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)

REPLY COMMENTS OF REMAT PARTIES ON PROPOSED DECISION ADOPTING NEW STANDARD OFFER CONTRACT FOR QUALIFYING FACILITIES OF 20 MEGAWATTS OR LESS

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, JTN Energy, Vejas Energy, LLC; Utica Water and Power Authority; Association of California Water Agencies; Nevada Irrigation District; and Clean Coalition ("ReMAT Parties") jointly submit the following reply comments on Administrative Law Judge ("ALJ") Peter Allen's April 3, 2020 Proposed Decision ("PD"). The ReMAT Parties request that the Commission promptly adopt the PD and re-open the Renewable Market Adjusting Tariff ("ReMAT") without further delay. None of the comments submitted on the PD justify further postponing the Commission's duty to adopt a PURPA-compliant standard offer contract ("SOC") for qualifying facilities ("QFs") of 20 megawatts or less.

II. THE COMMISSION MUST NOT FURTHER DELAY THIS PROCEEDING

It has now been almost two and a half years since the Commission suspended the ReMAT program in the wake of the Federal District Court's decision in *Winding Creek Solar LLC v. Peevey*, 293 F.Supp.3d 980 (N.D. Cal) (2017). The Commission opened this Order Instituting Rulemaking on July 26, 2018, to consider adoption of a new standard offer contract in light of *Winding Creek Solar* and its obligations under FERC's Public Utility Regulatory Policies Act of 1978 ("PURPA") regulations. On July 29, 2019, the Ninth Circuit Court of Appeals unanimously affirmed the *Winding Creek Solar* decision. *Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (2019). As required by Public Utilities Code § 1701.5(a), the Commission has already extended the deadline to resolve this proceeding once, from January 25, 2020 to July 25, 2020.

The lengthy delay in adopting a new SOC, and in re-opening ReMAT, has been devastating to renewable energy developers and asset owners, who have been forced to cease or suspend the development of small renewable energy projects. These projects were simply not viable without the predictability that ReMAT is designed to offer. Not only have the cessation and suspension of such projects caused severe financial consequences for developers and asset owners, they have also impeded the development of renewable energy at a time when California's renewable energy goals, and the looming climate crisis, require just the opposite. Moreover, the window of opportunity for smaller renewable projects may be closing, in light of the expiring production tax credit ("PTC"), and the step down of the investment tax credit ("ITC") at the end of this year. The two and a half year period since the December 15, 2017 suspension of ReMAT has already seen a number of small renewable developers go out of business or abandon projects, unable to weather the delay. Those impacts will only increase if the Commission fails to promptly take action on this PD.

Nor should the Commission delay this proceeding until the Federal Energy Regulatory Commission ("FERC") issues a Final Rule in *Qualifying Facilities Rates and Requirements; Implementation Policies Under the Public Utilities Regulatory Policies Act of 1978*, 168 FERC ¶ 61,184 (2019) ("PURPA NOPR"). At this stage of the PURPA NOPR, it is impossible to tell when, or if a Final Rule will be adopted, or what that Rule might contain. Furthermore, any Final Rule would likely be subject to further legal challenges, further extending the time before a Final Rule is implemented. The CPUC must abide by the law as it is today, not as it might be. And it must do what the Court ordered in *Winding Creek Solar*--adopt a PURPA-compliant program.

In their Joint Opening Comments, the investor-owned utilities ("IOUs") contend that if FERC ultimately adopts the rule it has proposed in the PURPA NOPR, "this rulemaking will be rendered moot because the QF Settlement SOC would meet the new regulatory requirement." Joint IOU Comments at 3. That assertion is deeply flawed. First, the PD SOC would also meet that new regulatory requirement. Therefore, if the proposed rule is adopted, the Commission would not be required to revise the PD SOC. Second, current law requires a revised SOC. Unless and until FERC adopts a Final Rule, programs like ReMAT cannot proceed, and this proceeding is necessary to allow those programs to re-open.

III. THE PD SOC CONTRACT TERM LENGTHS ARE SUPPORTED BY THE RECORD

The parties to this proceeding have advocated for a variety of contract term lengths, from three years to over twenty years. However, it is ultimately in this Commission's discretion to determine the appropriate term length for qualifying facility contracts under PURPA. As FERC itself has noted, FERC's regulations do not "specify a particular number of years for such legally enforceable obligations." *Windham Solar LLC*, 157 FERC ¶ 61,134 (2016) at 8, fn. 13. This is consistent with the United States Supreme Court's and the Ninth Circuit's determinations that states have broad discretion to implement PURPA. *FERC v. Mississippi*, 456 U.S. 742, 749-51 (1982); *Independent Energy Producers Association v. CPUC*, 36 F.3d 848, 856 (9th Cir. 1994). Having argued that the Commission has broad discretion to select the appropriate length for a QF contract, the IOUs cannot now complain that the Commission exercised that discretion and chose to implement a longer term than the IOUs suggested.

