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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

WINDING CREEK SOLAR LLC,

Plaintiff,

v.

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

Defendants.

Case No. 13-cv-04934-JD

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 AND ABBREVIATIONS

Acronym or Abbreviation	Full Term
CPUC	California Public Utilities Commission
CPUC	*California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010)
CPUC Opposition	*Memorandum of Points and Authorities of Defendant Commissioners of the California Public Utilities Commission in Opposition to Motion for Summary Judgment* (ECF No. 90)
D.	CPUC Decision
FERC	Federal Energy Regulatory Commission
kW	Kilowatt
Lesser Dec.	*Declaration of Dr. Jonathan A. Lesser in Support of Plaintiff Winding Creek Solar LLC's Motion for Summary Judgment* (ECF No. 89-1)
Melone Dec.	*Declaration of Thomas M. Melone and Request for Judicial Notice in Support of Plaintiff Winding Creek Solar LLC's Motion for Summary Judgment* (ECF No. 89-2)
MW	Megawatt
Otter Creek	*Otter Creek Solar, LLC*, 143 FERC ¶ 61,282 (2013)
PG&E	Pacific Gas and Electric Company
PURPA	Public Utility Regulatory Policies Act of 1978
QF	Qualifying Facility
QF/CHP Settlement	Qualifying Facility and Combined Heat and Power Settlement
ReMAT	Renewable Market Adjusting Tariff
SCE	Southern California Edison Company
SDG&E	San Diego Gas & Electric Company
SPEED Program	Sustainably Priced Energy Enterprise Development Program

Acronym or Abbreviation	Full Term
Utilities	PG&E, SCE and SDG&E (jointly)
Winding Creek	Winding Creek Solar LLC
Winding Creek	*Winding Creek*, 151 FERC ¶ 61,103 (2015)
Winding Creek Motion	*Motion of Winding Creek Solar LLC for Summary Judgment and Memorandum of Points and Authorities* (ECF No. 89)

Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), and San Diego Gas & Electric Company ("SDG&E") (collectively "Utilities") respectfully file this *amicus curiae* brief in response to the Court's *Invitation for Briefing* (ECF No. 104-1).[1] Although the Utilities are not parties to this proceeding, they have a substantial interest in the outcome and appreciate the Court's invitation to address the three issues raised in Winding Creek Solar LLC's ("Winding Creek") motion for summary judgment.

The Utilities agree with the California Public Utilities Commission ("CPUC") that Winding Creek's summary judgment motion should be denied and that summary judgment should instead be entered in favor of the CPUC Commissioners named as defendants. The arguments raised by Winding Creek are based on an incorrect understanding of the purpose of the Renewable Market Adjusting Tariff ("ReMAT") Program, and effectively ignore relevant Federal Energy Regulatory Commission ("FERC") precedent, including FERC's *Notice of Intent Not to Act and Declaratory Order* relevant to this proceeding. In addition, in its summary judgment motion, Winding Creek raises for the first time concerns regarding a standard form contract that is not a part of the ReMAT Program. Winding Creek never raised concerns regarding the standard form contract in the enforcement petitions that it filed at FERC, nor did it request that FERC address the standard form contract. Winding Creek has failed to exhaust its administrative remedies regarding the standard form contract and thus this Court lacks jurisdiction over this aspect of Winding Creek's motion.

In short, Winding Creek's claims are factually and legally flawed, or are not properly before this Court, and thus its Second Amended Complaint should be summarily dismissed. Below, the Utilities provide some limited additional background information for the Court's consideration, and then address the three issues identified by the Court in its *Invitation for Briefing*.

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[1] This *amicus curiae* brief is being submitted by counsel for PG&E on behalf of the Utilities.

I. FACTUAL BACKGROUND

Winding Creek and the CPUC have already provided extensive background information regarding California's implementation of the Public Utility Regulatory Policies Act of 1978 ("PURPA") and the creation and implementation of the ReMAT Program. The Utilities will not repeat those discussions here. However, one point bears some elaboration. The ReMAT Program is a result of a California statute, California Public Utilities Code section 399.20, that was enacted to "encourage electrical generation from eligible renewable energy resources"[2] and is a part of California's larger renewable energy program referred to as the "Renewable Portfolio Standard" or "RPS."[3] Section 399.20[4] does not mention PURPA or Qualifying Facilities ("QFs").

