BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
08/31/18
04:59 PM

Order Instituting Rulemaking Regarding Continued Implementation of the Public Utility Regulatory Policies Act and Related Matters	Rulemaking 18-07-017 (Filed July 26, 2018)

COMMENTS OF WINDING CREEK SOLAR LLC

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August 31, 2018

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COMMENTS OF WINDING CREEK SOLAR LLC ON PROPOSED RULEMAKING

I. Introduction

Winding Creek Solar LLC ("Winding Creek") respectfully submits these comments in response to the *Order Instituting Rulemaking Regarding Continued Implementation of the Public Utility Regulatory Policies Act and Related Matters* issued August 1, 2018 (the Order"), by the California Public Utilities Commission ("Commission" or "CPUC").

The Order contains a Staff Pricing Proposal (the "Staff Pricing Proposal") and six questions on which the Commission seeks comment at this time for amendments to the current Standard Offer Contract ("SOC"). The SOC is the contract that the CPUC unsuccessfully argued in *Winding Creek Solar LLC v. Peevey,* No. 13-04934, 2017 U.S. Dist. LEXIS 201893, (N.D. Cal. Dec. 6, 2017), *appeal docketed* (9th Cir. December 22, 2017) ("*Winding Creek*"), excused the unlawful features of the Renewable Market Adjusting Tariff (the "Re-MAT"). The Order lays out the CPUC's strategy to adjust the SOC to seem to comply with PURPA,[1] and then argue that the features of the Re-MAT declared unlawful in *Winding Creek*, and similar features of other programs, such as the Bio-MAT,

[1] The Public Utility Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 ("PURPA"), *see* 16 U.S.C. §824a-3 ("PURPA").

magically do not need to change.

The CPUC's strategy makes a mockery of the statute. Even to the uninitiated the CPUC's strategy is a transparent effort to eviscerate PURPA—the only federal law mandating that utilities purchase renewable energy. Regardless of what other programs in California may increase renewable energy in California, the CPUC's intended "poke in the eye" to PURPA sets a precedent that other States in the Nation would follow, which at the end of the day undermines the climate change ambitious goals the California Legislature has now set for 100% renewable energy by 2045.

Instead of taking a position of truly being a nationwide leader, the CPUC seeks to join the ranks of the PURPA scoundrels, such as Montana, whose commissioners were caught on a hot mic stating that their recent proposed changes in "terms" to PURPA contracts would hopefully kill them all.[2] That is exactly what the Staff Pricing Proposal is intended to do.

The only mechanism through which California could drag the remainder of the Nation toward California's goal of 100% by 2045 is PURPA. PURPA "was and remains a primary incentive for renewable power development." Steven Ferrey et al., *Fire and Ice: World Renewable Energy and Carbon Control Mechanisms Confront Constitutional Barriers*, 20 Duke Envtl. L. & Pol'y F. 125, 140 (2010). PURPA is therefore a critical tool for reducing greenhouse gas emissions and the need for action is urgent. It is the Nation's bare minimum renewable energy standard.

Instead of being a PURPA scoundrel, the CPUC should embrace PURPA and provide terms that are fair, non-discriminatory, and will in fact be certain to encourage renewable energy. The CPUC has the opportunity to impact the rest of the Nation by what it does here, and what it does before the Ninth Circuit in *Winding Creek*. A ruling that grants Winding Creek what it seeks, will benefit Californians and immediately bring all States within the Ninth Circuit under the same PURPA regime,

[2] https://billingsgazette.com/news/government-and-politics/hot-mic-records-troubling-conversation-about-solar-regulations/article_8499a49d-e281-5dd7-aae7-aecccfa0394e.html

expanding the reach of California's climate change goals. A ruling from the Ninth Circuit favorable to Winding Creek would likely have a precedential effect in other Circuits, further expanding the reach of California's climate change goals.

On the other hand, if the CPUC succeeds at the Ninth Circuit even in part, then PURPA becomes a dead-letter, which might be fine for California given its legislated 100% renewable energy goals, but will be counterproductive to California's ultimate climate goals which of necessity must rely on the climate policies of the remaining 88% of the Nation.

In practical terms, the CPUC's parochial strategy is pennywise and pound foolish. In legal terms, it is unlawful. The Staff Pricing Proposal for forecasted pricing is not even an attempt to engage in forecasting. Moreover, it is discriminatory and is inconsistent with other CPUC pricing. Finally, it does not comply with the order of the District Court in *Winding Creek*.

Whatever perceived minimal increase in costs that the CPUC thinks might result from an uncapped Re-MAT or similar PURPA program, those costs are insignificant when compared to the benefits those projects bring as the staff proposal in Docket R14-10-003, Order of March 14, 2018, *An Energy Division Staff Proposal Addendum #2*[3] clearly shows. In fact, using the social cost of carbon ("SCC") rates shown in the CPUC staff proposal at page 16 of the pdf, the levelized benefit to Californians from Winding Creek's facility would be roughly $85.75 per MWh over the 20-year term of a contract using a PG&E's 7.61% discount rate. With the remedy proposed by Winding Creek in *Winding Creek* of a contract at the initial $89.23 per MWh rate (adjusted for time-of-use factors), Californians would be obtaining capacity and energy almost for nothing.

