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June 2, 2010

VIA E-FILING

The Hon. Kimberly D. Bose
Office of the Secretary
Docket Room
Federal Energy Regulatory Commission
888 First Street, N.E., Room 1A, East
Washington, D.C. 20002

Re: Public Utilities Commission of the State of California, Docket No. EL 10- 64-000, Motion to Intervene and Comments of People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General

Dear Ms. Bose:

Enclosed for e-filing in the above-docketed case, please find an original electronic filing of the attached document entitled **"MOTION TO INTERVENE AND COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN JR., ATTORNEY GENERAL."**

Thank you for your cooperation in this matter.

Sincerely,

/s/

KEN ALEX
Senior Assistant Attorney General

For EDMUND G. BROWN JR.
Attorney General

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Public Utilities Commission of the	)	
State of California	)	Docket No. EL10-64-000

MOTION TO INTERVENE AND COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA *EX REL.* EDMUND G. BROWN JR., ATTORNEY GENERAL

I. MOTION TO INTERVENE

Pursuant to Rule 214(a)(2) of the Rules of Practice and Procedure ("Rules") of the Federal Energy Regulatory Commission ("Commission"), the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General ("Attorney General") hereby files this Motion to Intervene in the above-docketed proceeding.

1. The Attorney General is California's chief law officer (Cal. Const. art. V, § 13), and has primary responsibility for enforcing, inter alia, the State's environmental and consumer protection laws. Pursuant to the California Constitution, statutes, and case law, the Attorney General has independent authority and duty to act to protect the natural resources of the State from pollution, impairment, or destruction in furtherance of the public interest. *See* Cal. Const., art. V, § 13; Cal. Govt. Code, §§ 12511, 12600-12; *D'Amico v. Board of Medical Examiners,* 11 Cal.3d 1, 14-15 (1974).

2. The petition filed by the California Public Utilities Commission ("CPUC") raises issues concerning the interpretation of California state law and the interaction of California law and federal law. As California's chief law officer, the Attorney General is uniquely qualified to provide legal argument and insight on those topics. In addition, any determination in this matter

may impact California law, California regulations, and the ability of state agencies to enforce state and federal law. As such, the Attorney General is an appropriate party to participate as intervenor.

3. All pleadings, correspondence and other communications concerning these proceedings should be directed to the following persons, and their names and addresses should be placed on the official service list for this docket:

KEN ALEX
Senior Assistant Attorney General
JULIA LEVIN
Special Assistant Attorney General
P.O. Box, 1515 Clay St.
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WHEREFORE, for all of the foregoing reasons, the People of the State of California *ex rel.* Edmund G. Brown Jr., Attorney General, respectfully requests that the Commission grant him leave to intervene and admit him as a party in the above-captioned proceeding pursuant to Rule 214 of the Commission's Rules of Practice and Procedure.

II. COMMENTS OF ATTORNEY GENERAL

A. Introduction

California has long been a world leader in energy efficiency, energy planning, and, now, in tackling climate change. California adopted the first statewide program mandating reductions in greenhouse gas emissions. State law (AB 32, Chapter 488, Statutes of 2006) requires reductions to 1990 emissions levels by 2020, and by executive order, the Governor has extended that goal to achieve emission reductions of 80% below 1990 levels by 2050. Governor's Exec. Order No. S-3-05 (June 1, 2005). In 2007, California passed the Waste Heat and Carbon Emission Reduction Act, AB 1613, Public Utilities Code §§ 2840 et seq., to "reduce wasteful

consumption of energy through improved . . . utilization of waste heat whenever it is cost effective, technologically feasible, and environmentally beneficial, particularly when this reduces emissions of carbon dioxide and other carbon-based greenhouse gases." Pub. Utilities Code § 2840.4(b).

Pursuant to that Act, the California Public Utilities Commission adopted policies and procedures for implementation of the requirements of AB 1613, and the California Energy Commission adopted Guidelines, setting forth specific criteria for eligible combined heat and power units. The CPUC also adopted a standard offer requirement establishing an offer to buy (or a "feed-in tariff") for excess power provided by the combined heat and power unit to the Investor-owned Utilities as part of the IOUs' procurement requirements. The CPUC initiated this proceeding with FERC for a determination that the feed-in tariff is not preempted by the Federal Power Act (FPA), 16 U.S.C. §§ 824, et seq., or the Public Utilities Regulatory Policies Act (PURPA), 16 U.S. C. §§ 824a-1, et seq. The IOUs argued in the CPUC proceeding that the feed-in tariff may be preempted as a setting of a wholesale rate for power, a function generally within the exclusive purview of FERC.

