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

JOINT REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E), SOUTHERN CALIFORNIA EDISON COMPANY (U 338 E), PACIFIC GAS AND ELECTRIC COMPANY (U 39 E) AND QUALIFYING FACILITY PARTIES TO THE NOVEMBER 2, 2018 SCOPING MEMO

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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

JOINT REPLY COMMENTS OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E), SOUTHERN CALIFORNIA EDISON COMPANY (U 338 E), PACIFIC GAS AND ELECTRIC COMPANY (U 39 E) AND QUALIFYING FACILITY PARTIES TO THE NOVEMBER 2, 2018 SCOPING MEMO

Pursuant to the schedule provided in the November 2, 2018 Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo),[1] and the California Public Utilities Commission (CPUC or Commission) Rules of Practice and Procedure, Southern California Edison Company (SCE), San Diego Gas & Electric Company (SDG&E), Pacific Gas and Electric Company (PG&E) (the Joint Investor-Owned Utilities or Joint IOUs) and Qualifying Facility (or QF) Parties: APT Solar Company, Association of California Water Agencies, the California Wind Energy Association, the Clean Coalition, Division Solar, LLC, Poco Power, LLC, Solar Electric Solutions, LLC, Utica Water and Power Authority, and ImModo Development LLC, (hereinafter Joint IOUs and QF Parties collectively referred to as Joint Parties) respectfully submit these Reply Comments in response to the November 14, 2018 Comments submitted by Winding Creek Solar, LLC (Winding Creek), Joint Comments of Bear Valley Electric Service (U 913 E), a Division of Golden State Water Company, Liberty Utilities (Calpeco Electric), LLC (U 933 E), and PacifiCorp (U 901 E) (collectively Bear Valley Electric), and Green Power Institute (GPI) (collectively, the Intervenor Comments) to the Scoping Memo. Many of the Intervenor Comments lack substantive merit and, for the reasons set forth herein and in the Joint

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1 Assigned Commissioner's Scoping Memo and Rule (dated November 2, 2018), at 4.

Proposal of the IOUs and Qualifying Facility Parties filed on November 14, 2018, the proposal submitted by the Joint Parties (the Joint Proposal) should be adopted by the Commission without modification.

I.

THE PROPOSED MINIMUM 12-MONTH MAXIMUM 36-MONTH TERM CONTRACT IS CONSISTENT WITH PURPA

Under the Federal Energy Regulatory Commission's (FERC) Public Utilities Regulatory Policies Act (PURPA) regulations, Qualifying Facilities (QFs) have the option of selling their energy and capacity to electric utilities pursuant to contracts (*i.e.*, legally enforceable obligations) at rates based on estimates of an electric utility's avoided cost over the term of the contract.[2] PURPA requires that the rates for purchases by utilities from QFs must be "just and reasonable to the electric consumers of the electric utility and in the public interest."[3] There is a tension between offering fixed-price contracts for significant term lengths and ensuring costs are just and reasonable for customers.[4] The longer the contract term the more inaccurate avoided cost estimations may be – even though such estimations are based on the best available information at the time the contract is executed – because electric and fuel market prices fluctuate, technologies evolve, and public policies change. As a result, the longer the contract term, the greater uncertainty as to the reasonableness of the contract pricing over the term, and the greater the risk that California electric customers will pay prices exceeding avoided cost. To balance PURPA's requirement for utilities to offer QFs a fixed-price contract, while also

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[2] 18 C.F.R. §292.304, as explained by Order No. 69, 45 Fed. Reg. 12224 (Feb. 25, 1980).

[3] 18 C.F.R. §292.304 (a)(1)(i).

[4] QF contracts with pricing based on time of delivery, pursuant to 18 C.F.R. § 292.304(d)(1) and (2)(i), do not pose the same financial risks to electric customers as a fixed-price contract (pursuant to 18 C.F.R. § 292.304(d)(2)(ii)) because the avoided costs change with market conditions. Formula-rate contracts can resolve the tension but legal issues remain unresolved as to the use of formula-rate contracts under 18 C.F.R. § 292.304(d)(2)(ii).

providing just and reasonable rates to their customers, a reasonable minimum and maximum contract length is within the Commission's discretion.