The Joint IOU Opening Comments contend (at p. 7) that the record is insufficient to establish that the seven and twelve year terms adopted by the PD are just and reasonable and in the public interest. That contention is incorrect. This OIR proposed to start with the non-price terms provided in the QF Settlement SOC, which had already been considered and adopted by this Commission in D.10-12-035. The burden was therefore on the parties to establish a record sufficient to deviate from the term lengths that the Commission had already adopted, based on an earlier record.

The parties were also given substantial opportunities to augment the record concerning appropriate contract term lengths. On October 22, 2019, ALJ Allen issued a Ruling providing additional information concerning the contract terms for all renewable portfolio standard and combined heat and power contracts provided to the Commission for the period January 2016 through September 2019. Those contracts had terms ranging from ten to twenty-five years, and provided a record that longer contract terms might be appropriate. The Ruling also provided all parties with the opportunity to provide supplemental comments to augment the record on term length. Based on that detailed record, the PD proposes that the Commission exercise its discretion and approve maximum terms of seven and twelve years. While parties may disagree with that conclusion, there is clearly record support for that decision.

IV. LONG-TERM FIXED PRICE CONTRACTS WILL PROVIDE RATEPAYER BENEFITS

The IOUs also contend that seven and twelve year fixed price contracts "are likely to result in customers paying QF contract costs that materially exceed the utility's avoided costs over the contract term." IOU Opening Comments at 6. That claim is unsupported by the record. To the contrary, as the PD notes, the Staff Proposal found that CAISO prices have remained remarkably stable over the past three years, and appear to be consistent with long-term contracts recently executed for renewable resources. PD at 40. And while staff noted that increased penetration of renewables could exert downward pressure on prices, the Staff Proposal also noted that fluctuations in gas prices and supply and demand balances could have the opposite effect. *Id.* Furthermore, the elimination of the PTC and the step down in the ITC at the end of this year will likely exert upward pressure on renewable pricing.

The IOUs attempt to refute this evidence by presenting, in Appendix C to their Opening Comments, the hourly average day-ahead LMP for a single generator. However, a single location cannot be extrapolated to represent the entire market. Nor can a single solar PV generator represent the range of QF technologies. Finally, the IOUs' own data shows that prices rose in 2019, as compared to 2018, undercutting the IOUs contention that a long-term fixed price will inevitably result in ratepayers overpaying because prices will fall. To the contrary, a long-term fixed price contract can be a valuable hedge against potential price increases, and can provide significant benefits to ratepayers. Nothing in the record supports the IOUs' contention that the contracts will likely result in ratepayer harm.

V. ReMAT IS NOT REQUIRED TO INDEPENDENTLY COMPLY WITH PURPA

In its Opening Comments, Winding Creek Solar LLC contends, among other things, that ReMAT must independently comply with PURPA.[1] That assertion is flatly incorrect as a matter of law. FERC has recognized that "as long as a state provides QFs the opportunity to enter into long-term legally enforceable obligations at avoided cost rates, a state may also have alternative programs that… limit how many QFs or the total capacity of QFs, that may participate in the

[1] Winding Creek's Reply Comments also contain a lengthy effort (well in excess of the five pages accorded to reply comments) again arguing this settled point of law. Given that legal brief fails to respond to any party comments and is overlength, it should be rejected as violating the Commission Rules of Practice and Procedure, Rule 14.3.

[alternative] program." *Winding Creek Solar* LLC, 151 FERC ¶ 61,103 (2015). Both the District Court and the Ninth Circuit in the *Winding Creek* Solar case also accepted FERC's interpretation regarding alternative programs. *See Winding Creek Solar*, 932 F.3d at 865. Winding Creek Solar is improperly attempting to re-argue legal issues it lost in other forums. Settled law permits the Commission to re-open ReMAT as soon as it adopts the PD, and the Commission should re-open ReMAT as soon as practicable after the PD is adopted.

VI. CONCLUSION

The suspension of the ReMAT program for almost two and half years has caused immense damage to small renewable developers, and the upcoming elimination of the PTC and reduction of the ITC mean that any further delay in re-opening ReMAT will have further adverse consequences. The ReMAT Parties urge the Commission to adopt the PD, and move forward with re-opening ReMAT.

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Respectfully submitted,

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