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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WINDING CREEK SOLAR LLC,

Plaintiff,

vs.

MICHAEL PEEVEY, MICHAEL FLORIO, CATHERINE SANDOVAL, CARLA PETERMAN AND MICHAEL PICKER, in their official capacities as Commissioners of the California Public Utilities Commission,

Defendants.

Case No. 13-04934 JD

REPLY MEMORANDUM OF POINTS AND AUTHORITIES OF DEFENDANT COMMISSIONERS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT

Date: September 3, 2014
Time: 9:30 a.m.
Courtroom 11, 19th Floor

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I. INTRODUCTION

Despite two chances to amend, with specific guidance from this Court, the Second Amended Complaint ("SAC") still fails to allege any basis for Article III standing, and Winding Creek provides no legal authority to establish subject matter jurisdiction, or that the SAC states a claim for preemption based on the Public Utility Regulatory Policies Act of 1978 ("PURPA"). The SAC should be dismissed without further leave to amend.

II. THE UNBUILT LODI FACILITY IS NOT A QUALIFYING SMALL POWER PRODUCTION FACILITY

A. Winding Creek's Plain Language Argument Is a Tortured Construction of PURPA

Winding Creek agrees that subject matter jurisdiction, and the question of whether Winding Creek has statutory standing, depend on whether the unbuilt 1.0 Megawatt ("MW") solar facility in Lodi, California ("Lodi facility") is a "small power production facility" as defined by PURPA. *See* Opp., p. 5-7; MTD, pp. 8-13. PURPA defines "small power production facility" as:

> (A) "small power production facility" means a facility which is an eligible solar, wind, waste, or geothermal facility, *or* a facility which –
>
> (i) produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, geothermal resources, or any combination thereof; and
>
> (ii) has a power production capacity which, together with any other facilities located at the same site (as determined by the Commission), is not greater than 80 megawatts.

16 U.S.C. § 796(17)(A) (emphasis added). In a footnote, Winding Creek admits that the "Lodi facility claims to be a 'small power production facility' under Subsection 796(17)(A)(i) & (ii)," rather than as an "eligible solar, wind, waste or geothermal facility." *See* Opp., p 8 n.6. Nonetheless, Winding Creek argues that, based on selective language of PURPA's definition of "eligible solar, wind, waste or geothermal facility" in Subsection 796(17)(E)(ii) ("construction of such facility commences not later than December 31, 1999"), Congress made it "crystal clear" that in using the word "produces" in Subsection

796(17)(A), Congress "did not intend to exclude" unconstructed facilities that do not produce energy from the definition of "small power production facility." *See* Opp., pp. 7-8.

Winding Creek's analysis is contrary to the plain language of PURPA and is unsupported by the rules of statutory construction. Subsection 796(17)(E) provides in full:

> "eligible solar, wind, waste or geothermal facility" means a facility which produces electric energy solely by the use, as a primary energy source, of solar energy, wind energy, waste resources or geothermal resources; *but only if–*
>
> **(i)** *either of the following is submitted to the Commission not later than December 31, 1994*:
>
> **(I)** an application for certification of the facility as a qualifying small power production facility; or
>
> **(II)** notice that the facility meets the requirements for qualification; and
>
> **(ii)** *construction of such facility commences not later than December 31, 1999, or, if not, reasonable diligence is exercised toward the completion of such facility taking into account all factors relevant to construction of the facility.*

See 16 U.S.C. § 796(17)(E) (emphasis added). Winding acknowledges that the question of statutory interpretation begins and ends with the text if the text is unambiguous, citing *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). *See* Opp., p. 6. However, Winding Creek's analysis is contrary to the rules of statutory construction cited in *BedRoc*. *BedRoc* affirms that: "The preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *See BedRoc,* 541 U.S. at 183, *citing Conn. Nat. Bank v. Germain,* 503 U.S. 249, 253-54 (1992). Moreover, when a word is not defined in a statute, it takes its ordinary meaning at the time Congress enacted the statute. *See BedRoc,* 541 U.S. at 183; *see also HP Inkjet Litigation,* 716 F.3d 1173, 1181-82 (9th Cir. 2014). Winding Creek also ignores the rule that "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *See Gozlon-Peretz v.*

United States, 498 U.S. 395, 404-05, *citing Russello v. United States,* 464 U.S. 16, 23 (1983) (internal quotation marks omitted).