The Joint Proposal strikes a delicate balance that complies with the various PURPA requirements. In particular, it offers fixed prices for energy and capacity at the time of contract execution based on the utility's avoided costs for up to three years. Upon the end of the term, the QF still retains the ability to request a new PURPA contract, at which time the fixed prices will be updated to reflect the utility's updated avoided costs. As such, the QF is assured an ongoing opportunity to sell at a PURPA-defined price, and that price is fixed for multiple years at a time, avoiding the variability and uncertainty of pricing defined at the time of delivery. Other state commissions have adopted this strategy to balance customer costs and contract term length. The Idaho Public Utilities Commission established that using successive two-year fixed-price PURPA contracts would "maintain a more accurate reflection of the actual costs avoided by the utility over the long-term."[5] The Montana Public Service Commission reduced its fixed-price contract term from 25 years to 10 years, stating that "shortening of the contract is not intended to inhibit a QF's ability to recover its investment, but functions as a means to ensure avoided costs remain just and reasonable and in the public interest and maintains a more accurate reflection of the actual costs avoided by the utility over the long-term."[6] Given the inherent uncertainty about energy prices and future capacity prices in California,[7] the Joint Parties assert that a maximum three-year contract term for a fixed-price contract is reasonable, appropriate, and consistent with PURPA.

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[5] Order on Reconsideration, In the Matter of Idaho Power Company's Petition to Modify Terms and Conditions of PURPA Purchase Agreements, Case No. IPC-E-15-01, Order 33419 (Nov. 5, 2015), pp. 16-19.

[6] In the Matter of Nw. Energy's Application for Interim & Final Approval of Revised Tariff No. QF-1, Qualifying Facility Power Purchase, 7500C, 2017 WL 3169003, at *26 (July 21, 2017).

[7] For example, the Commission in R. 17-09-020 is currently considering substantial reforms to its Resource Adequacy requirements, which may substantially change a utility's avoided costs for capacity.

Winding Creek and GPI assert that the Joint Proposal is not compliant with PURPA because the FERC declaratory order in *Windham Solar, LLC* opined that a contract term "should be long enough to allow QFs reasonable opportunities to attract capital from potential investors."[8] However, Winding Creek and GPI's assertion does not accurately portray the CPUC's discretion and duties under PURPA. FERC clarified in *Windham Solar LLC* that its "regulations, do not, however, specify a particular number of years for such legally enforceable obligations."[9] FERC concedes that it is a state commission's discretion in implementing PURPA on the appropriate length for a QF contract. Winding Creek agrees. Per its own comments, "[o]f course, there is nothing to prevent the [standard offer contract] from adding the three-year fixed term."[10] Thus FERC's declaratory order that contract length should consider QF financing may be considered by state commissions, but certainly is not binding.[11] Considerations in term length are discretionary, but it is a state commission's obligation to establish the rates, terms, and conditions that are just and reasonable to customers and in the public interest.

Further, the Joint Proposal represents a negotiated proposal with numerous QF Parties, which required compromises on all sides.[12] These QF Parties also seek to finance new projects, make capital investments in existing facilities, and face the same financial concerns as other parties, such as Winding Creek. However, the QF Parties have agreed to a 36-month maximum term because PURPA does not mandate minimum term length and a three-year term will not

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8 157 F.E.R.C. ¶ 61,134 at P 8 (2016) ("*Windham Solar, LLC*"); *see also* Opening Comments of Winding Creek (Winding Creek Opening Comments), p. 6, filed in R.18-07-017 on November 14, 2018; GPI Opening Comments on Scoping Memo (GPI Opening Comments), p. 19, filed in R.18-07-017 on November 14, 2018.

9 *Windham Solar LLC*, footnote 13.

10 Winding Creek Opening Comments, p. 6.

11 This fact was most clearly demonstrated by the decision of the United States Court of Appeals for the Seventh Circuit, which held that renewable QFs that could not produce a firm supply of power were not even eligible for fixed-price contracts *of any term*. *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 396 (5th Cir. 2014). *See also Niagara Mohawk Power Corp. v. FERC,* 117 F.3d 1485, 1488 (D.C. Cir. 1997) ("A [FERC] order that does no more than announce the Commission's interpretation of the PURPA or one of the agency's implementing regulations is of no legal moment unless and until a district court adopts that interpretation when called upon to enforce the PURPA.").

12 As more fully set forth in Section III herein.

preclude future development. Such a term length will provide flexibility for a generator that seeks near-term certainty combined with the flexibility to capture future pricing without being locked into a fixed price that falls below market pricing. The Joint Proposal can be used by developers in the market, and accomplishes the Commission's goals in this proceeding – to create a fixed-price standard offer contract for energy and capacity pursuant to a legally enforceable obligation over a specified term based on the utility's avoided costs at the time the obligation is incurred.[13] While longer-term contracts may further enhance access to financing, it would be unreasonable to reject the Joint Proposal based on unsubstantiated claims by Winding Creek and GPI that the term length is not sufficient to foster investment and to comply with the requirements of PURPA.

II.