Winding Creek's claim of PURPA non-compliance raises a very different issue than whether the Section 399.20 purchase mandate is lawful. Rather, Winding Creek is arguing that the state has not properly implemented the PURPA purchase mandate, claiming that the megawatt ("MW") cap included in Section 399.20, and adopted as a part of the ReMAT Program, as well as the ReMAT Program pricing violate PURPA.[5] Winding Creek's argument confuses the issue. As discussed below, the CPUC has adopted a comprehensive approach to PURPA implementation, referred to here as its "QF Program," which includes standard rates and standard contracts, which is more than is required by PURPA. The current comprehensive QF Program was the result of a settlement agreement, referred to as the QF and Combined Heat and

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[2] Cal. Pub. Util. Code § 399.20(a) (2015); *see also* CPUC Decision ("D.") 12-05-035, p. 2 (2012) (describing basis for ReMAT Program). D.12-05-035 is attached as Exhibit A to the Second Amended Complaint (ECF No. 61-2).

[3] *See Memorandum of Points and Authorities of Defendant Commissioners of the California Public Utilities Commission in Opposition to Motion for Summary Judgment* ("CPUC Opposition") (ECF No. 90), pp. 6-10 (describing origins of ReMAT Program).

[4] All further statutory references are to the California Public Utilities Code unless otherwise noted.

[5] Second Amended Complaint, ¶¶ 85-89.

Power ("QF/CHP") Settlement, which was approved by the CPUC in 2010.[6] The QF/CHP Settlement included a "Standard Contract" which is available to all QFs under 20 MW.[7] All QFs under 20 MW, including Winding Creek, can execute a Standard Contract under the existing QF Program, and it is the vehicle by which the Utilities abide by PURPA and meet the various federal requirements imposed by PURPA.

On the other hand, Section 399.20 was not intended to be a vehicle for implementation of PURPA. As noted above, Section 399.20 does not mention PURPA or QFs. Indeed, only a small segment of potential QFs meet the four eligibility criteria listed under Section 399.20(b)(1)-(4). Specifically, eligible facilities under the statute are limited to renewable resources and facilities with effective capacities of 3 MW or less, and must be "strategically located."[8] Section 399.20 thus excludes many types of generators such as facilities using fossil-fuels and generators that are larger than 3 MW[9] or are not "strategically located," which can qualify as QFs under PURPA.[10] Section 399.20(f)(1) also limits the size of the ReMAT Program to 750 MW statewide, which is allocated among the Utilities and publicly-owned utilities (under Section 387.6) based on their respective, proportionate share of electric demand in California.[11] In short, Section 399.20, and the ReMAT Program which implements the statute, are not

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[6] D.10-12-035, p. 2, 2010 Cal. PUC LEXIS 467 (2010) (approving the "comprehensive" QF/CHP Settlement for an "orderly transition from the existing QF program to a new [QF/CHP] program."); *see also* CPUC Opposition, p. 11 (describing the history of California's QF programs).

[7] A portion of the form Standard Contract approved under the QF/CHP Settlement is included as Exhibit 4 to the *Declaration of Dr. Jonathan A. Lesser in Support of Plaintiff Winding Creek Solar LLC's Motion for Summary Judgment* ("Lesser Dec.") (ECF No. 89-1), pp. 154-167.

[8] Cal. Pub. Util. Code § 399.20(b) (defining resources that are eligible under Section 399.20).

[9] The Utilities' obligation to purchase from QFs facilities under PURPA with a net capacity exceeding 20 MW was terminated in 2011. *See Pacific Gas and Electric Company*, 135 FERC ¶ 61,234 (2011). Thus, the QF purchase obligation under PURPA for the Utilities is limited to facilities 20 MW or less.

[10] Some fossil-fueled generators, namely, cogeneration facilities, can qualify as QFs under PURPA. *See* 18 C.F.R. § 292.205 (criteria for qualifying cogeneration facilities).

[11] Cal. Pub. Util. Code § 399.20(f)(1).

intended to implement PURPA in California, but instead are designed to create a limited purchase program for a specific type of technology, facility size, and project location.

II. THE STATUTORY CAP ON REMAT DOES NOT VIOLATE PURPA

The first issue identified by the Court is:

> Whether the ReMAT program violates the Public Utility Regulatory Policies Act of 1978 ("PURPA"), because the Program caps the amount of electricity that California's state-regulated utilities must purchase from Qualifying Facilities through the Program.

The ReMAT Program cap does not violate PURPA because there are other reasonably available means for QFs to sell power, exercising their PURPA rights.