In both Subsections 796(17)(A) and (E), Congress uses the term "facility which produces electric energy." Neither "facility which produces electric energy" or "produces" is defined in PURPA. The common meanings of "produces" in 1978 include "to manufacture; make" and "to yield or generate."[1] Accordingly, the plain meaning is a facility which makes energy. Congress did not say "designed to produce" or "will produce" electric energy. *See Banko v. Apple, Inc.*, 2013 WL 7394596, at *4 (N.D. Cal. Sept. 27, 2013) (Congress could have used other words, but chose not to do so). Moreover, the language in Subsection 796(17)(E)(ii) on which Winding Creek relies ("construction of such a facility commences not later than December 31, 1999) is *not* included in Subsection 796(17)(A), so even if Winding Creek's interpretation that Congress meant to include unconstructed facilities were correct, Congress intentionally excluded them from the alternate definition of "small power production facility" (which the Lodi facility claims to be) in Subsection 796(17)(A)(i) and (ii).

Finally, Winding Creek wholly ignores the other requirements of Subsection 796(17)(E)(i), that the facility submit to the FERC an application for certification or a notice that the facility meets the requirements for qualification *no later than December 31, 1994*. The plain meaning of Subsection 796(17)(E) is simply that Congress defined an "eligible solar, wind, waste or geothermal facility" as a very limited subset of a "small power

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[1] *See Funk & Wagnall's Standard College Dictionary* 1075 (4th ed. 1974) ("1. To bring forth or bear; yield, as young or natural product. . . 3. To bring about; cause to happen or be. . . 5. To manufacture; make. . . . 9. To yield or generate an appropriate product or result."). *See also Webster's New World Dictionary, Second College Edition* 1134 (Second College ed. 1982) (1. to bring to view; offer for inspection (to *produce* identification) 2. to bring forth; bear; yield (a well that *produces* oil) 3. a) to make or manufacture (to *produce* steel) b) to bring into being; create (to *produce* a work of art) 4. to cause; give rise to (war *produces* devastation) 5. to get (a play, motion picture, etc.,) ready for presentation to the public. 6. *Econ.* to create (anything having exchange value) 7. *Geom.* to extend (a line or plane) – *vi.* to bear, yield, create, manufacture, etc., something – *n.* something that is produced; yield, especially fresh fruits and vegetables.").

production facility." In sum, Subsection 796(17)(A) is unambiguous, and the unbuilt Lodi facility is not a "facility which produces electric energy" and thus is not a "small power production facility."

B. Winding Creek's Alternative "Reasonable" FERC Interpretation Argument Has No Legal Basis

Winding Creek alternatively argues that if the Court finds PURPA ambiguous, it "must defer to FERC's carefully reasoned and longstanding interpretation" that an unbuilt facility is a "qualifying small power production facility." *See* Opp., pp. 8-9. As demonstrated above, PURPA's definition of "small power production facility" is not ambiguous, and a "qualifying small power production facility" must be a "small power production facility." *See also* MTD, pp. 9-10. Even if PURPA were ambiguous, Winding Creek does not cite a single FERC decision which holds that an unconstructed facility, certificated or not, is a "small power production facility" as defined by PURPA. Indeed, FERC decisions hold the exact opposite of what Winding Creek argues, as this Court previously noted in its February 10, 2014 Order (Dkt. 39, pp. 10-11). Winding Creek also fails to address any of the FERC decisions relied upon in the February 10, 2014 Order, including *CMS Midland, Inc.*, 50 FERC ¶ 61,098, at pp. 61,277-78 (1990). Contrary to Winding Creek's view of the FERC's "long-standing interpretation," *CMS Midland* squarely holds that certification becomes effective only when the facility produces energy, and a facility must produce energy to have status as a qualifying facility:

> For purposes of this discussion, the operative word in the above definitions is "produces." Since a facility cannot be a qualifying cogeneration facility unless it is a cogeneration facility and, by definition, a facility cannot be a cogeneration facility before it produces electric energy, whether the facility satisfies the statutory and regulatory requirements for qualifying status *before* the facility produces electric energy is irrelevant.

See id. at p. 61,278 (emphasis original); *Citizens for Clean Air & Reclaiming Our Env't v. Newbay Corp.*, 56 FERC ¶ 61,428, at pp. 62,532 (1991) ("[t]he critical date for determining [qualified facility] status for a facility not already producing electric energy is the date that it

first commences production of electric energy"); *see also N. Tex. Wind Ctr. LLC*, 121 FERC ¶ 62,214, at P 9 (2007) (self-certification only effective if operated in conformance with FERC's regulations). The Court also previously relied upon the fact that the FERC's Form 556 expressly states that self-certification, alone, does not establish qualifying facility status. *See* Dkt. 39, p. 10. Winding Creek's own authority acknowledges that, in assessing self-certification, the FERC simply analyzes whether the representations regarding the facility or proposed facility are accurate. *See N. Laramie Range Alliance Pioneer Wind Park I*, 138 FERC ¶ 61,171, at P 11 (2012), cited at Opp., p.10.

