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9
 10 **UNITED STATES DISTRICT COURT**
 11 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 12 **SAN FRANCISCO DIVISION**

13
 14 WINDING CREEK SOLAR LLC,

15 Plaintiff,

16 vs.

17 MICHAEL FLORIO, CATHERINE
 18 SANDOVAL, CARLA PETERMAN,
 MICHAEL PICKER, and LIANE
 19 RANDOLPH, in their official capacities as
 Commissioners of the California Public
 20 Utilities Commission,

21 Defendants.

Case No. 13-04934 JD

**RESPONSE OF DEFENDANT
 COMMISSIONERS OF THE
 CALIFORNIA PUBLIC UTILITIES
 COMMISSION TO AMICUS CURIAE
 BRIEF OF PACIFIC GAS AND
 ELECTRIC COMPANY, SOUTHERN
 CALIFORNIA EDISON COMPANY, AND
 SAN DIEGO GAS & ELECTRIC
 COMPANY**

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TABLE OF ACRONYMS

1
2
3 **399.20 FiT:** Original feed-in tariff implementing California Public Utilities Code § 399.20, enacted in 2006.

4 **AB 1613 CHP:** A certain type of cogeneration facility (combined heat
5 and power system), as defined in California Public Utilities Code § 2840.2.

6 **FiT:** A feed-in tariff.

7 **kW:** A kilowatt is 1,000 watts of power. A watt hour is the basic unit of measure of
8 electric energy consumption.

9 **kWh:** A kilowatt hour is the amount of power necessary to produce 1,000 watts for one hour.
10 For example, ten 100-watt light bulbs burning for one hour uses 1,000 Wh of electric energy, or 1 kWh.

11 **MPR:** The Market Price Referent reflects the construction, operation and maintenance costs
12 of a proxy generator: a new, highly efficient 500 MW capacity combined cycle natural gas turbine.

13
14 **MW:** A megawatt is a million watts of power. For example, a MW is the amount of power needed to light 10,000 100 watt bulbs.

15 **MWh:** A megawatt hour is the amount of electric power delivered multiplied by the time over
16 which the energy is consumed (measured in hours). A MWh is the amount of power needed to light 10,000 100 watt bulbs for one hour.

17
18 **PG&E:** Pacific Gas and Electric Company.

19 **PURPA:** Public Utility Regulatory Policies Act of 1978, codified generally at 16 U.S.C.
20 § 796 and § 824a-3.

21 **QF:** A qualifying facility is an eligible cogeneration or small power production facility that is
22 a qualifying facility under the requirements specified in Subpart B of FERC's regulations (18 C.F.R. § 292.101(b)(1), § 292.203).

23 **QF Settlement:** The comprehensive settlement among QFs, utilities, and ratepayer
24 representatives approved by the CPUC in December 2010 in CPUC decision D.10-12-035.

25 **RAM:** The Renewable Auction Mechanism was established by the CPUC in D.10-12-048
26 as the primary contracting tool for utility procurement from smaller renewable energy projects (up to 20MW in size) that are eligible for the California Renewables Portfolio Standard Program.
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Re-MAT: Renewable Market Adjustment Tariff, the revised feed-in tariff program implementing amendments to California Public Utilities § 399.20.

RPS: The Renewable Portfolio Standard is a utility procurement requirement mandated by California law (Article 16 of the Public Utilities Code, commencing with § 399.11). The RPS requires increasing utility procurement by CPUC-regulated utilities from eligible renewable energy resources.

SCE: Southern California Edison Company.

SRAC: Short-Run Avoided Costs are the short-run marginal costs for the production of one additional unit of electricity: fuel costs, and certain operation and maintenance costs.

Standard Contract: The power purchase agreement approved by the CPUC that California’s regulated utilities must offer QFs of 20 MW or less.