Congress gave the states a wide degree of latitude to implement PURPA, particularly as to QFs over 100 kilowatts ("kW").[12] States may, for example, adopt standard rates for QFs over 100 kW.[13] States also may adopt standard contracts, or, a state may simply let QFs and utilities negotiate contracts individually.[14] What is not legal for a state to do is to adopt a PURPA program that results in a QF not being able to sell its power at an avoided cost rate, or having to face unreasonable obstacles to do so. As long as there is some available means to a QF of compelling a utility to purchase its power at avoided cost rates in accordance with 18 C.F.R. § 292.304(d), alternative programs that are also available to QFs are not unlawful, even if access to such programs is limited to a subset of QFs or by a MW cap.[15]

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[12] 16 U.S.C. § 824a-3(f) (providing states authority to implement PURPA and corresponding FERC regulations); *Winding Creek Solar, LLC v. Cal. Pub. Util. Comm.* 15 F.Supp.3d 965, 969-970 (N.D.Cal. 2014).

[13] Under 18 C.F.R. § 292.304(c), states must have standard rates for QFs under 100 kW and may do so for over 100 kW QFs.

[14] *See e.g.*, *Re Cogenerators & Small Power Producers*, 51 P.U.R.4th 369 (Ark. Pub. Serv. Cmm'n Feb. 18, 1983) (noting that "Arkansas has chosen to implement the FERC rules by adopting rules which parallel the FERC rules, and additionally require case-by-case negotiation where standard tariffs do not apply and which provide for extensive procedures by which QFs may appeal to the PSC from deadlocked negotiations with utilities.").

[15] *Otter Creek Solar, LLC*, 143 FERC ¶ 61,282 (2013) at P. 4, *reh'g denied*, 146 FERC ¶ 61,192 (2014) ("*Otter Creek*"). References to "P." for FERC decision citations refers to the paragraph number in the FERC decision.

For example, in *Otter Creek*, the state of Vermont had two separate programs that were available to QFs. The first program was available to all QFs under a longstanding Vermont Public Service Board Rule that had previously been found to be consistent with PURPA.[16] The second program was limited to small, renewable QFs with a pricing structure that differed from the pricing structure in the established QF program.[17] Otter Creek filed a petition requesting that the FERC initiate an enforcement action, claiming that the second program, referred to as the Sustainably Priced Energy Enterprise Development or "SPEED" Program, violated PURPA because it allegedly did not require avoided cost rates, eliminated a QF's option to elect long-run avoided costs, required contracting with an entity other than a utility, and set aside a certain amount of capacity for new utility-owned facilities so that QFs could not "displace" utility-owned generation.[18] FERC declined to initiate an enforcement action finding that the SPEED Program was "an optional program available to certain small renewable QFs" and that, as long as QFs had an option to participate in a PURPA-compliant program, the state could adopt an alternative program that limits the rights QFs would otherwise be entitled to under PURPA or that pays costs different than avoided costs.[19]

FERC also took no issue with another mandatory purchase program in California that was limited to a specific type of technology and facility size.[20] In *CPUC*, FERC reviewed a program that was created to implement a California statute referred to as Assembly Bill 1613 or "AB 1613" that required the Utilities to offer a certain price to purchase energy and capacity from small (20 MW or less) cogeneration facilities (referred to as combined heat and power or

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[16] *Id.*

[17] *Id.*, PP. 3-4.

[18] *Id.*, P. 3.

[19] *Id.*, P. 4; *see also Otter Creek*, 146 FERC ¶ 61,192, P. 8.

[20] *California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010), P. 67 ("*CPUC*"); *granting clarification and dismissing rehearing*, 133 FERC ¶ 61,059 (2010); *reh'g denied*, 134 FERC ¶ 61,044 (2011).

"CHP" facilities) that met certain environmental compliance requirements.[21] FERC did not find that this program, which was limited to a specific kind of technology, violated PURPA.

Here, Winding Creek filed a petition for enforcement at FERC in March 2015 requesting that FERC initiate an enforcement action against the CPUC because, according to Winding Creek, the 750 MW statutory cap for the ReMAT Program allegedly violates PURPA.[22] FERC issued a *Notice of Intent Not to Act and Declaratory Order* in May 2015, declining to initiate an enforcement action and instead finding that the 750 MW cap for the ReMAT Program was permissible under PURPA because it was an alternative to California's existing QF Program.[23] Relying on *Otter Creek*, FERC held that:

> In California, QFs 20 MW and smaller, including Winding Creek, may sell their net capacity to their host utility under a long-term PURPA contract at an avoided cost rate, containing both an energy and capacity component, pursuant to California's Standard Contract for QFs 20 MW or Under. The Re-MAT program is a feed-in tariff program that is an alternative to California's standard PURPA avoided cost rate program. The Commission has held that, as long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, a state may also have alternative programs that QFs and electric utilities may agree to participate in; such alternative programs may limit how many QFs, or the total capacity of QFs, that may participate in the program.[24]

FERC's determination that the 750 MW ReMAT Program cap does not violate PURPA is entirely consistent with *Otter Creek*.