Winding Creek ignores the fact that the FERC's regulations do not change PURPA's definition of "small power production facility." *See* MTD, p. 10. Instead, Winding Creek argues that 18 C.F.R. § 292.207(b)(1) allows a proposed or existing facility to be certificated. But this does not nullify PURPA's requirement that a small power production facility must produce energy to have qualifying facility status. *Cf. S. Cal. Edison Co. v. FERC*, 195 F.3d 17, 23-27 (D.C. Cir. 1999) (interpretation ignores separate definition of "small power production facility"). Winding Creek further argues that FERC's regulation requiring that utilities make their avoided cost information publicly available to allow investors to estimate the expected return on a potential investment before construction of a facility demonstrates that the FERC has interpreted "small power production facility" to include unbuilt facilities. *See* Opp., p. 9, citing *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, 45 Fed. Reg. 12,214, 12,218 (1980) ("*Order 69*"); *see also* 18 C.F.R. § 292.302. This is pure speculation. *Order 69* does not say so, and Winding Creek cites no FERC decision so holding.

Finally, Winding Creek argues that "limiting the definition of 'small power production facilities' to those already constructed" frustrates the primary purpose of

PURPA, to promote the development of renewable energy. *See* Opp., p. 9.[2] But Winding Creek does not explain how. Moreover, where, as here, a statute is unambiguous, "there is no occasion to resort to legislative history." *See BedRoc*, 541 U.S. at 186; *see also Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001) (strong presumption that the plain language expresses legislative intent, which can be rebutted only if there is a clearly expressed contrary legislative intent, or a literal reading would produce absurd results). Winding Creek offers no explanation of how a literal reading of the definition of "small power production facility" in Subsection 796(17)(A) to exclude unbuilt facilities would produce an absurd result.[3] As shown above, under § 292.302, *any person* can obtain information about a utility's avoided cost, so investors can estimate the financial feasibility of a proposed facility. It is unclear how development would be hindered.

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[2] As the CPUC previously summarized (Dkt. 27, pp. 4-5), the industry has changed significantly since 1978 as a result of PURPA's success in developing markets for QF power, and the deregulation of the wholesale electricity market; renewable facilities now provide more than half of new generation sources. *See Revised Regulations Governing Small Power Production and Cogeneration Facilities*, 114 FERC ¶ 61,102, at PP 95-96 (2006); *N. Am. Natural Res., Inc. v. Strand*, 252 F.3d 808, 810, 814 (6th Cir. 2001); *S. Cal. Edison*, 70 FERC ¶ 61,215, at pp. 61,675-76 (1995), *overruled on other grounds, CPUC*, 133 FERC ¶ 61,059, at P 30 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011). Indeed, in 2005, Congress amended PURPA to eliminate the mandatory purchase obligation from QFs over 20 MW if there is nondiscriminatory access to specified markets. *See* 16 U.S.C. § 824a-3(m). In 2011, FERC terminated the purchase obligation from QFs over 20 MW for California utilities. *Pac. Gas. & Elec. Co.*, 135 FERC ¶ 61,234, at PP 5-6, 23-29 (2011). Finally, the utility mandatory purchase obligation has never been absolute. PURPA does not require a utility to buy electricity not needed to serve utility customers. *See Order 69*, p. 12,219; *City of Ketchikan, Alaska*, 94 FERC ¶ 61,293, at pp. 62,062-063 (2001).

[3] At Opp., p. 9,Winding Creek relies on *JD Wind I*, 130 FERC ¶ 61,127 (2010), but that case involved operating, not unbuilt, facilities. *See id.* at P 3. Winding Creek also claims that the CPUC's citation to *N. Little Rock Cogeneration, L. P. v. Entergy Services*, 72 FERC ¶ 61,263 (1975) is "ironic" because the petitioner in that case was the owner of a proposed QF. *See* Opp., p. 10. There is no irony. As Winding Creek acknowledges at p. 13, n. 7, *Little Rock* is not a PURPA enforcement action under Section 210(h), but a complaint that the contract of a non-QF is "unjust and unreasonable, unduly discriminatory and anticompetitive, and contrary to the public interest." *See Little Rock*, pp. 62,171-174.

