

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**

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May 11, 2023

Agenda ID #21596
Ratesetting

TO PARTIES OF RECORD IN RULEMAKING 18-07-017:

This is the proposed decision of Administrative Law Judge Manisha Lakhanpal. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's June 29, 2023 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, *ex parte* communications are prohibited pursuant to Rule 8.2(c)(4).

/s/ MICHELLE COOKE

Michelle Cooke

Acting Chief Administrative Law Judge

MLC:jnf

Attachment

Decision PROPOSED DECISION OF ALJ LAKHANPAL
(Mailed 5/11/2023)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking
Regarding Continued Implementation
of the Public Utility Regulatory
Policies Act and Related Matters.

Rulemaking 18-07-017

DECISION CLOSING PROCEEDING

Summary

In this decision, the California Public Utilities Commission does not make changes to the avoided cost pricing options available to a Qualifying Facility of 20 megawatts or less seeking to sell electricity and/or capacity pursuant to the Public Utility Regulatory Policies Act of 1978. Since this was the only outstanding issue in the proceeding, we are closing the proceeding.

1. Background

On July 26, 2018, the California Public Utilities Commission (CPUC or Commission) opened this Order Instituting Rulemaking (OIR) to continue the implementation of the Public Utility Regulatory Policies Act of 1978 (PURPA) and related matters. Parties filed comments to the OIR on August 31, 2018, and on September 12, 2018. Reply comments were filed on September 24, 2018.

On September 27, 2018, a prehearing conference (PHC) was held to discuss the issues and to address the procedures and schedule for this proceeding. At the request of the parties, a workshop was held on October 18, 2018.

On November 2, 2018, the assigned Commissioner issued the Scoping Memo and Ruling. The OIR recognized that a federal court found the Commission did not comply with PURPA because the standard offer contract “failed to provide [qualifying facilities] the option to choose energy rates determined either at the time of contract execution or at the time of product delivery as required by 18 C.F.R. 292.304.”¹ Parties filed their comments on November 14, 2018, and reply comments on November 28, 2018.

On May 7, 2020, the Commission issued Decision (D.) 20-05-006 adopting a new standard offer contract available to any Qualifying Facility (QF) of 20 megawatts or less seeking to sell electricity and/or capacity to electric utilities pursuant to PURPA. This decision left the proceeding open to consider whether any further action is required to comply with PURPA, as necessary, such as to comply with any changes in federal regulations.

On July 16, 2020, the Commission issued D.20-07-033 extending the statutory deadline of this proceeding for a second time to January 25, 2021.

On July 16, 2020, the FERC issued Order No. 872, revising the PURPA regulations to take effect on December 31, 2020.² On August 17, 2020, FERC received requests for rehearing and/or clarification of the order from various stakeholders.

¹ Order Instituting Rulemaking at 6-7 referring to *Winding Creek Solar LLC v. Peevey*, 293 F.Supp.3d 980, 990-91 (N.D. Cal. 2017), *aff’d sub nom. Winding Creek Solar LLC v. Peterman*, 922 F.3d 861 (9th Cir. 2019).

² *Qualifying Facility Rates and Requirements Implementation Issues Under the Public Utility Regulatory Policies Act of 1978*, Order No. 872, 85 FR 54638 (Sep. 2, 2020), 172 FERC 61,041 (2020) (Order 872).

On November 19, 2020, FERC issued Order No. 872-A, an order denying rehearing and clarifying portions of Order No. 872.³ Four petitions for review of FERC Order No. 872 and Order No. 872-A (FERC 872 Orders) were filed at the Ninth Circuit Court of Appeals.⁴

The FERC 872 Orders, among other things, revised 18 CFR 292.304 of the PURPA implementing regulations. Revisions to 18 CFR 292.304 include providing in (d)(2) that “a state regulatory authority... may require that rates for purchases of energy from a qualifying facility pursuant to a legally enforceable obligation vary through the life of the obligation and be set at the electric utility’s avoided cost for energy calculated at the time of delivery.”

On January 11, 2021, we issued an Amended Scoping Memo and Ruling (Amended Scoping Memo) seeking party comments on two issues: whether pursuant to 18 CFR 292.304 the Commission should make changes to avoided cost pricing options for the standard offer contract and other matters related to QFs that include storage configurations (storage-paired QFs).⁵

Comments on the Amended Scoping Memo were filed on February 10, 2021, by the California Wind Energy Association (CalWEA), Green Power Institute (GPI), Public Advocates Office at the California Public Utilities Commission (Cal Advocates), joint comments by Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E) (Joint investor-owned utilities (IOUs)) and

³ Order Addressing Arguments Raised on Rehearing and Clarifying Order 872 in Part, 173 FERC 61,158 (effective Feb. 16, 2021).

⁴ *Solar Energies Industries Association, et al. v. FERC*, Case Nos. 20-72788, 20-72275, 21-70083, and 21-70113 (consolidated Feb. 8, 2021).

⁵ Amended Scoping Memo at 5.

jointly by Vote Solar, the Solar Energy Industries Association, and the California Energy Storage Alliance (Joint Parties).