Nothing in PURPA prohibits a state from adopting a limited, alternative program for certain QFs, including caps on the size of the program, as long as there is an existing state

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[21] *CPUC*, 132 FERC ¶ 61,047, P. 5.

[22] A copy of Winding Creek's Petition for Enforcement is included as Exhibit 4 to the *Declaration of Thomas M. Melone and Request for Judicial Notice in Support of Winding Creek Solar LLC's Motion for Summary Judgment* ("Melone Dec.") (ECF No. 89-2), pp. 69-75.

[23] *Winding Creek*, 151 FERC ¶ 61,103 (2015) ("*Winding Creek*"), *reh'g denied*, 153 FERC ¶ 61,027 (2015). A copy of *Winding Creek* is included as Exhibit 5 to the Melone Dec., pp. 79-81. FERC's order denying reconsideration was issued after Winding Creek's summary judgment motion was filed.

[24] *Id.*, P. 6 (footnotes omitted) (emphasis added).

program that is available to all QFs and is compliant with PURPA. Indeed, as to QFs over 100 kW, such "program" may consist of nothing more than the right to negotiate with a utility on a case-by-case basis. This is consistent with the "wide degree of latitude" provided to states under PURPA.[25] It is undisputed that there is currently no program cap on the number of Standard Contracts that the Utilities are required to sign under the QF Program.[26] Thus, California can limit the ReMAT Program to 750 MW because there is a QF Program that offers a Standard Contract which currently has no cap on the total program capacity that is offered at avoided cost.

Winding Creek's argument that the 750 MW cap violates PURPA is largely based on *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193 (2014).[27] As FERC explained, that case is readily distinguished from the situation in California.[28] In *Hydrodynamics*, the Montana Public Service Commission had established a 50 MW cap on purchases from wind-powered QFs within a certain size range.[29] FERC determined that this limitation violated PURPA because wind-powered QFs could not otherwise obtain a contract except by winning a competitive solicitation, which were not regularly held.[30] However, as FERC explained in *Winding Creek*, that is not the case in California because QFs, such as Winding Creek, can sell their capacity under the Standard Contract.[31] Moreover, FERC noted that the Standard Contract is priced "at an avoided cost rate" and thus is a PURPA-compliant contract.[32]

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[25] *Winding Creek Solar, LLC*, 15 F.Supp.3d at 969-970.

[26] *See* Lesser Dec., ¶ 13 ("Utilities have an unlimited obligation to purchase QF-generated electricity pursuant to the Standard Offer contract.")

[27] *Motion of Winding Creek Solar LLC for Summary Judgment and Memorandum of Points and Authorities* ("Winding Creek Motion") (ECF No. 89), pp. 13-16 (citing and discussing *Hydrodynamics*).

[28] *Winding Creek*, 151 FERC ¶ 61,103, P. 7.

[29] *Hydrodynamics, Inc.*, 146 FERC ¶ 61,193, P. 7.

[30] *Id.*, pp. 32, 34.

[31] *Winding Creek*, 151 FERC ¶ 61,103, P. 6.

[32] *Id.*

Finally, it is notable that Winding Creek does not challenge other limitations on the availability of the ReMAT Program, including the requirement that eligible projects are renewable resources, 3 MW or less, and "strategically located."[33] PURPA is not limited to renewable resources, nor is it limited to facilities that are 3 MW or less (the limit in California is 20 MW or less) or that are "strategically located." The facility size, location, and technology limitations in the ReMAT Program benefit Winding Creek, which is proposing a 1 MW solar photovoltaic resource project.[34] If the Court determines that the 750 MW cap violates PURPA, it must also necessarily determine that the 3 MW facility size limitation and renewable technology limitation violate PURPA. In that case, the ReMAT Program would be no different than the existing QF Program and QFs such as Winding Creek would essentially be left with no alternative program, but instead would only have the choice of the Standard Contract. Of course, the Standard Contract is already available to Winding Creek, but Winding Creek apparently has no interest in that contract.