In fact, the CPUC's feed-in tariff is not a wholesale rate, but rather an offer to buy developed as part of the process for retail procurement. The feed-in tariff provides a baseline standardized offer for excess power from eligible CHP units, and, as such, fits within the state's traditional role providing retail procurement. The CPUC is not setting a rate for the wholesale generator, which can sell power at any rate that it sees fit. Rather, the CPUC is setting a price that the IOU must offer the generator in order to meet the environmental goals of the state law – increased energy efficiency and reduction of greenhouse gas emissions. As a result, FERC

retains its authority to approve the contract between buyer and seller, whether it is at the feed-in rate or some other.

In addition, California's law and the PUC feed-in tariff for combined heat and power systems applies only to systems of 20 MW or below. FERC has explicitly exempted energy sales of 20 MW and below from PURPA and sections 205 and 206 of the FPA based on state regulatory authority. 18 C.F. R. 292.601. As a result, California law applies to this particular feed-in tariff for 20 MW or smaller systems.

Even if FERC determines that the feed-in tariff is somehow more akin to a wholesale rate, PURPA empowers the State, through the CPUC, to set avoided cost rates for Qualified Facilities (QFs). 16 U.S.C. §824a-3(f). The CHP feed-in tariff meets PURPA's requirements that the rate (1) be "just and reasonable" to consumers, (2) be in the public interest, (3) not discriminate against QFs, and (4) not exceed the purchaser's incremental alternative cost. 16 U.S.C. § 824a-3(b)(2). The rate fulfilling those requirements is referred to as the "avoided cost" rate, which PURPA defines as "the cost to the electric utility of the electric energy which, but for the purchase from such . . . [QF], such utility would generate or purchase from another source." 16 U.S.C. § 824a-3 (d); see 18 C.F.R. § 292.101(b)(6). Here, as discussed below, the CHP feed-in tariff meets the definition of avoided cost under PURPA.

B. Preemption

The issue before FERC is whether the FPA or PURPA preempts the CPUC's feed-in tariff for excess power generated from eligible CHP units. We therefore begin with a discussion of the rules governing federal preemption of state health and welfare laws.

1. Preemption of State Health and Safety Laws is Disfavored

Preemption analysis proceeds from the premise that "the historic police powers of the States [are] not to be superseded by . . . [a] Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Group*, 505 U.S. 504, 516 (1992). Courts must construe federal statutes "in light of the presumption against the pre-emption of state police power regulations." *Id.* at p.518. The Supreme Court has likewise concluded that the scope of preemption must be narrowly construed, rejecting any suggestion that the presumption "should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of [preemption]. . . ." *Medronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) [emphasis in original].

The presumption against preemption is especially strong when applied to state health and safety regulations. "[T]he regulation of health and safety matters is primarily, and historically, a matter of local concern." *Hillsborough County v. Automated Medical Laboratories, Inc*., 471 U.S. 707, 719 (1985). The federal government accordingly grants the states "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Medtronic*, supra, 518 U.S. at p.475 (citation omitted). The state health and safety law at issue here – reduction of greenhouse gas emissions and promotion of energy efficiency – lies at the heart of these traditional police powers. Ca. Pub. Util. Code § 2840.6(a) ("It is the intent of the Legislature that state policies dramatically advance the efficiency of the state's use of natural gas by capturing unused waste heat, and in so doing, help offset the growing crisis in electricity supply and transmission congestion in the state."); *see* Global Warming Solutions Act, Ca. Health and Safety Code §§ 38500, et seq. ("Global warming poses a serious threat to the economic well-being, public health, natural resources, and the environment

of California. The potential adverse impacts of global warming include the exacerbation of air quality problems, a reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems").

C. AB 1613 and the PUC Feed-in Tariff

In 2007, California enacted AB 1613, the Waste Heat and Carbon Emission Reduction Act, Ca. Pub. Utilities Code §§ 2840 et seq., which required the California Energy Commission to adopt guidelines for combined heat and power systems, and the CPUC to set rates at which the IOUs must offer to buy "excess electricity that is delivered to the grid that is generated by a combined heat and power system that is in compliance" with the Energy Commission Guidelines, as part of the IOUs' procurement obligations. Ca. Pub. Utilities Code § 2841(a). Importantly, the law requires that the CPUC set the offer to buy at rates that "ensure that the ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff." *Id.* In essence, the law requires that the offer to buy price be set as "cost avoided." The CPUC set the feed-in tariff in its "Decision Adopting Policies and Procedures for Purchase of Excess Electricity Under Assembly Bill 1613," as part of PUC Rulemaking 08-06-024 (attached as Exhibit PUC 1 to the CPUC's Petition in this matter), page 38, table 2.