On June 10, 2022, in D.22-06-003, we adopted provisions for utilities to offer the standard offer contract to storage-paired QFs, with certain modifications to the contract, and consistent with PURPA. This decision declined to adopt any specific pricing mechanism for storage-paired QFs and retained unchanged the pricing options adopted in D.20-05-006 for capacity and energy.

In D.22-12-008, we extended the statutory deadline of the proceeding to June 15, 2023.

2. Submission Date

This matter on the avoided cost pricing options was submitted on February 10, 2021, upon receipt of comments.

3. Issues Before the Commission

The only remaining issue in this proceeding is whether, pursuant to Title 18 of the Code of Federal Regulation (CFR) section 292.304 (18 CFR 292.304), the Commission should make changes to the avoided cost pricing options available to QFs.

4. Summary of Comments

On February 10, 2021, parties filed comments on whether avoided cost pricing options for the standard offer contract should be modified.

CalWEA “recommends that the current standard offer contracts and pricing options – particularly the fixed-price option at the time of contract signing – remain available to QFs for distinct resource categories until such time as there is clear evidence of over-subscription.”⁶ CalWEA states that “FERC

⁶ CalWEA Comments on Amended Scoping Memo at 1.

leaves it to the discretion of states on how contracts should be priced.”⁷ CalWEA acknowledges D.20-05-006 remedied the deficiencies found by the federal court in *Winding Creek* and contends that the findings in D.20-05-006 remain valid and there is no reason to modify the terms of the current fixed energy-price contract.⁸ Further, CalWEA argues that until the utilities can provide clear evidence of a high subscription rate and that the contract price exceeds avoided cost, such as data suggesting that the utilities could procure the same energy and capacity at a significantly lower cost if competitively procured, no changes to pricing options should be made.⁹ CalWEA further states that some technologies that may not have the same market opportunities as other technologies may need fixed-price contracts.¹⁰

GPI states that it is premature to modify the current pricing options due to pending legal challenges to the FERC ruling that allows states the additional authority to deny fixed-price options.¹¹ GPI states that it opposes the FERC 872 Orders because in GPI’s view, they will make PURPA ineffective to encourage power production from QFs.¹² GPI further states that it anticipates the pending legal challenges being successful and forcing the revocation of the FERC 872 Orders.¹³

⁷ *Id.* at 2.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Id.* at 2-3.

¹¹ GPI Comments on Amended Scoping Memo at 1-2.

¹² *Id.* at 2.

¹³ *Id.* at 3.

Joint Parties state “that nothing in FERC Orders 872 or 872-A requires the Commission to take any action in relation to its implementation of PURPA.”¹⁴ The Joint Parties argue that given the possibility of an outcome at the court of appeals that allows fixed prices to remain, it would be prudent for the Commission to await a court decision on the legal challenges to the FERC orders before eliminating standard offer contracts with the fixed price option.¹⁵ The Joint Parties contend that from a clean energy policy perspective, there is “an urgent need for new clean energy capacity” and so eliminating fixed-energy priced standard offer contracts at this time would be short-sighted and weaken efforts to meet the State’s energy needs and goals.¹⁶

Cal Advocates does not oppose re-examining avoided cost pricing options in response to the FERC 872 Orders and supports the potential change allowed by the regulation change from fixed to variable energy avoided cost.¹⁷ Cal Advocates states that the Commission should adopt a decision supported by a robust record.¹⁸

The Joint IOUs state that the FERC 872 Orders, among other things, eliminated the requirement for states to offer a fixed energy price option for QFs.¹⁹ The Joint IOUs recommend the Commission exercise its discretion under the FERC 872 Orders to eliminate the fixed energy price option.²⁰ The IOUs

¹⁴ Joint Parties Comments on the Amended Scoping Memo at 2.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3-4.

¹⁷ Cal Advocates Response to Amended Scoping Memo at 1-2.

¹⁸ *Id.* at 2.

¹⁹ Joint IOUs Comments on Assigned Commissioner’s Ruling at 2-3.

²⁰ *Id.* at 7.

further state that they should be allowed to submit a Tier 1 Advice Letter that replaces the energy price determined at the time of the execution option with an energy price determined at the time of the delivery option.²¹ The Joint IOUs state that the energy fixed-price option would result in above-market costs for the life of the QF contract as compared to the price of the utility procuring solar energy at capacity on its own.²²

Additionally, the Joint IOUs recommend changing the methodology to calculate capacity prices adopted in D.20-05-006.²³ The Joint IOUs state that that the decision calculates capacity payments on a delivered energy basis and instead request capacity payments be based on the net qualifying capacity that the IOU shows on its monthly Resource Adequacy (RA) plan, multiplied by the weighted average of the zonal RA pricing listed in the recent RA reports published by the Commission.²⁴

5. Discussion and Analysis

The purpose of this proceeding was to continue the implementation of PURPA in accordance with federal law, including FERC regulations. The FERC 872 Orders continued flexibility for state regulatory authorities to establish avoided cost rates for QF sales, including revising 18 CFR 292.304 to allow a state to eliminate the option for fixed avoided costs for energy.²⁵

²¹ *Id.* at 3.