I. INTRODUCTION

Pursuant to the Court’s “Order Re Amici Curiae,” dated November 11, 2015, (Dkt. No. 104), the defendants Commissioners of the California Public Utilities Commission (CPUC or CPUC Commissioners) submit this response to the *Amicus Curiae* Brief of Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company (Utilities’ *Amicus* Brief) filed on January 14, 2016. (Dkt. No. 109). The CPUC agrees with the bulk of the representations in the Utilities’ *Amicus* Brief that Winding Creek’s claims are rooted in misunderstandings regarding the Public Utility Regulatory Policies Act (PURPA), the CPUC’s PURPA compliance regime, and the Federal Energy Regulatory Commission (FERC) and federal court precedent granting state commissions wide discretion in implementing PURPA. Utilities’ *Amicus* Brief, p. 1; (Dkt. No. 109, p. 7). However, the CPUC feels compelled to clarify vague statements in the Utilities’ *Amicus* Brief that: (1) may imply the Renewable Market Adjusting Tariff (Re-MAT) program is not PURPA compliant, (2) may imply the as available Qualified Facilities (QFs) of less than 20 MW may not have a right to the Standard Contract, which implements a QF’s rights under 18 C.F.R. § 292.304(d)(2), and (3) does not discuss in full the Ninth Circuit’s recognition in *Independent Energy Producers Association, Inc. v. Cal. P.U.C. (IEP)*, 36 F.3d 848, 859 (9th Cir. 1994), that states have great flexibility in calculating avoiding costs. For all of the reasons set forth in this and other pleadings, the CPUC agrees with the Utilities’ *Amicus* Brief, as clarified herein, that Winding Creek’s summary judgment motion should be denied and summary judgment should instead be entered in favor of the CPUC. Utilities’ *Amicus* Brief, p. 1; (Dkt. No. 109, p. 7).

II. DISCUSSION

A. The Re-MAT Program is PURPA Compliant

The Utilities create ambiguity by stating that “Section 399.20 was not intended to be a vehicle for implementation of PURPA,” and was only intended to “encourage electrical generation from eligible renewable energy resources.” Utilities’ *Amicus* Brief, p. 3; (Dkt. No. 109, p. 9); Utilities’ *Amicus* Brief, p. 2; (Dkt. No. 109, p. 8) citing California Public Utilities

1 Code Section 399.20(A). To clarify this ambiguity, the CPUC returns to the origin and
 2 history of the development of the Re-MAT program.¹ By the passage of Assembly Bill (AB)
 3 1969 (2006), which was codified as California Public Utilities Code § 399.20,² the California
 4 State Legislature directed the CPUC to adopt a renewable energy program addressing specific
 5 types of generation, which later was named Re-MAT.

6 The Utilities are correct that § 399.20 did not label the Re-MAT program as a PURPA
 7 program; however, in the implementation of § 399.20, the CPUC intentionally and explicitly
 8 designed the Re-MAT program to comply with PURPA. As the CPUC stated in the first
 9 Re-MAT decision, Decision (D.) 12-05-035, 2012 WL 2049420 (Cal.P.U.C.), “since this
 10 program is developed to be compliant with PURPA, a participating generator must register
 11 with FERC as a QF.” Indeed in the accompanying footnote, the CPUC stated:

12 The fundamental premise of the pricing proposal adopted today is that the
 13 prices reflect avoided costs, which the Commission has authority to set under
 14 the PURPA for QFs. In the absence of such federal authority, the Commission
 15 would not have jurisdiction to establish the wholesale FiT program prices.
 Therefore, to satisfy the PURPA requirements, the participating generator must
 be a QF. (PG&E April 16, 2012 Reply Comments.)

16 Id. at p. 102, footnote 89. The CPUC’s design of Re-MAT has been affirmed repeatedly by
 17 FERC, which, in the context of Winding Creek’s own Petition for Declaratory Order,
 18 recognized “Re-Mat program [as] consistent with PURPA.” *Winding Creek Solar LLC*, 153
 19 FERC ¶ 61,027, at P. 7 (2015) (Dkt. No. 99-1, p. 3).

20 The unique characteristics of the Re-MAT program are PURPA compliant. As noted
 21 by the Utilities’ *Amicus* Brief, “only a small segment of potential QFs meet the four eligibility
 22 criteria listed under Section 399.20(b)(1)-(4)” of the California Public Utilities Code. When
 23

24
 25 ¹ For a detailed discussion of the Re-MAT program see CPUC Opposition Brief to Motion for
 Summary Judgement (OB), pp. 8-11. (Dkt. 90, pp. 16-19).

26 ² Unless otherwise noted all code sections are to the California Public Utilities Code.