C. The CPUC's Re-MAT Program

Winding Creek claims, Opp. pp.10-11, that because the CPUC's Re-MAT program, as initially established in CPUC decision ("D.")12-05-035,[4] has project viability criteria, in addition to the requirement that a participating generator be a QF, this means that the Lodi facility does not need to produce energy to be a "small power production facility" as defined by PURPA. This conclusion is a *non-sequitur*; the FERC has exclusive jurisdiction to determine QF status. *See Indep. Energy Producers v. Pub. Utils. Comm'n of Cal.*, 36 F.3d 848, 853-57 (9th Cir. 1994) ("*IEP*").

The FERC has recognized that the State has the jurisdiction to determine the composition of utility portfolios, and can order its regulated utilities to contract with specific types of resources. *See* MTD, p. 4. Moreover, the FERC has expressly ruled that as long as the participating generators are QFs, and the rate is set at avoided cost, a State feed-in-tariff program is not preempted by PURPA. *See CPUC*, 132 FERC ¶ 61,047, at PP 64-67 (2010), *clarified by* 133 FERC ¶ 61,059, *reh'g denied*, 134 FERC ¶ 61,044 (2011). Accordingly, although unbuilt projects are eligible to participate in the Re-MAT program, only sellers that are QFs may participate and receive the avoided cost price. *See* D.12-05-035, 2012 WL 2049420, pp. 11-12, 105 nn. 83-85 (May 24, 2012) (Dkt. 63-1, Exh. O, Att. A); D.13-05-034, 2013 WL 2446732, pp. 25, 39, 44 (May 23, 2013) (Dkt. 63-1, Exh. S) ("In short, the seller must be a QF to participate in the FiT [Re-MAT] program."). In sum, because the Lodi facility is not a "small power production facility," this Court lacks subject matter jurisdiction and Winding Creek lacks statutory standing. *See* CPUC MTD, pp. 8-10, 13.

III. NO VIOLATION OF PURPA

The SAC alleges that the Re-MAT program rates are not utility avoided cost because the rates are lower than PG&E's "long-run avoided costs." *See* SAC, ¶¶ 73, 97. Despite

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[4] As explained in the CPUC's MTD, p.6 n.3, D.12-05-035 (what Winding Creek calls the "May 12 Order") was modified on rehearing and the conformed decision is attached to D.13-04-031 (*See* Dkt. 63-1, Exh. O, Att. A; Exh. R, pp. 16-84), Winding Creek continues to incorrectly cite to the original decision.

three chances to do so, Winding Creek still cannot provide legal authority for its position that 18 C.F.R. § 292.304(d)(2)(ii) requires that an "LRAC" or "long-term avoided cost" rate, and continues to refer vaguely to LRAC as alleged "industry shorthand" or "colloquial." *See* Opp., pp. 3, 12. This has absolutely no legal weight. The absence of the term "LRAC" or long-run avoided cost rate from FERC's regulations is not, as Winding Creek claims, a "strawman." *See* Opp., p. 12. It is an inconvenient fact for Winding Creek, as are the FERC regulations and other authorities cited by the CPUC regarding the State commission's broad discretion in setting avoiding cost rates, which Winding Creek completely ignores. *See* MTD, pp. 3, 11. The CPUC also is not "wrong as a matter of law" (Opp., p. 12) regarding the substance of § 292.304(d)(2); the CPUC's description of that regulation is based not only on the language of the regulation – which makes no reference to a "long-run" rate – but also the FERC's *Order 69*. *See* MTD, p. 11. Winding Creek's reliance, at p. 12, on *IEP* is similarly unavailing. That case says nothing about PURPA or any FERC regulation requiring a "long-run" rate, and acknowledges the CPUC's "broad ratemaking authority" under PURPA. *See IEP*, 36 F.3d at 856.

Winding Creek wrongly argues that the CPUC presented no authority that market-based rates are avoided cost rates, but Winding Creek admits that market-based rates can reflect a utility's avoided cost. *See* Opp., p. 13:5. Winding Creek provides no comprehensible explanation of how the Re-MAT market-based pricing mechanism violates PURPA. As the FERC explained in *Little Rock*: "If the QF proposed by Petitioners could not match the rate offered by a competing supplier of power to the City, regardless of whether the competitor was or was not a QF, then the QF demonstrably was not offering a rate at the City's avoided cost – and the City had no obligation under PURPA to purchase power offered at a higher price than the lowest bid." 72 FERC, ¶ 61,263, at p. 62,173.