II. Comments On As-Delivered Pricing—Questions 1, 3 and 5.

As the Commission knows, as-delivered pricing will only be used by existing facilities, and

[3] http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M212/K023/212023660.PDF.

is tangentially related to the main focus in *Winding Creek*, which is a qualifying facility's ("QF's) right to a *non-discriminatory* long-term forecasted avoided cost rate. Winding Creek has no comments at this time on the as-delivered pricing methodology in the Staff Pricing Proposal, except to note that at least with respect to distribution-sized projects, it is incomplete and inconsistent with the staff proposal regarding the SCC in R14-10-003.

III. Comments On Forecasted Pricing—Questions 2 and 4.

There is no other way to sugar-coat it—the Staff Pricing Proposal for forecasted pricing proposal is simply an abomination. As Winding Creek has shown, in reality the Re-MAT program is an epic failure caused by its unlawful features. Excluding projects at the initial $89.23 per megawatt-hour ("MWh") rate, only 3 solar projects have reached commercial operation under the Pacific Gas and Electric Company ("PG&E") Re-MAT program, representing a paltry 3.498 megawatts ("MWs"), an infinitesimal amount for PG&E.[4] To put the effect of the unlawful Re-MAT features in context, at the Re-MAT's current rate of "*success*," it would take more than 1,000 years to add enough solar energy to replace just PG&E's fossil-fuel Gateway Generating Station in Antioch, CA. The CPUC's touted alternative—the SOC—fares even worse. Since its inception almost a decade ago, not one new solar facility has been built in PG&E territory under that program. The proposed changes to the SOC would certainly continue that zero-built rate.

The Staff Pricing Proposal takes the Re-MAT pricing and proposes to cut it in half. There is simply no possible way to characterize such a proposal as being made in good faith, nor is it remotely in the realm of a justifiable proposal under PURPA.

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[4] *See,* PG&E's most recent RE-MAT status report (November 2017), available at: https://pge.accionpower.com/ReMAT/documents.asp?strFolder=c.%20PPAs%20Awarded/&filedown=&HideFiles=True. *See also*, May 2018 RPS report. http://www.cpuc.ca.gov/RPS_Reports_Data/. (last visited July 31, 2018).

The Staff Pricing Proposal does not even pretend to be a forecast. It makes no effort to forecast avoided costs. The Commission and the utilities regularly use computerized forecasting models, but yet here the Staff Pricing Proposal completely abandons the modelling used in energy planning.

The Commission's misguided strategy and the Staff Pricing Proposal are manifestly unlawful and discriminatory. If the CPUC offers contracts to certain QFs under certain pricing terms that purport to be avoided cost, such as the Bio-MAT, the Re-MAT, or the CHP program, its determinations as to price must be principled. The only principle exhibited by the Staff Pricing Proposal is to kill PURPA and do an end-run around the District Court's order.

Further, any action taken by the CPUC compelling wholesale energy transactions, such as the Re-MAT or the Bio-MAT is void *ab initio* under the Supremacy Clause of the United States Constitution unless it comports with the CPUC's limited authority under PURPA. The Federal Energy Regulatory Commission ("FERC") reiterated that rule in *California Pub. Utils. Comm'n*, 132 F.E.R.C. ¶61,047 (2010) at P64:

> The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. [*citing* 16 U.S.C. §§ 824, 824d, 824e; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988)]. While Congress has authorized a role for States in setting wholesale rates under PURPA, *Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority*.

(Emphasis added.)

State action is preempted merely because it lies within an exclusive federal field – even if the state action is *complementary* to federal policy. *See Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) (when Congress "occupies an entire field . . . even complementary state regulation is impermissible," and all "state regulation in the area" is foreclosed, "even if it is parallel to federal

standard").

Here the Commission's strategy is based upon the misguided notion that compelled wholesale sales under the Re-MAT, the Bio-MAT or some other Commission-favored program can avoid complying with PURPA if the SOC provides some fixed rate pricing. That notion is wrong for two obvious reasons. *First*, as stated above, the Commission can only require the investor-owned utilities to enter wholesale contracts if the specific contracts comply with PURPA, which means they must be at avoided costs. *Second*, if the Commission calculates avoided costs over 20 years, for example, for a solar project or a Bio-Mat project, then a QF is entitled to have its avoided cost rate calculated consistently with those.

IV. Other Terms of the Standard Contract—Question 6.

As the Commission knows, a minimum 20-year contract term is needed for a viable contract that can encourage QF generation. The current SOC has a maximum of a 12-year term, which must be changed to 20 years. In addition, just like other programs, such as the Bio-Mat and Re-MAT, energy and capacity needs to be wrapped up into one per MWh rate that is fixed at the beginning of the term.[5] Further, the ability of a QF to lock-in the contract and its rate, and other terms, should be no more onerous than what is offered for other CPUC programs that regulate wholesale sales.

V. Conclusion.

The Commission should reject the Staff Pricing Proposal and the current strategy of amending the SOC. Instead the Commission should re-institute the Re-MAT, uncapped and without the pricing adjustments. The Commission should also provide to all generators in the Re-MAT queue the contract they would have received at the time they entered the queue, but for the unlawful cap and

[5] A single fixed rate for the entire term is not required, but rates fixed at the beginning of the term are required. An escalating rate tied to forecasted avoided costs is permissible instead of a levelized rate.

pricing adjustment mechanism. Taking that approach would be consistent with the District Court's order, further the climate goals of the California Legislature, set a precedent in the context of the *Winding Creek* litigation that would extend the reach of California's climate goals to other States, and it would put an end to the prospect of ongoing challenges to not only the Re-MAT, but the Bio-Mat, the CHP program and any other California program that offers more favorable (and thus discriminatory) pricing terms to certain QFs.

Dated: August 31, 2018

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