PURPA DOES NOT MANDATE A FORWARD-LOOKING FORECAST TO DETERMINE AVOIDED COSTS

Winding Creek incorrectly states that 18 C.F.R. § 292.304(d)(2)(ii) "requires a forward-looking forecast. Looking backwards 3 years is not a forecast of *future* avoided costs [,]"[14] and for that reason the Commission should reject the Joint Proposal. Contrary to Winding Creek's assertion, 18 C.F.R. § 292.304(e) sets forth specific factors that should be taken into account, to the extent practicable, in determining utility avoided costs.[15] Notably, PURPA's enumerated factors in determining avoided costs do not mandate a forward-looking forecast be utilized, or even suggest that such an approach is preferred over a historical approach.

Ironically, the very relief that Winding Creek seeks through the Ninth Circuit, *i.e.*, a ReMAT contract price at the $89.23MWh,[16] is premised on an avoided cost calculated using

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[13] 18 C.F.R. § 292.304(d)(2)(ii).
[14] Winding Creek Opening Comments, p. 6.
[15] 18 C.F.R. § 292.304(e).
[16] Winding Creek Opening Comments, p. 3.

historical data. In D.12-05-035, which was issued in May 2012, the Commission set the starting ReMAT price of $89.23/MWh "based on the weighted average contract price of [PG&E, SCE, and SDG&E's] highest priced executed contract resulting from the Commission's Renewable Auction Mechanism held in November 2011."[17] Therefore, contrary to Winding Creek's assertion, not only does PURPA not "require" a forward-looking forecast to determine avoided cost, ReMAT's initial price was set using historical data. The diverse parties to the Joint Proposal considered various pricing methodologies and concluded that the three-year historic average is consistent with PURPA and is the best available method for this proceeding. Accordingly, the Joint Parties urge the Commission to adopt the pricing mechanism included in the Joint Proposal.

III.

THE JOINT PROPOSAL REPRESENTS A CONSENSUS AMONG A DIVERSE GROUP OF STAKEHOLDERS

From the onset, this proceeding was intended to be narrow in scope and the ALJ set forth a procedural schedule intended to promote an efficient proceeding.[18] And, ostensibly for the purpose of meeting these goals, the Scoping Memo encouraged parties to reach a settlement in this proceeding or include a joint proposal in their November 14, 2018 comments.[19] To that end, the Joint IOUs worked diligently and conducted extensive outreach with the parties in this proceeding to reach a fair and efficient consensus that is responsive to the August 1, 2018 Order Instituting Rulemaking (OIR) commencing this proceeding, which addresses the *Winding Creek Order* as discussed in the Joint IOU Reply Comments.[20]

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[17] D.12-05-035, issued May 31, 2012, p. 2.

[18] Order Instituting Rulemaking Regarding Continued Implementation of the Public Utility Regulatory Policies Act, p. 8, and Scoping Memo, p. 4.

[19] Scoping Memo, p. 5.

[20] *See generally*, Joint IOU Reply Comments, filed September 24, 2018.

Additionally, on October 18, 2018, the Commission convened a Workshop at which numerous parties participated and the Joint Parties presented a proposal for the parties' review, consisting of a list of terms material to the development of a new Standard Offer Contract (SOC) that would remedy the deficiencies noted by the *Winding Creek* Court. On October 19, 2018, the Joint IOUs distributed to the Service List their then-current proposal of terms for the new SOC, and the Joint IOUs likewise noticed and conducted an all-party conference call on October 26, 2018 (the Conference Call) to afford all parties an opportunity to ask questions and provide feedback on the proposal. Since the Conference Call, the parties have continued to work together to reach a consensus that represents the interests of a broad range of stakeholders. The Joint Proposal, which as of this filing has been tentatively agreed to by 12 different parties,[21] accomplishes just that. Accordingly, the Joint Proposal should be adopted because it achieves the OIR's stated purpose and represents a SOC developed and agreed to by a broad and diverse group of stakeholders.

IV.

GPI FUNDAMENTALLY MISUNDERSTANDS PURPA

GPI's Opening Comments lack substantive merit and demonstrate a fundamental misunderstanding of the current and historical framework through which PURPA operates. In particular, GPI attempts to broaden the scope of this OIR to obtain additional subsidies for under 20 MW "in front of the meter" renewable resources by misinterpreting and misconstruing the role of the SOC and ReMAT in favor of GPI's stated policy goal of "reducing the environmental impacts of fossil-based energy systems." The Joint Parties certainly are in favor of achieving the State's ambitious renewable energy goals and are among those on the front lines of that effort. However, the Joint Parties strongly disagree with GPI's assertion that such goals

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[21] PG&E, SCE, SDG&E, APT Solar Company, Association of California Water Agencies, the California Wind Energy Association, the Clean Coalition, Division Solar, LLC, Poco Power, LLC, Solar Electric Solutions, LLC, Utica Water and Power Authority, and ImModo Development LLC.

can only be achieved by adopting a novel interpretation of PURPA that goes far beyond the intent and the language in the statute.