There also is nothing wrong with a market in which QFs are "forced to compete with one another." *See* Opp., p. 13:8-10. Winding Creek relies on *S. Cal. Edison v. FERC*, 70 FERC ¶ 61,215 (1995). However, that case was *expressly overruled on this point* by the FERC in 2010. The FERC squarely held that the CPUC may base an avoided cost price for

a feed-in-tariff on the costs avoided by the utility in purchasing electricity from a particular type of generator as mandated by State law, such as renewable energy sources. *See CPUC*, 133 FERC ¶ 61,059, at PP 26-30. Winding Creek's argument that the Re-MAT program frustrates PURPA because PURPA was intended to allow QFs a "premium" (*see* Opp., p. 13) also has no basis. To the contrary, Congress specifically stated that the business risks of QFs are not guaranteed to be recoverable. *See* MTD, p. 12.

The 750 MW cap for the Re-MAT program also does not conflict with PURPA's mandatory purchase obligation. Notably, Winding Creek does not challenge the program's limitation to generators of 3 MW or less, which benefits the Lodi facility, but excludes utility purchases from larger QFs. Most importantly, Winding Creek avoids any mention of the FERC decisions rejecting Winding Creek's affiliate's challenge to Vermont's feed-in-tariff program because it did not offer a "long run" avoided cost rate. *See* MTD, pp. 14-15. As the FERC observed, by participating in an optional feed-in-tariff program, a QF agrees to the rates that result from the program [and cannot argue that it is being denied its option to choose a different rate as allowed by 18 C.F.R. § 292.304(d)(2)]. *See Otter Creek Solar LLC*, 143 FERC ¶ 61,282 (2013), *reh'g denied*, 146 FERC ¶ 61,192 (2014). If Winding Creek does not like the rates allowed by the Re-MAT program, as Winding Creek admits, the standard all-source contract is available. *See* MTD, p. 14. Nothing in the SAC challenges the all-source contract, which has been upheld by the California Courts of Appeal and recognized by the FERC as compliant with PURPA. *See id.*

Winding Creek attempts to fall back on its argument that avoided cost is a question of fact, and Winding Creek must be allowed discovery. *See* Opp., p. 14. However, as previously briefed, in a PURPA enforcement action, the district court's inquiry is a pure question of law that does not require discovery: whether the State commission's rule, on its face, violates PURPA or FERC's regulations. *See* Dkt. 17, pp. 18-19; *see, e.g., Exelon Wind 1, LLC v. Smitherman*, 2012 WL 4465607, at *7-8 (W.D. Tex. 2012). The district court does not engage in ratemaking, which is a legislative, not judicial, function. *See United States v. Morgan*, 313 U.S. 409, 417 (1941).

IV. NO ARTICLE III INJURY

Winding Creek makes three arguments that it has Article III standing. First, Winding Creek claims injury because it is a "qualifying small power producer" as the owner of the Lodi facility. As demonstrated above and in the MTD, the unbuilt Lodi facility is not a "small power production facility," and thus Winding Creek has no legally protected interest under PURPA based on its ownership of that facility. Second, contrary to Winding Creek's assertion, PURPA and FERC's regulations do not require an "LRAC rate," which is the pricing the SAC expressly alleges, in ¶ 97, is "guaranteed." So Winding Creek has no injury based on the alleged denial of the avoided cost contract "required by federal law" (*see* SAC, ¶ 73), and the SAC does not comply with this Court's guidance in the June 11, 2014 Order. *See* Dkt. 60, p. 8. Third, Winding Creek argues that it is the CPUC Commissioners who "focus on the status of Winding Creek's financing," and now implies Winding Creek's financing status is not relevant. *See* Opp., p. 15:9-22. The reason for that focus is no mystery. The section of the SAC entitled "Injuries To Be Redressed," ¶¶ 75-77, alleges that the Re-MAT financing is too low to enable Winding Creek to construct the Lodi facility. Winding Creek's only argument is that its allegations are sufficient and must be taken on faith. Winding Creek avoids addressing its own admissions that it rejected the previously higher Re-MAT program prices, and also makes no response to the CPUC's arguments that no reasonable inference arises from the allegations given the participation of other QFs in the program, even as the price decreases. *See* MTD, pp. 10-12.

V. CONCLUSION

Further amendment is futile, and the SAC should be dismissed without leave to amend.

Dated: July 30, 2014

Respectfully submitted,

By: /s/ ELIZABETH M. MCQUILLAN
ELIZABETH M. MCQUILLAN