capacity, which can be avoided by purchasing from QFs).

⁵⁸ The CPUC uses the term "adder" in its rehearing (CPUC Request for Clarification or Rehearing at 3), but the AB 1613 Decision refers to it as a 10 percent location "bonus." AB 1613 Decision, 2009 Cal. PUC Lexis 790 at *50.

⁵⁹ See *SoCal Edison*, 71 FERC ¶ 61,269 at 62,080.

⁶⁰ *Id.*

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PURPA and our regulations.⁶¹ Just as we are not addressing whether the CPUC's offer price under its AB 1613 program is consistent with the avoided cost rate treatment of PURPA, we do not address here whether the specific amount of 10 percent, as opposed to a different amount, is justified by avoided costs. We also note that, although a state may not include a bonus or an adder in the avoided cost rate unless it reflects actual costs avoided, a state may separately provide additional compensation for environmental externalities, outside the confines of, and, in addition to the PURPA avoided cost rate, through the creation of renewable energy credits (RECs).⁶²

The Commission orders:

The CPUC's request for rehearing is hereby dismissed, and its request for clarification is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

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

⁶² *American Ref-Fuel*, 105 FERC ¶ 61,004 at P 23. Compensation for such environmental externalities through RECs is outside of PURPA, and is not part of the avoided cost calculation; RECs are separate commodities from the capacity and energy produced by QFs. If a state chooses to create these separate commodities, they are not compensation for capacity and energy.

The CPUC may also grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds. *CGE Fulton, LLC*, 70 FERC ¶ 61,290, *reconsideration denied*, 71 FERC ¶ 61,232 (1995); *see also SoCal Edison*, 71 FERC ¶ 61,269 at 62,080 (explaining that "a state may also subsidize certain types of generation, for instance wind, or other renewables, through, e.g., tax credits.").

Attachment 3: Voluntary ARTs in Wisconsin as of October 2010

| Resource | Utility/Coop | Tariff | Price/kWh (Peak) | Price/kWh (Off-Peak) | Price/kWh (Flat Rate) ¹ | Contract Duration | Project Cap | Program Cap | Funded thru Base Rates or Green Pricing Program? | Enrollment - Installed Systems | Enrollment - Installed Capacity (kW) | Enrollment Pending ² | Status of Tariff ³ |
|--------------|-------------------|-----------------------|------------------|----------------------|------------------------------------|-------------------------|-------------|--|--|--------------------------------|--------------------------------------|---------------------------------|-----------------------------------|
| Biogas | WEPCO | CGS 5 | \$0.1550 | \$0.0614 | \$0.093 | 15 years | 2000 kW | 10 MW | Base | 6 | 2500 | | Open |
| | WPL | Pgs-ART ⁴ | \$0.1200 | \$0.0735 | \$0.093 | 10 years | 2000 kW | 0.5% of retail electric kWh sales from the prior calendar year (cap applies to all non-solar renewables combined) | Base | 1 | 600 | 9 systems 8000 kW | Full if all pending are installed |
| | WPSC | PG-Biogas | \$0.1050 | \$0.0600 | \$0.080 | 10 years | 2000 kW | 10 MW | Base | 0 | 0 | | Open |
| | DPC | DG-5 | \$0.1050 | \$0.0540 | \$0.075 ⁵ | 5-10 years ⁶ | 2000 kW | Until fully subscribed ⁷ | Base | 4 | 1633 | | Open |
| | NSPW | Art-1 | | | \$0.073 | 10 years | 800 kW | 0.25% of retail electric kWh sales from the prior calendar year (cap applies to biogas, biomass and wind combined) | Base | 0 | 0 | | Open |
| | WPL | Pgs-6 ⁴ | \$0.0800 | \$0.0490 | \$0.062 | unspecified | 800 kW | 10 MW | Base | 1 | 400 | | Closed |
| | MGE | Pg-3 ⁸ | | | \$0.061 | unspecified | unspecified | 5 MW (cap applies to biogas and wind combined) | Base | 0 | 0 | | Open |
| PV | WPPI ⁸ | | | | \$0.300 | 10 years | variable | 300 kW | Green | 22 | 91 | 12 systems 90 kW | Open |
| | MGE | Pg-4 | | | \$0.250 | 10 years | 10 kW | 1 MW | Green | 94 | 484 | | Open |
| | WPL | Pgs-ART | | | \$0.250 | 10 years | 20 kW | 683 kW | Green | 102 | 689 | | Full |
| | WPSC | PG-Solar | | | \$0.250 | 10 years | 20 kW | 300 kW | Base | 46 | 313 | | Full |
| | WEPCO | CGS-PV | | | \$0.225 | 10 years | 100 kW | 1 MW | Green | 144 | 951 | 5 systems 49 kW | Full |
| | DPC | DG-5 | \$0.1050 | \$0.0540 | \$0.075 ⁵ | 5-10 years ⁶ | 2000 kW | Until fully subscribed ⁷ | Base | 1 | 46 | | Open |
| Wind | WEPCO | CGS 4 | | | ≤\$0.126 ⁹ | 10 years | 100 kW | 25 customers | Base | 4 | 260 | | Open |
| | WPL | Pgs-ART ¹⁰ | \$0.1200 | \$0.0735 | \$0.093 | 10 years | 1000 kW | 0.5% of retail electric kWh sales from the prior calendar year (cap applies to all non-solar renewables combined) | Base | 1 | 50 | 1 system 68 kW | Full if all pending are installed |
| | NSPW | Art-1 | | | \$0.066 | 10 years | 1000 kW | 0.25% of retail electric kWh sales from the prior calendar year (cap applies to biogas, biomass and wind combined) | Base | 0 | 0 | | Open |
| | DPC | DG-5 | | | \$0.065 ⁵ | 5-10 years ⁶ | 2000 kW | Until fully subscribed ⁷ | Base | 3 | 2130 | | Open |
| | MGE | Pg-3 | | | \$0.061 | unspecified | unspecified | 5 MW (cap applies to biogas and wind combined) | Base | 1 | 35 | | Open |
| TOTAL | | | | | | | | | | 430 | 10,182 kW | 8,207 kW | |