D. FPA and PURPA

Under the Federal Power Act, 16 U.S.C. §§ 824 et seq., the FERC has exclusive authority to set wholesale rates for electricity in interstate commerce. *Mississippi Power & Light Co. v. Mississippi,* 487 U. S. 354 (1988). PURPA, 16 U.S.C. §§ 824a-1 et seq., provides an exception to that exclusive authority, allowing State PUCs to set rates for Qualifying Facilities (with

certain restrictions). 16 U.S.C. § 824a-3(f). In addition, the Energy Policy Act of 2005 amended PURPA and authorized FERC to exempt certain QFs from the Federal Power Act. 16 U.S.C. § 824a-3(m)(1)(A)-(C); 18 C.F.R. 292.309 (2009). FERC exempted energy sales made by QFs of 20 MW or smaller. 18 C.F.R. 292.601. Thus, the CPUC may set rates for an offer to buy excess power generated by CHP units if the offer does not constitute a wholesale rate, if the offer applies to sales exempted by FERC, or if the offer meets the requirements of PURPA.

E. The CPUC's Feed-in Tariff Does Not Set a Wholesale Rate for Generators, But Rather Creates an Offer to Buy as part of IOU Procurement Designed to Promote Energy Efficiency and Reduction of Greenhouse Gas Emissions

The CPUC's feed-in tariff sets a rate at which the IOUs must *offer to purchase* excess power from combined heat and power systems that meet specific criteria. The obligation results from state statute and state regulations designed to promote energy efficiency and reduction of greenhouse gas emissions. Ca. Pub. Util. Code § 2840.4. As such, the tariff does not set a wholesale rate. The CPUC has not directed the seller to sell power and it has not dictated a price at which the seller must sell. The IOU must provide the option to buy should the seller wish to avail itself. At the point at which the buyer and seller enter a contract for sale of the excess CHP power, that contract must be approved by FERC.[1]

The CPUC's feed-in tariff for excess combined heat and power arises as state regulation of the IOUs' purchasing practices, an area of long-standing state regulation. "The Commission has consistently recognized that wholesale ratemaking does not, as a general matter, determine whether a purchaser has prudently chosen from among available supply options." *Central Vermont Pub. Serv. Corp.,* 84 FERC 61,194 (1998). "[S]tates have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. . . . .They also,

assuming state law permits, may or order utilities to purchase renewable generation." *Southern California Edison Co.,* 71 FERC 61,269 (1995).

At the CPUC proceedings, and now in their own petition for declaratory relief to FERC, the three California IOUs contend that two FERC decisions from the mid-1990s, *Connecticut Light and Power*, 70 FERC 61,012 (1995), and *Midwest Power Systems*, 78 FERC 61,067 (1997), preclude the CPUC's feed-in tariff. *Southern California Edison, et al.*, Docket No. EL 10-66-000, Petition for Declaratory Order at 15-16, 21-22. *Connecticut Light and Power* and *Midwest Power* confirm that FERC has exclusive jurisdiction over the setting of wholesale electric rates, and that State Commissions are preempted from doing so. *Connecticut Light and Power*, 70 FERC at 61,030; *Midwest Power Systems*, 78 FERC at 61,247. But both *Connecticut Light and Power* and *Midwest Power* concerned state-created obligations for power purchase and contracts for sale, not, as here, a requirement simply for the IOU to provide an offer to purchase. In *Connecticut Light and Power*, the State Commission ordered purchase agreements at determined rates for 25 years. 70 FERC at 61,024. In *Midwest Power*, the State Commission ordered the parties to enter long term contracts on specific terms. 78 FERC at 61,245. In neither case did FERC address the issue of whether the establishment of an offer to purchase power at a particular rate is akin to setting a wholesale rate, and therefore, those cases do not address the issue presented here.

The CPUC's feed-in tariff for CHP excess power does not require a sale or the entry of a contract. The generator retains authority to sell at any rate it sees fit and to any buyer, while benefiting from the option to sell to the IOUs at the feed-in tariff rate. FERC retains its authority to review the contract, even at the feed-in rate, once entered. In addition, the seller retains

[1] We argue in Section F below that FERC has exempted these particular tariffs from the FPA, so,

authority to ignore the feed-in tariff rate and negotiate either with the IOUs or with another purchaser, including through the bidding process at the California ISO markets or selling directly to an Electric Service Provider. *See, e.g.*, California Energy Commission, Distributed Generation and Cogeneration Policy Roadmap for California (March 2007) at 8.