III. WINDING CREEK HAS FAILED TO EXHAUST ADMINISTRATIVE REMEDIES REGARDING THE STANDARD OFFER CONTRACT, OR, ALTERNATIVELY, WHETHER THE STANDARD OFFER CONTRACT IS IN COMPLIANCE WITH PURPA

The second issue identified by the Court is:

> Whether the existence of the standard offer contract for QFs of 20 MW or less (*see* California Commission Decision D.10-12-035) justifies or warrants the cap that exists for the ReMAT Program, and whether the standard contract gives Qualifying Facilities the option to choose a contract rate that is "calculated at the time the obligation is incurred." 18 CFR § 292.304(d)(2).

This issue includes two separate questions. The first question is whether the 750 MW cap is legally permissible given that there is a separate QF Program through which QFs can sell

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[33] These limitations are included in Section 399.20(b) and were adopted into the CPUC's ReMAT Program. *See* D.12-05-035, pp. 2-4 (describing statutory limitations included in the ReMAT Program).

[34] Winding Creek Motion, p. 11.

power, *i.e.*, by signing the Standard Contract. This question is addressed above in Section II. As the Utilities explained, because the Standard Contract under the existing QF Program is available to all QFs, the ReMAT Program, which is a voluntary, alternative program, can be limited, including a 750 MW limit on the program size.

The second question included in this issue is whether the availability of the Standard Contract ensures that Winding Creek can sell power under a legally enforceable obligation with a rate based on avoided costs "calculated at the time the obligation is incurred."[35] That is, Winding Creek argues that the ReMAT Program cap must be removed because the Standard Contract is not a suitable substitute in that it does not offer a specific option that must be made available under PURPA.[36] There are several responses to this question of whether the Standard Contract provides for the type of sale to which Winding Creek claims an entitlement.

First, this is not a question that Winding Creek raised in either of the petitions that it filed at FERC, and thus Winding Creek has failed to exhaust its administrative remedies on this issue. Because of Winding Creek's failure to exhaust its remedies, this Court lacks subject matter jurisdiction to determine whether or not the Standard Contract provides the pricing option Winding Creek claims is missing. That is a question that, in the first instance, needs to be addressed by FERC.

Second, even if Winding Creek had exhausted its administrative remedies, which it has not, its claim that the Standard Contract approach to pricing is non-compliant has no substantive merit.

Finally, it is not clear that Winding Creek is entitled to the type of avoided cost pricing pursuant to a legally enforceable obligation that it seeks under 18 CFR § 292.304(d)(2)(ii) and

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[35] Winding Creek Motion, at p. 17.

[36] The Utilities do not agree that, were the Standard Contract to be found deficient, the remedy would be to lift the ReMAT Program cap. There are innumerable other means by which any deficiency could be remedied.

thus, Winding Creek's claim may be moot. All three of these issues are addressed on more detail below.

A. Winding Creek Has Failed To Exhaust Its Administrative Remedies

A QF alleging that a state has failed to comply with PURPA is required to first petition FERC to initiate an enforcement action.[37] If FERC declines to do so, the QF may then bring a lawsuit in United States district court.[38] The exhaustion of administrative remedies is jurisdictional and a court lacks subject matter jurisdiction if a plaintiff has failed to do so.[39]

In this case, Winding Creek filed two separate petitions with FERC challenging the ReMAT Program.[40] These petitions focused on various aspects of the ReMAT Program that Winding Creek asserts violate PURPA. However, the Court will search in vain to find any discussion in either petition of the Standard Contract or any request by Winding Creek that FERC initiate an enforcement action related to the Standard Contract due to its alleged deficiency (*i.e.*, not providing a rate set when the obligation is entered into). Winding Creek's first petition asked FERC to initiate an enforcement action on seven issues, none of which relate to or mention the Standard Contract.[41] In its second petition, Winding Creek requested that FERC initiate an enforcement action regarding the 750 MW cap on the ReMAT Program.[42] Again, there is no mention of the Standard Contract. Simply put, Winding Creek has not yet raised to FERC the issue of whether the Standard Contract is deficient and, until it does so, it has failed to exhaust its administrative remedies.

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[37] 16 U.S.C. § 824a-3(h)(2)(B) (2015).

[38] *Id.*

[39] *Allco Finance Limited v. Klee*, 805 F.3d 89, 97-98 (2nd Cir. 2015) (dismissing PURPA claim because plaintiff failed to exhaust administrative remedies by filing petition at FERC); *Niagara Mohawk Power Corp. v. FERC*, 306 F.3d 1264, 1270 (2nd Cir. 2002) (same).

[40] Melone Dec., Exhibits 2 and 4.

[41] *Id.*, Exhibit 2, pp. 34-35.

[42] *Id.*, Exhibit 4, p. 2.

