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and Liane Randolph, in their official capacities as Commissioners
8 of the California Public Utilities Commission

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

12
13 WINDING CREEK SOLAR LLC,

14 Plaintiff,

15 vs.

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

19 Defendants.
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Case No. 3:13-cv-04934 JD

**[PROPOSED] FINDINGS OF FACT OF
CPUC DEFENDANTS**

Trial Date: April 4, 2017
Time: 9:00 a.m.
Courtroom: 11, 19th Floor
Judge: Hon. James Donato

1 **I. The Parties**

- 2 1. Plaintiff Winding Creek Solar LLC (WCS) is a developer of solar generating
3 facilities and currently seeks to develop at least a 1 megawatt (MW) solar generating
4 facility in Lodi, California. Second Amended Complaint (SAC), (ECF 61) ¶ 10.
- 5 2. Thomas Melone is President of WCS and owns 100% of Allco Finance Limited,
6 which owns 100% of WCS. Certification of Interested Entities or Persons, (ECF 6).
- 7 3. Thomas Melone is President of Allco Renewable Energy Limited and eight other
8 complainants, including WCS, which sought to develop 57 solar generating projects
9 sized at 1.0 to 1.5 MW (for a total of 84.5 MW) in the service territory of Pacific Gas
10 & Electric Company (PG&E). Verified Complaint; Declaration of Harvey Y. Morris
11 in Support of the CPUC's Request for Judicial Notice. Exhibit 9, p. 10, Verification
12 and Exhibit A
- 13 4. Defendants are Commissioners of the California Public Utilities Commission
14 (CPUC). SAC, (ECF 61), ¶¶ 62-65.
- 15 5. The CPUC has developed numerous programs that are compliant with the Public
16 Utility Regulatory Policies Act of 1978 (PURPA), 16 U.S.C. § 824a-3, but have
17 identified only two of these programs for which WCS can qualify: the Renewable
18 Market Adjusting Tariff (Re-MAT) program; and the Standard Contract for QFs 20
19 MW or Less. Lee Unretained Expert Report, ¶¶ 55-59; (ECF 130; Trial Exh. 113).

20 **II. The Re-MAT Program**

- 21 6. The State of California by law mandates that electric utilities procure renewable
22 energy through a feed-in tariff program mandated by Cal. Pub. Util. Code § 399.20,
23 and California law imposes a 750 MW overall cap on this procurement. Cal. Pub.
24 Util. Code § 399.20 (2017).
- 25 7. In accordance with Cal. Pub. Util. Code § 399.20, the mandated 750 MW was
26 allocated to load serving entities, including the three large CPUC-regulated electric
27 utilities, based on their proportional load share. PG&E's share of the Re-MAT

1 procurement obligation was 218.8 MW for all product categories (as-available
2 peaking (solar generation); as-available non-peaking; and baseload). PG&E's share
3 was then divided equally between each product category. Accordingly, PG&E was
4 required to procure 72.93 MW of as-available peaking resources, such as solar
5 generation. After the capacity already under contract under Cal. Pub. Util. Code §
6 399.20 was subtracted from the respective product category, PG&E's initial Re-
7 MAT program period had 36.679 MW in the as-available peaking product category.
8 Lee Unretained Expert Report, ¶¶ 25-27; (ECF 130; Trial Exh. 113).

9 8. During PG&E's first Re-MAT program period, when the offer price was \$89.23 per
10 megawatt hour (MWh), WCS was not among the projects at or near enough the head
11 of the queue and so was not eligible to accept this first offer under the CPUC
12 program rules. SAC, ¶ 58 (ECF 61).

13 9. As of March 1, 2014, WCS's Lodi project's position in the queue made it eligible to
14 accept PG&E's Re-MAT offer price for "peaking, as-available services," and PG&E
15 offered WCS a long-term contract at a CPUC-mandated base price of \$77.23/MWh.
16 SAC, p. 18 at ¶¶ 67-69 (ECF 61). WCS declined to enter into a contract with PG&E.
17 *Id.* Other QFs did sign up for the full 5 MW and the price dropped down to
18 \$65.23/MWh. *See id.*, ¶ 61. Two months later, PG&E offered WCS a long-term
19 contract of \$65.23/MWh and WCS declined this offer, as well. *Id.*, ¶ 69. Since that
20 time, WCS has remained eligible during every Re-MAT program period to accept an
21 offer of a long-term fixed price contract. *See id.*, ¶¶ 67-70; *see also* Lee Unretained
22 Expert Report, ¶ 31 (ECF 130).

23 10. WCS alleges that WCS has suffered an injury-in-fact, because PG&E's offer of
24 \$65.23/MWh was purportedly too low to enable WCS to obtain financing. SAC, ¶
25 75 (ECF 61). The SAC never alleged that the \$77.23/MWh was too low to obtain
26 financing. *See* SAC, (ECF 61).

