

**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
(Filed July 26, 2018)

**COMMENTS OF THE
CALIFORNIA WIND ENERGY ASSOCIATION
ON ORDER INSTITUTING RULEMAKING**

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***On behalf of the California Wind
Energy Association***

September 12, 2018

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I. INTRODUCTION

In accordance with the “Order Instituting Rulemaking Regarding Continued Implementation of the Public Utility Regulatory Policies Act and Related Matters” filed July 26, 2018 (“OIR”) and Administrative Law Judge Allen’s email ruling on August 23, 2018, extending the due date for initial comments to September 12, 2018, the California Wind Energy Association (“CalWEA”) submits these comments in response to questions posed in the OIR relating to pricing options for qualifying facilities (“QF”) under the Public Utility Regulatory Policies Act (“PURPA”). The California Public Utilities Commission (“Commission”) has a great deal of experience with establishing avoided costs for QFs under PURPA-based contracts. Thus, there should not be any need for evidentiary hearings in this proceeding.

The OIR includes a pricing proposal prepared by Commission staff (the “Staff Pricing Proposal”).¹ The Staff Pricing Proposal includes proposed pricing for both energy and capacity, determined both at the time of delivery and at the time of contracting. The Commission should proceed swiftly to adopt the pricing options set forth in the Staff Pricing Proposal for energy and capacity determined at the time of contract execution because:

¹ See *Proposal to Update Avoided Cost Pricing for Qualifying Facilities of 20 MW or Less*, included as an Attachment to the OIR.

- A. The proposal to adopt pricing for energy and capacity determined at the time of contract execution addresses the shortcomings identified by federal district court in the *Winding Creek Order*;²
 - B. The proposed pricing for energy and capacity determined at the time of contract execution reasonably reflects utility avoided costs; and
 - C. The Commission has flexibility in determining avoided costs.
- These positions are explained further below.

II. COMMENTS

A. **The Proposal to Adopt Pricing for Energy and Capacity Determined at the Time of Contracting Addresses the Shortcomings Asserted in the *Winding Creek Order***

The Commission should adopt the Staff Pricing Proposal element establishing energy and capacity prices determined at the time of contract execution because this element of the Staff Pricing Proposal addresses the PURPA pricing shortcomings identified by the federal district court in the *Winding Creek Order*. In the *Winding Creek Order*, the court asserted that PURPA requires that QFs are afforded an opportunity to sell energy or capacity at avoided cost rates determined (1) at the time of delivery or (2) at the time the obligation is incurred, at the election of the QF.³ The court further asserted that the Standard Contract for QFs 20 MW or Less (“QF Settlement SOC”) does not satisfy the requirements of PURPA because it does not offer both of these pricing options.⁴ Because the QF Settlement SOC pricing does not fully satisfy the PURPA pricing requirements and the ReMAT Program has an overall cap on participation, the court also enjoined further application of the ReMAT Program.⁵

Adopting the Staff Pricing Proposal element establishing energy and capacity prices determined at the time of contract execution satisfies the PURPA pricing shortcoming asserted by the court in the *Winding Creek Order*. Under the Staff Pricing Proposal, eligible QFs would have the option to select capacity and energy prices that are fixed and known at the time of contract

² *Winding Creek Solar, LLC v. Carla Peterman, et al.*, N.D. CA Case No. 13cv04934-JD, Findings of Fact and Conclusions of Law, and Order on Summary Judgment, December 6, 2017 (“*Winding Creek Order*”).

³ *Winding Creek Order* at p. 15 (quoting 18 C.F.R. §292.304(d)(2)).

⁴ *Id.* at p. 18.

⁵ *Id.* at p. 20.

execution.⁶ This pricing option would satisfy the requirement in 18 C.F.R. §292.304(d)(2)(ii) to provide a pricing option based on avoided costs determined at the time the obligation is incurred. By satisfying the fixed price determined at the time of execution pricing requirement, the new standard offer contract contemplated by the OIR (“New QF SOC”), together with the QF Settlement SOC, would offer both pricing options described by the court in the Winding Creek Order. And, with a PURPA-compliant primary PURPA program, the Commission could seek to have the ReMAT Program injunction lifted. Thus, the Commission should adopt the Staff Pricing Proposal element establishing energy and capacity prices determined at the time of contract execution.

