C. Public Utilities Regulatory Policy Act

1. Californians for Renewable Energy v. California Public Utilities Commission*, 922 F.3d 929 (9th Cir. 2019)*

Californians for Renewable Energy and other solar energy producers in California, (collectively, CARE)[{1}] filed suit against the California Public Utilities Commission and its current and former commission members, among others, (collectively, CPUC)[{2}] in the United States District Court for the Central District of California alleging CPUC's regulations do not comply with the federal Public Utility Regulatory Policies Act (PURPA).[{3}] The district court denied CARE's motion for leave to file an amended complaint seeking attorney's fees and granted summary judgment for CPUC on all other claims.[{4}] CARE appealed. The Ninth Circuit affirmed the district court's denial of the motion to leave to file an amended complaint and grant of summary judgement on two claims, but reversed and remanded for further adjudication of whether CPUC's programs use the proper standards for compensation when fulfilling Renewable Portfolio Standards (RPSs).

Congress passed PURPA in 1978 to promote alternative energy generation and granted authority to the Federal Energy Regulatory Commission (FERC) to set out regulations governing how utilities must interact with small, independent alternative energy producers. One of the greater mandates of PURPA is the requirement that utilities purchase electricity from small or cogeneration alternative energy facilities, called qualified facilities (QFs). Utilities must purchase electricity from QFs at a compensation rate equivalent to the utility's avoided cost, measured by the cost to the utility of the electricity or capacity the utility would generate itself or purchase from a different source but for the purchase from the QF. Additionally, PURPA mandates utilities to connect QFs to the grid to facilitate such purchases. In promulgating regulations, FERC granted authority to state regulatory agencies to decide how to best comply with PURPA through state regulations. CPUC is the state agency charged with implementing PURPA requirements in California. PURPA does not contain a provision providing attorney's fees for claims arising under the statute.

After the passage of PURPA, CPUC struggled to come up with a beneficial regulatory scheme, as their initial attempt created QF "oversubscription"[{5}] and caused a repeal of the mandated contracting requirements between QFs and utilities. In 2002, California enacted an RPS, setting a requirement that utilities in the state obtain 33% of their electricity from renewables by 2020, and 50% by 2030. To achieve these goals, companies may also purchase RPS credits (instead of electricity) from renewable sources. The majority of the RPS requirements in California are met by renewable facilities with capacities over 20 megawatts (MW).

In 2005, Congress lessened the requirements of PURPA through the Energy Policy Act[{6}] (EPAct), after determining QFs no longer faced harsh barriers to the market. The EPAct removed the purchase obligation from any QF that FERC determined no longer faced discriminatory access to competitive electricity markets, which FERC interpreted as any utility over 20 MW.

As such, CPUC took multiple steps to implement PURPA and EPAct's requirements, four of which are challenged in this action. First, CPUC released the Qualifying Facility and Combined Heat Power (CHP) Settlement (QF Settlement)[{7}] which laid out standard contracts for utilities to enter with QFs.

[[1]]Petitioners include Californians for Renewable Energy and its members Michael E. Boyd and Robert Sarvey, all small-scale solar energy producers.[[1]]

[[2]] Respondents include California Public Utilities Commission, current CPUC commission members Michael R. Peevey, Timothy Alan Simon, Michael R. Florio, Catherine J.K. Sandoval, Mark J. Ferron, former CPUC commission members Rachel Chong, John A. Bohn, Dian M. Gruenich, Nancy E. Ryan, and Southern California Edison Company.[[2]]

[[3]] Solutions for Utilities, Inc. v. Cal. Pub. Utilities Comm'n, No. 11-04975-SJO-JCGx, 2016 WL 7613906 (C.D. Cal. Dec. 28, 2016); Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645 (2005).[[3]]

[[4]] *Solutions*, 2016 WL 7613906 at *1.[[4]]

[[5]] Oversubscription in this instance is the result of more QF facilities signing contracts than the utility company has the electricity demand need for, at that particular price.[[5]]

[[6]] Energy Policy Act of 2005, 16 U.S.C. §§ 1251–1252, 1254 (2005).[[6]]

[[7]] *Solutions*, 2016 WL 7613906 at *6.[[7]]

One contract, designed specifically for QFs with a capacity of less than 20 MW, sets a flat rate fee for utility companies based on energy costs (fuel and certain maintenance costs) and capacity costs (mainly capital costs of facilities). CHP facilities with capacities below 20 MW are compensated based on a Market Price Referent point: the cost to design, build, and operate a 500 MW combined cycle natural gas power plant. Second, CPUC implemented the Renewable Market Adjusting Tariff (Re-MAT) program, which applies to generators with a capacity of 3 MW or less, requiring utilities to purchase electricity at a program-specific rate.{{8}} Lastly, CPUC created the Net Energy Metering (NEM) Program, limited to consumer generators with a capacity of 1 MW or less. This program compares the amount of electricity generated to the amount used by the consumer over a 12-month period, and requires compensation when the consumer generates more than it uses. The utility must compensate the consumer for this excess generation at a rate based on an hourly day-ahead delay rate.{{9}} Even as defined by CPUC, this rate does not include capacity costs.

In 2011, CARE sued CPUC alleging both PURPA and § 1983{{10}} claims. The district court dismissed both claims and the Ninth Circuit upheld the dismissal, but reversed and remanded CARE's PURPA claims. The district court then entered summary judgment in favor of CPUC on all of CARE's PURPA claims and refused CARE's motion for leave to amend the complaint. The Ninth Circuit reviewed the district court's grant of summary judgment de novo, and denial of the motion to amend a complaint for an abuse of discretion.