1 § 399.20 was implemented, the CPUC limited participation in Re-MAT solely to a subset of
2 PURPA QFs of which the CPUC sought to encourage increased utility procurement. The
3 PURPA implementing regulations provide state utility commissions the discretion to design
4 PURPA programs to encourage specific types of renewable resources, if other PURPA
5 programs are available to all QFs. Specifically, 18 C.F.R § 292.304(c)(3)(ii) states the
6 standard rates for purchase “may differentiate among qualifying facilities using various
7 technologies on the basis of the **supply characteristics** of the different technologies.”
8 (Emphasis added). The Re-MAT program thus targets specific renewable distributed
9 generation and compensates them based on the type of energy they supply. QFs that do not
10 qualify for Re-MAT, are eligible for the Standard Offer Contract (which is available to any
11 QFs 20 MW or smaller) and may be eligible for other PURPA programs in California (such as
12 the AB 1613 program).

13 In addition to preferences for specific types of generation, § 399.20 (f)(1) also
14 instructs the CPUC to limit the size of program. The legislative history of § 399.20 does not
15 speak to the policy objectives of the limit on procurement (§ 399.20 was subsequently
16 amended to increase the size of the program from 250 MW to 750 MW). The capacity limit
17 may have resulted from a political compromise; however, the origin of the policy is not
18 material to the whether the Re-MAT program complies with PURPA. When considering
19 Winding Creek’s Petition for Request for Rehearing on the Declaratory Order, FERC
20 reiterated that it “found that the Re-MAT program,” which includes the 750 MW limit, “is
21 consistent with PURPA, because it is an alternative to a primary PURPA program, the
22 Standard Contract for QFs 20 MW or Under, which is consistent with PURPA.” *Winding*
23 *Creek Solar LLC*, 153 FERC ¶ 61,027, at P. 7 (2015), (Dkt. No. 99-1, 3). As the Utilities
24 correctly note, the California PURPA programs are distinguishable from the Montana PURPA
25 programs at issue in *Hydrodynamics, Inc.*, 146 FERC ¶61, 193 (2014), which did not include
26 a standard offer contract available to all QFs without any restrictions. The relevant CPUC
27 and FERC decisions unambiguously state that the Re-MAT program complies with PURPA.

1 California's PURPA program, as implemented by the CPUC, rests on decades of QF
2 contracting experience, informed by decades of FERC and federal court guidance. Every
3 procurement program where the CPUC engages in wholesale rate setting – such as Re-MAT,
4 the AB 1613 Feed-in Tariff, or the Standard Contract (*see* CPUC OB, pp. 8-12, Dkt. No. 90,
5 p. 16-20) – must comply with PURPA, including the requirements that the wholesale generators
6 be QFs and that the rates do not exceed the utilities' avoided costs. While the availability of the
7 Standard Contract is currently the backbone of California's PURPA program, any program
8 adopted in compliance with PURPA – like the Re-MAT, is part of the CPUC's PURPA
9 program.

10 **B. As Available QFs Of Less Than 20 MW Have A Right To The Standard**
11 **Contract, Which Implements A QF's Rights Under 18 C.F.R.**
12 **§ 292.304(d)(2)**

13 In 2010 the CPUC approved a comprehensive settlement among QF and ratepayer
14 representatives, and California's three largest investor-owned utilities. *See* D.10-12-035, p. 5,
15 2010 WL 5650671 (Cal.P.U.C.). That settlement provides a variety of QF contract options,
16 including a *pro forma* agreement that utilities must make available to QFs of 20 MW or less
17 (the Standard Contract). The Standard Contract allows a 12-year term for new facilities, and
18 provides separate payment provisions for energy and capacity.

19 The Utilities' *Amicus* Brief describes this contract and then compares it to the purchase
20 obligation set forth at 18 C.F.R. § 292.304(d)(2). Given the Fifth Circuit's holding in *Exelon*
21 *Wind 1, LLC v. Nelson*, 766 F3d 380 (5th Cir. 2014), the *Amicus* Brief then states: "It is less
22 clear whether Winding Creek is entitled to sell energy and capacity under subsection (d)(2)."
23 This statement seems to suggest that the Standard Contract, or the opportunity to provide energy
24 under § 292.304(d)(2) may not be available to some California QFs.