B. The Proposed Pricing for Energy and Capacity Determined at the Time of Contracting Reasonably Reflects Utility Avoided Costs

The Commission should adopt the proposed energy and capacity pricing determined at the time of contract execution set forth in the Staff Pricing Proposal because these prices reasonably reflect utility avoided costs. Under PURPA, avoided costs are defined as “the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.”⁷ Under the Staff Pricing Proposal, energy prices determined at the time of contract execution would be based on average CAISO Day-Ahead prices for default load aggregation points for the previous three years.⁸ The investor-owned utilities have previously argued that actual CAISO Day-Ahead prices are a good indicator of their short-run avoided costs for the corresponding time period.⁹ However, because CAISO Day-Ahead prices are determined on a day-ahead basis for each hour of each day, these prices are variable over time, and thus future CAISO Day-Ahead prices cannot be known with certainty at the time a contract is executed. To establish a price determined at the time of contract execution, the avoided cost rate must be based on an estimate of future CAISO Day-Ahead prices. As explained in Section II.C. below, the Commission has flexibility in determining avoided costs. And, as explained in the Staff Pricing Proposal, using recent historical CAISO Day-Ahead pricing data as an estimate for future CAISO

⁶ See Staff Pricing Proposal at pp. 21-25.

⁷ 18 C.F.R. §292.101(b)(6).

⁸ Staff Pricing Proposal at p. 21.

⁹ See e.g., D. 07-09-040 at pp. 54-56.

Day-Ahead prices is a reasonable methodology based on other available data reviewed by Commission staff.¹⁰ Thus, the Commission should adopt the proposed energy pricing determined at the time of contract execution set forth in the Staff Pricing Proposal.

Under the Staff Pricing Proposal, capacity prices determined at the time of contract execution would be based on the current as-available capacity prices in the QF Settlement SOC with a 2.5% escalation factor.¹¹ The QF Settlement SOC applies capacity prices that were originally adopted in Commission Decision 07-09-040 after active participation by many stakeholders. This capacity price is based on the estimated fixed cost of a combustion turbine (CT), less the estimated value of ancillary services (A/S) and capacity value that is recovered in market energy prices.¹² Because these prices are based on a comprehensive record developed in Rulemaking 04-04-003 and Rulemaking 04-04-025, these prices are reasonable for use under the New QF SOC. Thus, the Commission should adopt the proposed capacity pricing determined at the time of contract execution set forth in the Staff Pricing Proposal.

C. The Commission Has Flexibility in Determining Avoided Cost

While there may be many possible methods for estimating avoided costs, the Commission has flexibility to exercise its discretion when making its own determination of avoided costs. As FERC has previously explained, “the determinations that a state commission makes to implement the rate provisions of section 210 of PURPA are by their nature fact-specific and include consideration of many factors, and we are reluctant to second guess the state commission’s determinations.”¹³ Similarly, the Ninth Circuit Court of Appeals has determined that “PURPA delegates to the states broad authority to implement section 210 of the statute.”¹⁴ Thus, the Commission has flexibility in determining avoided costs for purposes of PURPA pricing and should exercise its discretion to adopt the proposed energy and capacity pricing determined at the time of contract execution set forth in the Staff Pricing Proposal.

¹⁰ Staff Pricing Proposal at p. 23.

¹¹ *Id.* at pp. 23-24.

¹² D. 07-09-040 at p. 91.

¹³ *California Public Utilities Commission*, 133 FERC ¶ 61,059 at P 24 (2010).

¹⁴ *Indep. Energy Producers Ass’n v. Cal. P.U.C.*, 36 F.3d 848 (9th Cir. 1994).

III. CONCLUSION

The Commission should proceed swiftly to adopt the proposed energy and capacity pricing determined at the time of contract execution set forth in the Staff Pricing Proposal because this pricing will enable the Commission to present a PURPA-compliant primary PURPA option. With a PURPA-compliant primary PURPA option, the Commission can seek to have the ReMAT Program injunction lifted.

Respectfully submitted,

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