²² *Id.* at 7-8.

²³ *Id.* at 10.

²⁴ *Ibid.*

²⁵ FERC “granted states the flexibility to require that energy rates (but not capacity rates) in QF power sales contracts... vary in accordance with changes in the purchasing electric utility’s as-available avoided costs at the time the energy is delivered. If a state exercises this flexibility a QF no longer would have the ability to elect to have its energy rate be fixed but would continue to be entitled to a fixed capacity rate for the term of the contract...” FERC Order 872-A at ¶12.

Footnote continued on next page.

The issue under consideration in the Amended Scoping Memo was whether pursuant to 18 CFR 292.304, the Commission should make changes to the avoided cost pricing options available to QFs. The Commission declines to make changes to avoided cost pricing options pursuant to 18 CFR 292.304 at this time.

We agree with the Joint IOUs that the FERC 872 Orders did not mandate the states to offer a fixed energy price option for QFs. However, as also noted by the Joint IOUs, retaining a fixed price option is at the Commission's discretion. The Commission adopted fixed and variable avoided cost energy rate pricing options in D.20-05-006 for QFs standard offer contracts that require no revision because of the FERC 872 Orders.

We also agree with GPI and the Joint Parties that adopting pricing changes before legal disputes regarding the validity of the FERC 872 Orders are resolved would be premature and unnecessary.²⁶ It is not an efficient use of resources to build a record in this proceeding of what parties anticipate the outcome of a federal court decision could be.

We also decline to make changes raised in the Joint IOUs' comments seeking changes in the avoided cost calculation of capacity payments under the standard offer contract. What the Joint IOUs are requesting is a modification of the pricing mechanism adopted in D.20-05-006. The pricing mechanism was considered in detail before the Commission adopted D.20-05-006, therefore, re-opening the same issues now is not reasonable. Moreover, modifying the

See also Id. at ¶¶13-16 (describing the additional flexibility for states in setting energy and capacity rates, including "to continue setting QF rates under the standards long established").

²⁶ *Solar Energies Industries Association, et al. v. FERC*, Case Nos. 20-72788, 20-72275, 21-70083, and 21-70113 is awaiting a decision from the Ninth Circuit.

capacity pricing mechanism, as proposed by the Joint IOUs, was not the intent of the Amended Scoping Memo as the Joint IOUs request does not relate to the fixed energy rate option pursuant to 18 CFR 292.304 nor is it based upon any revisions in the FERC 872 Orders to that regulation. The Commission, in its discretion in implementing PURPA, declines to further consider revising the capacity pricing methodology adopted in D.20-05-006.

The Commission, at its discretion, may reopen the proceeding if it becomes necessary to revise avoided cost pricing options available to QFs under the standard offer contract for any reason. We agree with CalWEA that FERC leaves it to the discretion of states regarding how contracts should be priced and the Commission finds no reason to revisit the pricing in D.20-05-006 at this time. As a result, the pricing options to have a variable or fixed energy price offered to QFs under the current PURPA rules and the standard offer contract shall remain unchanged.

6. Conclusion

We conclude that no change in the Commission's avoided-cost pricing options for the standard offer contract will be made at this time and, therefore, this proceeding will close.

7. Comments on Proposed Decision

The proposed decision of Administrative Law Judge Manisha Lakhanpal in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by _____ on _____. Reply comments were filed by _____ on _____.

8. Assignment of Proceeding

Karen Douglas is the assigned Commissioner and Manisha Lakhanpal is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. The purpose of this proceeding is to implement PURPA in accordance with federal law.
2. The only remaining issue in this proceeding was whether pursuant to 18 CFR 292.304, the Commission should make changes to the avoided cost pricing options available to QFs.
3. D.20-05-006 adopted multiple pricing options, including fixed and variable avoided cost energy rates, for QFs in compliance with 18 CFR 292.304.
4. At this time, there is no compelling reason to revisit the pricing established in D.20-05-006.
5. The FERC 872 Orders, which revised 18 CFR 292.304 in 2020, are presumed valid and enforceable unless and until the appellate court overturns them.
6. The Amended Scoping Memo stated that given the FERC 872 Orders, there was good cause to amend the scope of the proceeding to consider whether to remove the fixed pricing option and require an IOU to use variable energy rates determined at the time of product delivery in the standard offer contract.
7. The Amended Scoping Memo did not include an issue to modify the capacity pricing mechanism as suggested by the Joint IOUs.

Conclusions of Law

1. The FERC 872 Orders give states the discretion to require variable avoided-cost rates for energy or to retain both a variable and a fixed-price option.

2. It is just and reasonable for the Commission to maintain the current pricing options for QFs established in D.20-05-006, retaining both the variable avoided-cost rates for energy and the energy fixed-price option.

3. The Commission's current QF pricing options comply with 18 CFR 292.304.

O R D E R

IT IS ORDERED that Order Instituting Rulemaking 18-07-017 is closed.

This order is effective today.

Dated _____, at San Francisco, California.