

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).

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.

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)).

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).

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*).

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.*

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.

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...)

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”).

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).

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 "add" (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 "add" 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 "add" 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 "add" 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 "add" 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.*

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.").