As the Second Circuit explained in *Niagara Mohawk*, the requirement that parties challenging a state's implementation of PURPA first exhaust their administrative remedies is not simply a statutory requirement, it is also pragmatic.[43] Requiring QFs to first file a petition at FERC gives FERC the opportunity to pursue an enforcement action if it believes a state program violates PURPA. Alternatively, FERC can decline to pursue an enforcement action and give clear guidance to the parties, and the courts, as to why it believes an enforcement action is unnecessary. Winding Creek has never asked FERC to initiate an enforcement action regarding the Standard Contract, nor has it challenged whether the Standard Contract offers a rate fixed at the time of the obligation. In fact, only in its pleadings in this proceeding has Winding Creek squarely raised the issue of the Standard Contract's compliance with this PURPA requirement. As a practical matter, as well as a jurisdictional requirement, this issue must first be presented to FERC so that it can determine whether to pursue an enforcement action or provide more guidance as to whether the Standard Contract is PURPA compliant.

B. The Standard Contract Pricing Represents Avoided Costs And Complies With PURPA

Even if Winding Creek had exhausted its administrative remedies, which it has not, the Court should determine that the Standard Contract pricing represents an avoided cost determined at the time of the obligation and thus complies with the PURPA requirement under 18 CFR § 292.304(d)(2)(ii). As Winding Creek's expert Dr. Lesser explained, the pricing in the Standard Contract has two components – a capacity payment that is a fixed dollar amount at the time the contract is executed and an energy payment that is based on a fixed formula that is calculated monthly using certain inputs.[44] As the CPUC explained in its brief, formula rates are widely accepted in the energy industry, and setting a formula for energy rates and a fixed capacity price at the time of contracting is compliant with the requirements of 18 CFR § 292.304(d)(2)(ii).[45]

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[43] *Niagara Mohawk*, 306 F.3d at p. 1270.

[44] Lesser Dec., Technical Appendix, ¶¶ 69-83.

[45] CPUC Opposition, pp. 18-19.

Moreover, as the Ninth Circuit has held, state utility commissions are afforded a "great deal of flexibility" in determining how avoided costs are calculated and the contractual relationship between utilities and QFs.[46] In California, the CPUC has determined that avoided costs in the Standard Contract are calculated using a fixed capacity cost and fixed energy cost formula, both of which are known to the QF at the time a contract is executed.

The CPUC's determination that the Standard Contract pricing represents avoided costs and is consistent with PURPA is supported by FERC's order on Winding Creek's petition to initiate an enforcement action. Although the issue of the Standard Contract's compliance with PURPA was not before FERC in that petition, as explained above in Section III.A, FERC did note that the Standard Contract is a "long-term PURPA contract at an avoided cost rate, containing both an energy and capacity component..."[47] FERC's statements are entirely consistent with the CPUC's determination.

The notion that the use of a formula rate (where the formula is fixed at the time of contracting) for energy does not satisfy PURPA is further belied by the fact that there is no legal precedent supporting the claim that the fixing of the formula does not satisfy the relevant regulation. Winding Creek claims that the decades-long usage of such rates misses the point,[48] but the lengthy usage and general acceptance support only one conclusion -- that the countervailing view has no legal merit.

C. Winding Creek May Not Be Entitled To Avail Itself Of 18 CFR § 292.304(d)(2)

Winding Creek's arguments regarding the Standard Contract are premised on the assumption that all QFs are entitled to legally enforceable obligations and to choose a rate based

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[46] *Independent Energy Producers v. CPUC*, 36 F.3d 848, 856 (9th Cir. 1994) quoting *Administrative Determination*, IV Federal Energy Reg. Comm'n Report (CCH) ¶ 32,457 at 32,173.

[47] *Winding Creek*, 151 FERC ¶ 61,103, P. 6.

[48] *Reply Memorandum in Support of Plaintiff Winding Creek Solar LLC's Motion for Summary Judgment* (ECF No. 95), p. 6.

on avoided costs "calculated at the time the obligation is incurred" under 18 C.F.R. § 292.304(d)(2)(ii).[49] Whether Winding Creek is entitled to a "legally enforceable obligation" under § 292.304(d)(2), or is limited to § 292.304(d)(1), is a matter within the discretion of the state.