25 As discussed below in Section C, for purposes of California's PURPA implementation,
26 the QF Standard Offer Contract is available to all QFs under 20 MWs and that contract
27 implements a QF's right to "provide energy or capacity pursuant to a legally enforceable
28 obligation to deliver energy or capacity over a specified term" pursuant to 18 C.F.R.

1 § 292.304(d)(2). There is no reason under Ninth Circuit precedent that the CPUC can identify
2 why Winding Creek would not be entitled to sell energy and capacity under subsection (d)(2).

3 **C. The Ninth Circuit Recognizes that PURPA Provides States Great Flexibility**
4 **in Calculating Avoided Cost**

5 In *IEP*, the Ninth Circuit told the CPUC that under PURPA, the CPUC cannot do
6 anything to alter existing long term contracts, but noted:

7 [A]lthough the avoided cost rates calculated in the Utilities' contracts are in
8 fact higher than the Utilities' current short term avoided cost rates, the proper
9 remedy for such a situation is to ensure that future standard offer contracts
10 contain **more flexible pricing mechanisms**.

11 *IEP*, 36 F.3d at 858 (emphasis added). Although the Utilities cite *IEP* for the proposition that
12 state utility commission are afforded a “great deal of flexibility” in determining how avoided
13 costs are calculated and the contractual relationship between utilities and QFs,” they fail to
14 explain the significant of this “flexibility” to both the Standard Offer Contract and the
15 Adjustment Price Mechanism in Re-MAT. (Dkt. 109, p. 12).

16 As the Utilities explain FERC noted that the Standard Offer Contract is a “long-term
17 PURPA contract at an avoided cost rate, containing both an energy and capacity component.”
18 Utilities' *Amicus* Brief, p. 12, (Dkt. 109) citing *Winding Creek Solar LLC*, 151 FERC ¶ 61,103,
19 P. 6. The FERC, CPUC, and Utilities all concur that short run avoided cost calculation in the
20 Standard Contract is compliant with PURPA. The FERC further reaffirmed this on
21 reconsideration in *Winding Creek Solar LLC*, 153 FERC ¶ 61,027 (2015) (Dkt. No. 99-1). In
22 contrast, Winding Creek's position about short run avoided costs is inconsistent with both the
23 Ninth Circuit's guidance in *IEP* and the FERC's *Winding Creek Solar LLC* decisions.

24 The Utilities point out that the avoided costs in the Standard Contract use a fixed
25 capacity cost and energy cost formula, which are known to the QF at the time the contract is
26 executed. (Dkt. 109, p. 12). As the CPUC pointed out in its OB, p. 11 (Dkt. No. 90, p. 19),
27 the Standard Contract is available for a 12 year term for new facilities and provides payments
28 separately for energy and capacity. The energy price uses a complex formula based on

1 previously approved short-run avoided cost formula; however, the capacity component is
2 fixed at rates at the time the contract is entered into based upon whether it is firm capacity or
3 as-available capacity, and increases each year thereafter. Therefore, this is different from a
4 price that is based on the time it is delivered.

5 The CPUC followed the Ninth Circuit’s direction and designed the Standard Offer
6 Contract to include the Standard Offer Contract with its flexible pricing mechanism for energy
7 prices. The Ninth Circuit’s guidance in *IEP* is also the underlying principle behind the
8 Re-Mat’s 5 MW auction cap, which another example of a flexible pricing mechanism.³

9 **III. CONCLUSION**

10 For the reasons asserted in the CPUC’s Opposition to Summary Judgment, and this
11 brief, the CPUC respectfully request the Court enter Summary judgment in favor of the CPUC
12 Commissioners.

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Respectfully submitted,

By: /s/ JAMES M. RALPH
James M. Ralph

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18 January 29, 2016

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26 ³ See CPUC OB., p. 22-25; (Dkt. 90, pp. 30-33).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **RESPONSE OF DEFENDANT COMMISSIONERS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION TO AMICUS CURIAE BRIEF OF PACIFIC GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND SAN DIEGO GAS & ELECTRIC COMPANY** with the Clerk of the Court for the United States District Court for the Northern District of California by using the appellate CM/ECF system on January 29, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ ROSCELLA V. GONZALEZ

Roscella V. Gonzalez