Footnotes

- For tariffs that offer differing on-peak and off-peak rates, this column shows the approximate average rate that would be earned if generation occurred equally across all hours of the year.
- Some utilities provided additional totals for systems accepted for enrollment under the tariff but not yet installed.
- "Closed" means the tariff has been withdrawn; existing contracts will be honored. "Open" means new applications are being accepted. "Full" means the tariff is active but the program cap has been reached.
- Biogas tariffs offered by WPL and MGE also apply to biomass with same terms.
- DPC tariffs allow the customer to lock in the price for the duration of the contract, or have the price adjusted periodically based on updated values for energy and renewable attributes.
- DPC tariffs allow the customer to choose a contract duration of 5 or 10 years.
- Although DPC currently does not have a program cap, "until fully subscribed" means that DPC might at some point establish one.
- WPPI offers to pay member utilities at a rate specified in a Schedule for Purchase of Solar Photovoltaic Energy (currently \$0.300/kWh). The utility then credits the customer that amount.
- WEPCO tariff for wind pays at the customer's retail rate (net metering). The current rate is \$0.12611/kWh for residential, farm, and some small business customers; less for everyone else.
- WPL tariff for wind also applies with same terms to all renewables other than solar, biogas, and biomass.

Participating WPPi member utilities as of October 2010

| | |
|-------------------|-----------|
| Algoma | 9/9/2010 |
| Black River Falls | 5/19/2009 |
| Boscobel | 5/19/2009 |
| Columbus | 2/8/2010 |
| Cuba City | 5/19/2009 |
| Evansville | 9/2/2009 |
| Jefferson | 6/8/2009 |
| Kaukauna | 6/11/2009 |
| Lodi | 7/21/2009 |
| Menasha | 7/27/2009 |
| Mount Horeb | 5/19/2009 |
| Muscoda | 5/19/2009 |
| New Glarus | 5/19/2009 |
| Oconomowoc | 6/8/2009 |
| Plymouth | 6/29/2009 |
| Prairie du Sac | 7/2/2009 |
| Reedsburg | 7/27/2009 |
| Richland Center | 5/19/2009 |
| River Falls | 1/30/2009 |
| Stoughton | 5/19/2009 |
| Sturgeon Bay | 4/23/2010 |
| Sun Prairie | 6/22/2009 |
| Two Rivers | 4/23/2010 |
| Waterloo | 6/8/2009 |
| Waupun | 7/16/2009 |
| Westby | 5/19/2009 |