By setting an offer for purchase, the CPUC's feed-in tariff is part of its management of utility procurement. As FERC has recognized, utility procurement management is an essential element of the state's traditional function. *See, e.g., Southern California Edison Co.*, 71 FERC 61,2080 (1995). Through the feed-in tariff for combined heat and power systems, the state seeks to reduce energy waste, promote efficiency, and curtail greenhouse gas and other emissions. *See* Assembly Comm. on Appropriations, Bill Analysis, A.B. 1613, (2007-2008 Reg. Sess.) as amended May 1, 2007, p. 1-2. As such, the CPUC's tariff is squarely within the state's traditional authority and function and does not constitute a wholesale rate.

F. FERC Has Exempted QFs Under 20 MW From the FPA, Providing the CPUC With Authority to Set Feed-in Tariff Rates.

Under FERC Order 697-A, codified at 18 C.F.R. 292.601, "[a]ll sales of energy or capacity made by QFs 20 MW or smaller are exempt from section 205 [of the FPA]." The CPUC's feed-in tariff for excess power from CHP units applies only to 20 MW and smaller systems, as required by California law. FERC has exempted the relevant systems from its jurisdiction, precluding any determination that the FPA or PURPA preempt the CPUC's feed-in tariff in this matter.

Further, to the extent that FERC's prior decisions in *Connecticut Light & Power*, 70 FERC 61,012 (1995), and *Midwest Power Systems*, 78 FERC 61,067 (1997), can be read to require state-set rates to comply with PURPA avoided cost requirements even if the sellers are

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in these particular circumstances, FERC contract review may be limited.

not certified as QFs, that issue does not arise with respect to the combined heat and power tariff at issue here. Under Ca. Pub. Util. Code § 2841(a), the CPUC must set the offer at rates that "ensure that the ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff." This, by definition, is an avoided cost rate.[2]

G. Under PURPA, California Has Authority to Set Avoided Cost Rates That Provide a "Wide Latitude" and May Include the Costs Associated With Providing the Benefits of GHG Reduction

If FERC determines that the CPUC feed-in tariff constitutes a wholesale rate, the CPUC, nonetheless, retains authority to set such a rate. Under PURPA, states have the authority to set avoided cost rates for Qualified Facilities (QFs)[3]. 16 U.S.C. §824a-3(f). Federal law loosely governs the states' rate-setting for QFs. PURPA requires that the rate set for purchase of power by the utility from a QF must (1) be "just and reasonable" to consumers, (2) be in the public interest, (3) not discriminate against QFs, and (4) not exceed the purchaser's incremental alternative cost. 16 U.S.C. § 824a-3(b)(2). The rate fulfilling those requirements is referred to as the "avoided cost" rate. PURPA defines avoided cost as "the cost to the electric utility of the electric energy which, but for the purchase from such . . . [QF], such utility would generate or purchase from another source." 16 U.S.C. § 824a-3(d); *see* 18 C.F.R. § 292.101(b)(6). While the state's method for setting the rate may not conflict with PURPA or the cited FERC regulation, the resulting rate is not determined by the federal regulation, and FERC has disavowed control or expertise as the correct price.

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[2] See more detailed discussion in Section G below.

[3] The CPUC does not require that the CHP facility register as a QF to be eligible for the feed-in tariff, and we concur. If FERC disagrees, QFs remain eligible for the CPUC-set rate on the alternative grounds set forth in this section.

FERC, under this system, provides to the state great deference for rate setting and "wide latitude in implementing PURPA." *Southern California Edison Co.*, 70 FERC ¶ 61,215, at 61,675 & n.17 (1995). *See also FERC v. Mississippi*, 456 U.S. 742, 751 (1982); *Indep. Energy Producers 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). As FERC stated in *Southern California Edison Co.*, 70 FERC ¶ 61,215, at 61,677 (1995), "[t]he Commission has not, and does not intend in the future, to second-guess state regulatory authorities' actual determinations of avoided costs (i.e., whether the per unit charges are no higher than incremental costs)." (Id.)

Deference is also appropriate for practical reasons. Rate setting is an imperfect exercise. The process attempts to create a rate that will fulfill state policy goals while staying within federal constraints into the future. Thus QF rates are necessarily estimated for the purposes of entering long-term contracts. Such estimates do not violate the avoided cost upper limit. 18 C.F.R. § 292.304(b)(5).