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- 1 11. Other project bidders accepted offer prices of \$77.23/MWh and \$65.23/MWh, and
2 successfully achieved commercial operation; and still other project bidders accepted
3 offer prices of \$61.23/MWh and \$57.23/MWh that are on schedule for commercial
4 operation. Lee Decl., ¶¶ 7-10 (ECF 130; Trial Exh. 112), citing Lee Unretained
5 Expert Report (ECF 130; Trial Exh. 113), Exh. 2 (Trial Exhs. 115 & 116).
- 6 12. Since PG&E commenced operation of its Re-MAT program, the cost of solar panel
7 production has been declining. This evidence of decreasing cost of production is not
8 refuted in the evidence. See Lee Unretained Expert Report., Fig. 1 and ¶¶ 46, 57
9 (ECF 130; Trial Exh. 113); see also Trial Tr., p. 166; see also CPUC's *California*
10 *Solar Initiative: Annual Program Assessment*, June 2016, p. 10, at CPUC Req. for
11 Judicial Notice, Exh. 8 (ECF 129).
- 12 13. WCS admits that the price of renewable generation has fallen, even below the cost of
13 fossil-fueled generation "[i]n many places.". WCS Reply Memo. in Support of Mot.
14 for Summ. J., p. 13, n.10 (ECF 95).
- 15 14. As of December 2016, PG&E has approximately 35.7 MW remaining in the as-
16 available peaking product category for new contracts. Lee Unretained Expert
17 Report, ¶ 54; (ECF 130; Trial Exh. 113). This is in part due to the operation of the
18 Re-MAT program's rules, under which the capacity under contract that subsequently
19 are terminated are returned to PG&E's pool of available capacity for that product
20 category. *Id.*, ¶¶ 30, 35.
- 21 15. For nearly three years, WCS has been eligible to accept a Re-MAT contract for the
22 as-available, peaking product category, but chose not to do so. See Trial Tr., 151
23 (Lee).
- 24 16. If the California Legislature does not expand Re-MAT further, the soonest that
25 PG&E will cease to offer Re-MAT contracts in the "peaking, as-available" product
26 category in which WCS seeks to participate is approximately 14 months from today,
27 May 2017. See Lee Decl., ¶¶ 2-3 (ECF 130; Trial Exh. 112).

III. QF Settlement Standard Contract for QFs 20 MW or Less

17. The QF Settlement resolved multiple years of litigation between multiple QFs and/or their trade associations, utilities, the CPUC, and other parties, and was the result of numerous months of settlement negotiations. Colvin Prepared Direct Test., ¶¶ 30-31 (ECF 134; Trial Exh. 101).

18. Because WCS was not a party to the QF Settlement, it can petition the CPUC to modify the QF Settlement decision and the Standard Contract for QFs 20 MW or Less, but WCS has never done so. Colvin Prepared Direct Test., ¶¶ 56-57 (ECF 134; Trial Exh. 101).

19. One component of the QF Settlement was the Standard Contract for QFs 20 MW or Less. Trial Exhs. 1, 12, 18. As recognized by a Federal Energy Regulatory Commission declaratory order, procurement through the Standard Contract for QFs 20 MW or Less is not capped. *Winding Creek Solar LLC*, 151 FERC ¶ 61,103 (2015), P 6 n.9, 2015 WL 2151303, **2.

20. The Standard Contract for 20 MW or Less also provides a payment stream that is reasonably certain and thus satisfies PURPA. Capacity payments are long-run avoided costs and are known and fixed for the terms of the contract, and they can only increase. Colvin Test., ¶¶ 39-42 (ECF 134; Trial Exh. 101).

21. Payments for energy are based on a formula that is defined at the time the obligation is incurred. *Winding Creek Solar LLC*, 151 FERC ¶ 61,103, *supra*, P 6. The Short Run Avoided Cost (SRAC) formula has three market-based variable inputs: a market heat rate, a gas index, and a location adjustment factor. Colvin Test., ¶¶ 43-45 (ECF 134; Trial Exh. 101). The gas input is based on a monthly index updated on the first day of each month based on the bid-week, which is the last week of the previous month. *Id.*

22. No new solar generator in PG&E's territory has elected to sign the Standard Contracts for 20 MW or less (under the QF Settlement). This is because solar

1 generators have found more favorable terms, conditions and pricing under other
2 PURPA-compliant programs approved by the CPUC, such as the Re-MAT program
3 and the Net Energy Metering/Net Surplus Compensation (NEM) program. It is
4 possible that in the future the price of natural gas or other factors may change the
5 economics that would incent new solar procurement in the Standard Contracts for 20
6 MW or less program. Colvin Test., ¶ 38 (ECF 134; Trial Exh. 101).

7 23. Under PURPA, the CPUC establishes its own avoided costs based upon the next
8 increment of power that would have been generated or procured but for the QF. As
9 part of that determination, the CPUC considers existing state laws such as the
10 Renewable Portfolio Standards (RPS) which influence utility procurement
11 obligations. For example, under the state’s RPS, 33% of the utility’s electricity must
12 come from eligible renewable resources by 2020. The utilities are on track to exceed
13 this target based on current procurement trends. The RPS informs the state’s choices
14 in its determination of avoided cost. California has multiple determinations of
15 avoided cost based on the procurement targets established by the legislature. As
16 another example, the state’s Emissions Performance Standard (which established a
17 threshold of 1,100 lbs. of carbon dioxide equivalent per MWh). This standard is the
18 equivalent to an efficient natural gas fired power plant, also known as a combined
19 cycle gas turbine. The standard does not allow approval of any long-term contracts
20 for generators that do not meet this performance threshold. This is a second example
21 of how the state law informs the CPUC’s choices in its determination of avoided
22 cost. Therefore, the state determines what the next increment of generation to base
23 avoided cost upon as part of its procurement and ratemaking function. Colvin Test.,
24 ¶ 24 (ECF 134; Trial Exh. 101).

25 Dated: May 19, 2017

Respectfully submitted,

26 /s/ HARVEY Y. MORRIS
27 HARVEY Y. MORRIS

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2017, I electronically filed the following document with the Clerk of the Court for the United States District Court, Northern District of California by using the CM/ECF system:

- **[PROPOSED] FINDINGS OF FACT OF CPUC DEFENDANTS**

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

/s/ HARVEY Y. MORRIS
HARVEY Y. MORRIS