First, the Ninth Circuit held that district court erred in granting summary judgment in favor of CPUC regarding the use of multiple sources of electricity in the calculation of avoided costs to determine the set price for contracts entered into under the QF Settlement. CARE argued that avoided costs should not be based on multiple sources, but on each individual type of electricity.{{11}} CARE argued that due to the lack of separate calculations, avoided costs for renewables are impermissibly calculated based on natural gas benchmarks instead of renewable benchmarks. CPUC in return argued that FERC does not require the use of multi-tiered pricing and gives the state discretion to determine the best implementation of PURPA. Relying on FERC precedent, the Ninth Circuit held where a state requires utilities to source away from certain types of generators through an RPS, the utility cannot calculate avoided costs based on a type of generator that would not also meet the RPS standards. Given an issue of fact exists as to whether CPUC's programs conform to this holding, the Ninth Circuit remanded this issue to the district court.

The court next addressed whether the avoided costs must include capacity costs, holding that the district court correctly granted summary judgment after determining all CPUC programs at issue adequately address PURPA requirements for the inclusion of capacity costs in avoided costs. The court applied the FERC standard requiring the inclusion of capacity costs only where a QF is of "sufficient reliability and with sufficient legally enforceable guarantees of deliverability"{{12}} and actually displaces the utilities need for additional capacity. The court held CARE did not provide any sufficient evidence as to why capacity costs, which CARE attempted to distinguish from capital costs, are an inadequate representation of avoided costs when determining the QF Settlement contract price. Further, the court found unpersuasive CARE's argument that the rate a utility pays to a consumer for excess generation under the NEM program must include capital costs. The compensation requirements of PURPA only apply under the NEM program where a utility purchases energy from a reliable QF, which allows the utility to actually forgo spending its own money on other capacity. NEMs do not rise to the requisite level of reliability, given they are not legally required to provide a utility with energy, and utilities cannot forgo purchasing other capacity based on NEMs. Therefore, utilities cannot be required to compensate for the capital costs of consumer-generators under the NEM program. In

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[[8]] The rate is calculated using 1) the average of the highest executed contract rates resulting from CPUC's auction to utility companies; 2) a two-month price adjustment based on market response; and 3) a time-of-delivery adjustment, with assumed inclusion of capacity costs.[[8]]

[[9]] A calculation of one day's price based on the production from the preceding day.[[9]]

[[10]] 42 U.S.C. § 1983 (2012).[[10]]

[[11]] This is known as "multi-tiered pricing" and requires a utility to calculate a separate avoided cost for each source (coal, natural gas, solar, etc.) instead of one overall avoided cost that considers all sources in its calculation.[[11]]

[[12]] Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978, 45 Fed. Reg. 12,214, 12,216 (Feb 29, 1980).[[12]]

analyzing the Re-MAT and CHP programs, the court found no issue as to the capital costs, because CARE provided only a bare assertion the costs need consideration, with no supporting reasoning. However, the court instructed the district court to review these programs for the use of natural gas facility benchmarks in calculating avoided costs, as consistent with the holding on the first issue. Finally, the court dismissed CARE's assertion that CPUC cannot allow utilities to condition purchases from QFs on the transfer of the QF's RECs to the utility. The court held that because the REC program is a state program, it is outside the purview of PURPA and therefore the federal statute does not govern its implementation.

The Ninth Circuit then turned to the third issue, holding that the NEM program does not violate PURPA's interconnection requirement. CARE argued the NEM program violates PURPA by placing the burden of the interconnection fee on the QFs. Relying on the plain text of the statute, the court held that PURPA's interconnection mandate only requires QFs be connected when needed to meet the mandatory purchase requirements; the statute provides no requirement that utilities must pay for the interconnection. Therefore, the NEM program does not violate PURPA and the district court properly granted summary judgment on the issue.

Finally, the court held the Eleventh Amendment{{13}} bars the award of equitable damages and attorney's fees under PURPA. Provided by both the Eleventh Amendment's protection of states and an absence of Congressional authorization of attorney's fees under PURPA, the court upheld the district court's denial of the motion based on a determination that CARE cannot state a cause of action for damages and attorney's fees against CPUC. The court further recognized that while a cause of action potentially exists against the individual commissioners for prospective injunctive relief, the commissioners have absolute immunity when acting in their legislative capacity, as in this case. Lastly, in light of Supreme Court precedent, the court found the lack of a PURPA provision providing for attorney's fees was dispositive against CARE's assertion that the private attorney general theory applied.{{14}} As such, the court held the district court did not abuse its discretion in denying CARE's motion for leave to file an amended complaint.

In conclusion, the Ninth Circuit affirmed the district court's denial of CARE's motion for leave to file an amended complaint and grant of summary judgment on all but one issue. The court reversed and remanded to the district court to determine whether CPUC's programs utilize other renewable energy providers as the benchmark for the calculation of avoided costs under PURPA.

Judge Jacqueline H. Nguyen dissented, disagreeing with the court's holding that PURPA requires avoided cost calculations based on sources that would also meet RPS requirements. Judge Nguyen reasoned this holding is inconsistent with FERC's administrative goal of allowing states discretion in their implementation of PURPA's requirements. A state should have flexibility in determining the calculation of avoided costs, given states may consider the reliability of solar or renewables relevant to the determination of proper avoided costs. Further, Judge Nguyen points out QFs and CPUC discussed the issue of avoided cost calculation, with the QF settlement reflecting this debate and the compromises resulting from it. As such, the court has no place to question the validity of the QF settlement.

[[13]] U.S. CONST. amend. VI.[[13]]

[[14]] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 269–70 (1975) (foreclosing the award of attorney's fees under the private attorney general theory absent explicit congressional authorization).[[14]]