A. PURPA Does Not Set a Price Floor For Projects 20 MW and Below

GPI's Opening Comments incorrectly describe PURPA as a "carveout" allowing states to regulate sales from projects at or below 20 MW by setting "a floor below which states cannot go with any program involving interstate sales."[22] Contrary to GPI's assertion, PURPA does not allow states to regulate the price of sales by QFs or to set a "floor" for such sales. Rather, PURPA permits QFs to charge any price that results from bilateral negotiations, whether above or below avoided cost.[23] Also, PURPA requires utilities to *purchase* from QFs (*i.e.*, whether fossil-fueled cogenerators of any size or renewables no larger than 80 MW) *on a mandatory basis* at a *maximum* rate not to exceed the utility's avoided cost.[24] [25] In fact, the levels of the SOC's energy and capacity rates were not evaluated *in any context* in the *Winding Creek* case as to whether the avoided-cost *maximum* for mandatory purchases was met. Contrary to GPI's claims, the *Winding Creek* decision did not judge whether the SOC or ReMAT programs met a "floor." Rather, the district court in *Winding Creek* explained that the *single* pricing mechanism in the existing QF SOC could not meet the *two* required pricing options under FERC's PURPA regulations.[26] ReMAT's avoided cost methodology also was found to be flawed, but there was no determination made that it exceeded avoided cost and the proposed SOC should render moot any inconsistencies between ReMAT and FERC's PURPA regulations.[27]

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[22] GPI Opening Comments, p. 5.

[23] FERC's PURPA regulations permit voluntary sales by QFs at negotiated rates. 18 C.F.R. § 292.301(b)(2). QFs larger than 20 MW must obtain market-based rate authority from FERC to sell power on a negotiated basis.

[24] *See* 18 C.F.R. § 292.304.

[25] The Joint IOUs, like most ISO-member utilities, have been released from this purchase obligation as to all QFs larger than 20 MW.

[26] Winding Creek, at 16 (noting that the CPUC does "not identify any program that even arguably satisfies 18 C.F.R. § 292.304(d)(2)(i)" and that "[t]his violates PURPA.")

[27] *See Winding Creek,* at 14.

B. PURPA Contracts are Not "Required" to Encourage Renewables

GPI further confuses the purpose of PURPA by incorrectly claiming that PURPA "contracts must 'encourage' renewables."[28] That statement is inaccurate. PURPA's goal, set in the 1970s, was to encourage *both* (fossil-fueled) cogenerators and renewables, *to the extent* such encouragement would not increase the overall cost of power for consumers.[29] California's aspirational renewable goals are being achieved outside PURPA avoided-cost contracts for in-front-of-the-meter generation, for example, through renewable mandates for utility- and distribution-scale renewables such as the Renewable Portfolio Standard, Renewable Auction Mechanism, and ReMAT programs. As a result of these mandates, renewable resources (excluding large hydro) accounted for nearly 30% of total California in-state electricity generation as of 2017.[30] Moreover, remedying the purported gaps in the state's implementation of PURPA that were identified in *Winding Creek* will enable the Commission to continue implementing the ReMAT program, which will continue to promote small-scale wholesale renewable energy generators. California has excelled at encouraging renewables through various policies.

V.

PROCESS

The Joint Parties support the goal of this OIR to address the holdings of the *Winding Creek* Court so that the Commission may take any necessary actions to lift its suspension of the ReMAT program. The *Winding Creek* injunction and associated Commission suspension have brought development of ReMAT-eligible projects to a halt. In furtherance of the goal to make

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[28] GPI Opening Comments, p.16.

[29] PURPA Section 210 "is not intended to require the ratepayers of a utility to subsidize cogenerators or small power producers." Joint Explanatory Statement of the Committee of Conference, H.R. Rep. No. 1750, 95th Cong. 2d Sess. 98 (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 7797, 7832.

[30] *See* California Energy Commission, Tracking Progress (updated August 2018) at p. 6.

ReMAT available again to generators of renewable energy, the Joint Parties urge the Commission to move this proceeding forward as quickly as possible. The Joint Parties also urge the Commission to leave this proceeding open until the ReMAT injunction is lifted to minimize delay in the event additional revisions are needed.

VI.

CONCLUSION

For the reasons set forth above and in the Joint Proposal of the IOUs and Qualifying Facility Parties filed on November 14, 2018, the Joint Parties recommend that the Commission adhere to the narrow scope of this OIR and adopt a short-term QF SOC with fixed prices at the time of execution as more fully set forth in the Joint Proposal.

Respectfully submitted on behalf of
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