Winding Creek Solar LLC v. Peevey, 2017 WL 6040012 (N.D. Cal. Dec. 6, 2017),
appeal filed **Winding Creek Solar LLC v. Peterman (9th Cir., Dec. 22, 2017).**

FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER ON SUMMARY JUDGMENT

JAMES DONATO, United States District Judge

Plaintiff Winding Creek Solar LLC has sued the Commissioners of the California Public Utilities Commission ("CPUC") for a declaration that three CPUC orders conflict with federal law and consequently violate the Supremacy Clause of the United States Constitution. The CPUC orders set up a procurement program called "Re-MAT" (short for "Renewable Market-Adjusting Tariff"), and regulate the terms on which utility companies like the Pacific Gas and Electric Company ("PG&E") must purchase power from alternative energy power production facilities like small wind farms and solar projects. Winding Creek intends to build such a solar project in Lodi, California, and it seeks a long-term contract to sell the energy from the proposed facility to PG&E. It sued because it believes the CPUC orders in dispute prevented it from getting a contract entitlement under the Public Utility Regulatory Policies Act ("PURPA").

BACKGROUND

To frame the rather technical dispute between the parties, the Court summarizes the statutory context set out in a prior order. Under the Federal Power Act ("FPA"), 16 U.S.C. § 791a et seq., the interstate commerce of electric energy at wholesale is subject to regulation by the Federal Energy Regulatory Commission ("FERC"). In 1978, Congress enacted the Public Utility Regulatory Policies Act ("PURPA"), which amended the FPA. PURPA was enacted to encourage the development of renewable sources of energy, and "thus to reduce American dependence on fossil fuels by promoting increased energy efficiency." *Indep. Energy Producers Ass'n, Inc. v. Cal. Pub. Util. Comm'n*, 36 F.3d 848, 850 (9th Cir. 1994). To that end, PURPA directs FERC to prescribe "such rules as it determines necessary to encourage cogeneration and small power production," including rules that require electric utilities to offer to "purchase electric energy from [qualifying cogeneration and small power production facilities]." 16 U.S.C. § 824a-3(a). * * *

The outcome of this case turns on three key requirements under PURPA and its implementing FERC regulations. The first is what the parties have referred to as the "must-take obligation," which is industry short-hand for the proposition that PURPA requires FERC to encourage small power production with rules that "require electric utilities to offer to ... purchase electric energy from [qualifying] facilities." 16 U.S.C. § 824a-3(a). FERC's implementing regulations state that "[e]ach electric utility shall purchase ... any energy and capacity which is made available from a qualifying facility ... [d]irectly to the electric utility." 18 C.F.R. § 292.303(a)(1). A few exceptions exist for this mandatory purchase obligation, but the parties agree that they do not apply here.

The second and third legal requirements that are critical to this case have to do with pricing. PURPA and FERC's regulations not only mandate that electric utilities must purchase energy and capacity from qualifying facilities, they also set certain required terms for those purchases. Under 18 C.F.R. § 292.304(b)(2), utilities must purchase energy and capacity from qualifying facilities at a rate that "equals the avoided costs" of the utility. * * *

The regulations also require that qualifying facilities be given a choice in the pricing of the energy sales to the utilities. Under 18 C.F.R. § 292.304(d):

> Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the term, be based on either:
>
> (i) The avoided costs calculated at the time of delivery; or
>
> (ii) The avoided costs calculated at the time the obligation is incurred.

The parties agree that section (d)(2) is the pertinent provision in this case because Winding Creek sought a "legally enforceable obligation for the delivery of energy or capacity over a specified term" to secure financing for its planned but unbuilt solar facility. * * *

The three specific CPUC orders that plaintiff challenges are: D.12-05-035 (the "May 2012 Order"), D.13-01-041 (the "January 2013 Order") and D.13-05-034 (the "May 2013 Order"). As Winding Creek alleges, these orders set the terms on which California's investor-owned utilities such as PG&E must enter into long-term, fixed-price contracts with qualifying facilities such as Winding Creek's Lodi facility. The overall procurement program established by these orders is known as the "Re-MAT Program," (the "Renewable Market-Adjusting Tariff" or " 'Re-MAT' for short"), and Winding Creek focuses its attack on two aspects of the program. It challenges the 750-megawatt statewide cap that the program places on the electric utilities' collective obligation to purchase electricity from qualifying facilities. It also alleges that "the Orders provide for a purchase price that is different than the utilities' avoided costs." Winding Creek asserts that both of these aspects of the Re-MAT program conflict with PURPA and the regulations enacted by FERC pursuant to PURPA.

* * * Tracking its complaint, Winding Creek sought summary judgment on the grounds that the Re-MAT Program violates PURPA because (i) it caps the amount of electricity that utilities must purchase from qualifying facilities, and (ii) the rate offered under the program is not based on the utilities' avoided costs.

Defendants sought summary judgment in their favor on the same issues, but in doing so, they relied heavily on a different CPUC procurement program: the "mandatory Standard Contract that California utilities must offer smaller QFs of 20 MW or less generation capacity under PURPA." Defendants argued that the Re-MAT program's caps did not violate the utilities' purchase

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