Section 292.304(d)(1) provides that a QF selling "as-available" energy is entitled to an avoided cost rate "based on the purchasing utility's avoided costs calculated at the time of delivery." Section 292.304(d)(2) is for a QF selling energy and capacity pursuant to a legally enforceable obligation for a specified time, and allows the QF to choose between avoided costs calculated at the time of delivery (the same as subsection (d)(1)) or at the time the obligation is incurred. In its Second Amended Complaint, Winding Creek acknowledges that its proposed solar facility would be an "as-available" facility because "[t]he ability of such facilities to generate electricity also depends upon conditions, such as whether the sun is shining, and therefore they sell their electricity 'as available.'"[50] Because it is an "as-available" facility, Winding Creek is clearly entitled to sell energy to a utility under PURPA pursuant to subsection (d)(1) at a price determined at the time of delivery. It is less clear whether Winding Creek is entitled to sell energy and capacity under subsection (d)(2).

In 2014, the Fifth Circuit addressed this issue in the context of Texas regulations implementing PURPA in *Exelon Wind 1, LLC v. Nelson*, 766 F.3d 380 (5th Cir. 2014) ("*Exelon*"). In that case, the QF challenging the Texas Public Utilities Commission's implementation of PURPA generated electricity from a wind facility.[51] Under Texas regulations, a QF was only eligible to receive a price under subsection (d)(2) if it could provide "firm power." "In other words, only those Qualifying Facilities able to forecast when they will deliver energy to the utility – and capable of delivering the specified amount of energy at the scheduled

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[49] Winding Creek Motion, p. 25.

[50] Second Amended Complaint, ¶ 49.

[51] *Exelon*, 766 F.3d at pp. 383-384.

time – are eligible to take advantage of the pricing options in subsection (d)(2) of FERC's regulation. By contrast, Qualifying Facilities with non-firm power that cannot guarantee such delivery may charge the utility only the current or 'as-available' market price for power."[52]

Exelon filed a petition at FERC arguing that all QFs in Texas should be entitled to the subsection (d)(2) pricing options, not just QFs that could provide firm power.[53] FERC agreed but declined to initiate an enforcement action, so the QF filed a lawsuit in federal court.[54] The Fifth Circuit disagreed and held that the state, not FERC, was empowered under PURPA to decide when and in what circumstances a QF was eligible to be paid under subsection (d)(2).[55] The Court went on to explain:

> The reading advocated by Exelon would render PURPA subsection (d)(1) superfluous. Subsection (d)(1) of FERC's Regulation allows a Qualifying Facility to provide power to the utility only on an as-available basis, and requires the Qualifying Facility to price the power at the moment of delivery. Subsection (d)(2) gives a Qualifying Facility this *exact same option* to sell power to the utility on an as-available basis, and also provides a Qualifying Facility with a second option to choose to fix the price "at the time the obligation is incurred."
>
> Under the reading advocated by Exelon and adopted by the district court, every Qualifying Facility must have the option to form a Legally Enforceable Obligation, and thus select between the two pricing options available under subsection (d)(2). If every Qualifying Facility may take advantage of the option provided under subsection (d)(2), it is hard to understand why Congress or FERC would also include a separate subsection limiting Qualifying Facilities to one pricing option.[56]

The Fifth Circuit went on to explain that limiting the subsection (d)(2) option to QFs that could provide firm capacity was reasonable since that section "requires a utility to purchase power at

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[52] *Id.*, pp. 385-386.

[53] *Id.*, p. 387.

[54] *Id.*

[55] *Id.*, p. 396; *see also Independent Energy Producers*, 36 F.3d at p. 856 ("Thus, the states play the primary role in calculating avoided costs and overseeing the contractual relationship between QFs and the utilities operating under the regulations promulgated by the Commission.").

[56] *Id.*, p. 399 (footnotes omitted) (emphasis in original).

rates set potentially years in advance, and as a result, the utility needs to know that the promised power actually will be produced and readily available."[57] Solar facilities, such as the one proposed by Winding Creek, are not necessarily able to provide this certainty and, as Winding Creek concedes[58], can only provide as-available energy.

The Utilities acknowledge that the *Exelon* case addressed a Texas regulation implementing PURPA. In California, the CPUC has not yet addressed the question whether an as-available QF, such as Winding Creek, is entitled to sell power to a utility under subsection (d)(2), and the QF/CHP Settlement moots the point in any case by adopting the Standard Contract. As the *Exelon* court made clear, the determination of whether a QF is entitled to sell power under subsection (d)(2) is an issue for the state to decide.[59] At a minimum, rather than addressing whether the Standard Contract complies with subsection (d)(2), the Court in this proceeding should determine that it is unclear whether the as-available facility proposed by Winding Creek is entitled to sell power under subsection (d)(2) and direct that the CPUC first address this question, under the CPUC's authority to implement PURPA and FERC's regulations. Winding Creek's concerns about the Standard Contract's compliance with subsection (d)(2) may be moot if Winding Creek can only sell its power under subsection (d)(1) because it is an as-available facility.