FERC has provided some guidance for states setting avoided cost rates. FERC regulation requires several factors to be considered "to the extent practicable" in determining avoided cost. 18 C.F.R. § 292.304(e) sets forth the following factors for consideration:

(1) Data regarding the utility's cost structure and plans to add capacity;

(2) "The availability of capacity or energy from a qualifying facility during daily and seasonal peak periods, including:"
   (i) The ability of the utility to dispatch the qualifying facility;
   (ii) The reliability of the QF;
   (iii) Contract terms;
   (iv) The extent to which scheduled outages of the qualifying facility can be coordinated with scheduled outages of the utility's facilities;
   (v) The usefulness of energy and capacity supplied from a qualifying facility during system emergencies;

(vi) The individual and aggregate value of energy and capacity from QFs on the electric utility's system;
(vii) The smaller capacity increments and the shorter lead times available with additions of capacity from QFs.

(3) The relationship of the availability of energy or capacity from the QF to the ability of the electric utility to avoid costs, including the deferral of capacity additions and the reduction of fossil fuel use;

(4) "The costs or savings resulting from variations in line losses from those that would have existed in the absence of purchases from a qualifying facility, if the purchasing electric utility generated an equivalent amount of energy itself or purchased an equivalent amount of electric energy or capacity."

The CPUC's rate for excess power from eligible CHP units reflects the many benefits of distributed, efficient generation consistent with PURPA and FERC's regulations. Congress enacted PURPA to encourage the development of small power production facilities and to reduce American dependence on fossil fuels. Congress also sought to eliminate barriers to the development of alternative energy sources. *See FERC v. Mississippi*, 456 U.S. 742, 750-51 (1982); *Indep. Energy Producers Ass'n v. CPUC,* 36 F.3d 848, 850 (9th Cir. 1994).

Under FERC's regulations, avoided cost rates "may differentiate among qualifying facilities using various technologies on the basis of the supply characteristics of the different technologies." 18 C.F.R. § 292.304(c)(3)(ii). Clearly, then, the CPUC may consider the cost of obtaining alternative renewable energy in determining "avoided cost" rates for purchases from QFs. California's efforts to address global warming are changing the market in which an IOU purchases power. The Global Warming Solutions Act (AB 32), Executive Order S-03-05 (setting GHG emission reduction targets), and AB 1613 (Waste Heat and Carbon Emission Reduction Act) have set California on a path that relies on cleaner power. California's Renewable Portfolio Standard requires purchase from renewable and efficient sources. *See* Ca. Pub. Util. Code §§399.11-399.20; see also §701.3. As a result, "incremental alternative energy"

increasingly does not come from fossil-fuel-based generators. What really matters is the avoided cost of alternative renewable energy and highly efficient sources. PURPA's language and intent and FERC's regulations governing avoided-cost rate setting are sufficiently flexible to accommodate the needs of states in meeting state law requirements for energy efficiency, renewable portfolio standards, and reduction of greenhouse gas emissions in the setting of cost avoided rates.

Finally, and significantly, as noted in the previous section, the Waste Heat and Carbon Emission Reduction Act, which gives rise to the CPUC-set rate, requires that the CPUC "ensure that the ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff." Ca. Pub. Utilities Code § 2841(a). As a result, the CPUC's rate for excess CHP is by definition an avoided cost rate. Given FERC's historical deference to a State's determination of avoided cost and the strong policy against federal preemption, with respect to QFs, the CPUC's rate unequivocally meets PURPA's requirements.

H. Conclusion

FERC has three alternative bases upon whichi it may uphold the CPUC's CHP feed-in tariff. First, because the tariff sets an offer to purchase rather than a requirement to enter a sale or a contract, the tariff does not constitute a wholesale rate. Second, FERC has exempted 20 MW and under systems from the application of the FPA and PURPA, thereby providing the CPUC with authority to issue a feed-in tariff regardless of whether or not the tariff constitutes a feed-in tariff. Third, if FERC determines that the CHP feed-in tariff constitutes a wholesale rate, the CPUC may set that rate for entities registered as QFs. In light of these alternative bases for the feed-in tariff, the Attorney General requests that FERC declare that the CPUC feed-in tariff for eligible combined heat and power units is not preempted by federal law.

Dated: June 2, 2010

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

_/s/_____
KEN ALEX
Senior Assistant Attorney General
JULIA LEVIN
Special Assistant Attorney General

CERTIFICATE OF SERVICE