Finally, in its points and authorities supporting its motion for summary judgment, Winding Creek relies heavily on *JD Wind 1, LLC*, 130 FERC ¶ 61,127 (2010) to support its interpretation of the subsection (d)(2) requirements. This FERC decision was an order denying rehearing of an underlying decision, *JD Wind 1, LLC*, 129 FERC ¶ 61,148 (2009).[60] Notably, the Fifth Circuit in *Exelon* was addressing the lawsuit filed by Exelon, d.b.a. JD Wind 1, that

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[57] *Id.*, p. 400.

[58] Second Amended Complaint, ¶ 49.

[59] *Id.*, p. 396.

[60] *JD Wind 1, LLC*, 130 FERC ¶ 61,127, P. 1, n. 1 (citing underlying decision). A copy of the *JD Wind* rehearing decision is attached to Winding Creek's Motion at Appendix p. 39.

followed the FERC decisions in *JD Wind 1*.[61] The Fifth Circuit ultimately rejected FERC's determination in *JD Wind 1*.[62] Thus, Winding Creek's citations to the *JD Wind 1* decision should be given little weight.

IV. QUESTIONS REGARDING REMAT PROGRAM PRICING ARE NOT RELEVANT TO THE ISSUES IN THIS PROCEEDING

The final issue identified by the Court is:

> Whether the ReMAT Program violates PURPA because the rate offered under the ReMAT Program is not based on the utility's "avoided costs" as required under the Federal Energy Commission's regulations at 18 CFR § 292.304(b)(2).

The Utilities are not offering an opinion as to whether the ReMAT Program pricing mechanism constitutes an "avoided cost" rate because this is not an issue that needs to be addressed by the Court to deny Winding Creek's motion for summary judgment, and to grant summary judgment for the CPUC Commissioners. As FERC explained in the *Otter Creek* decision, an alternative program that is open to certain QFs is not required to offer avoided cost pricing if both the utility and the QF have agreed to pay an alternative rate (*i.e.*, one that is above or below avoided cost):

> Those Vermont QFs that choose to participate in the SPEED program are agreeing to the rates that result from that program. Nothing in the Commission's regulations limits the authority of either an electric utility or a QF to agree to rates for any purchases or terms or conditions relating to any purchases which differ from the rates or terms or conditions which would otherwise be required by the Commission's regulations.[63]

This finding is entirely consistent with 18 C.F.R. § 292.304(b), which allows utilities and QFs to "agree to" rates other than avoided costs.

In this case, as in *Otter Creek*, QF participation in the ReMAT Program is voluntary and an alternative to the Standard Contract offered under the QF Program. QFs that voluntarily

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[61] *Exelon*, 766 F.3d at p. 387, n. 5 (quoting from FERC's decision in *JD Wind 1*).

[62] *Id.*, pp. 397-399.

[63] *Otter Creek*, 143 FERC ¶ 61,282, P. 4 (footnotes omitted).

choose to participate in the ReMAT Program are agreeing to accept the pricing provided in that program, even if they believe it is below avoided cost, as they are allowed to do under Section 292.304(b) of FERC's regulations. The Court does not need to determine if the ReMAT Program pricing complies with PURPA because, as a voluntary, alternative program, avoided cost pricing is not required. The pricing is as irrelevant as the cap given that PURPA can be fully implemented by other means.

V. CONCLUSION

In its *Invitation for Briefing*, the Court asked parties filing *amicus curiae* briefs to include a statement regarding payment or support from Winding Creek or the CPUC. Neither Winding Creek nor the CPUC authored any part of the Utilities' *amicus curiae* brief, nor did these parties or any other entity or person, other than the Utilities, contribute any money that was intended to fund the preparation of the Utilities' *amicus curiae* brief. If the Court decides to hold an additional hearing on Winding Creek's summary judgment motion, the Utilities would be prepared to participate in the hearing.

Winding Creek has failed to demonstrate that the ReMAT Program violates PURPA. Moreover, Winding Creek has failed to exhaust its administrative remedies regarding the Standard Contract or, alternatively, has failed to demonstrate that the Standard Contract violates PURPA. For these reasons, as described in more detail above, Winding Creek's motion for

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summary judgment should be denied and summary judgment should be entered in favor of the CPUC Commissioners.

Respectfully submitted on behalf of the Utilities,

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