BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Southern California Edison Company (U 338-E) for Applying the Market Index Formula and As-Available Capacity Prices Adopted in D.07-09-040 to Calculate Short-Run Avoided Cost for Payments to Qualifying Facilities Beginning July 2003 and Associated Relief	Application 08-11-001 (Filed November 4, 2008)
And Related Matters	Rulemaking 06-02-013 Rulemaking 04-04-003 Rulemaking 04-04-025 Rulemaking 99-11-022

REPLY OF THE ENERGY PRODUCERS AND USERS COALITION ON RESPONSES TO THE PETITION OF THE ENERGY PRODUCERS AND USERS COALITION FOR MODIFICATION OF DECISION 10-12-035

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Pursuant to Rule 16.4(g) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Energy Producers and Users Coalition[1] (EPUC) submits this reply to responses to the Petition for Modification of Decision 10-12-035 (Petition). EPUC received permission to file its reply from Administrative Law Judge Amy Yip-Kikugawa via e-mail on March 25, 2014.

I. INTRODUCTION

On February 6, 2014 EPUC filed a Petition for Modification of Decision 10-12-035. The Petition proposed no changes to the Settlement, but sought clarification of the Commission's intent in adopting the CHP Settlement. EPUC requested clarification that short-run avoided cost (SRAC) -based Power Purchase Agreements (PPAs) are a part

[1] EPUC is an ad hoc group representing the electric end use and customer generation interests of the following companies: Aera Energy LLC, Chevron U.S.A. Inc., ExxonMobil Power and Gas Services Inc., Phillips 66 Company, Shell Oil Products US, Tesoro Refining & Marketing Company LLC, THUMS Long Beach Company, and Occidental Elk Hills, Inc.

of the Commission under the Public Utility Regulatory Policies Act of 1978 (PURPA.) Without the authority from PURPA the Commission would have no legal authority to set wholesale prices.

EPUC replies to the California Cogeneration Council (CCC) and Southern California Edison Company, Pacific Gas and Electric Company and San Diego Gas and Electric Company (Joint Utilities) regarding the following issues:

1. CCC misunderstands the scope of the Petition. CCC erroneously states that EPUC has asked the Commission for a ruling on combined heat and power (CHP) agreements entered into under a Request for Offer (RFO).[2] EPUC does not request clarification of the characterization of RFO contracts. The Petition addresses only SRAC-based as-available PPAs in the form of pro forma agreements or customized versions of such agreements.

2. CCC agrees with EPUC that Optional As-Available (OAA) contracts priced at SRAC are part of the Commission's continuing implementation of PURPA. It erroneously argues, however, that any bilateral SRAC priced contract is not a PURPA contract because the price was not "mandated" by the Commission. CCC offers no foundation for this distinction, and the end result of its distinction is duplicative regulation.

3. The Joint Utilities ask the Commission not to respond to the Petition, characterizing it as a request for declaratory relief. EPUC is asking for a clarification of policy, not a declaratory order or advisory opinion, and the Commission has made exceptions to this general policy where warranted. Reasonable implementation of the Settlement depends upon the Commission's clarification of its intent in approving the CHP Settlement in D.10-12-035.

4. The Joint Utilities repeatedly demonstrate an inability to distinguish between PURPA's mandatory purchase obligation and the broader PURPA framework in suggesting that EPUC is attempting to circumvent the obligation not to oppose the Joint Application under Section 210(m) of PURPA, and PURPA has no relevance for "new" contracts with QFs.

5. The Joint Utilities' conclusion that the Commission has previously answered the question presented by the Petition misinterprets D.10-12-035 and ignores key Federal Energy Regulatory Commission (FERC) decisions.

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[2] Response of the California Cogeneration Council to the Petition of the Energy Producers and Users coalition for Modification of Decision 10-12-035, filed March 17, 2014, p.9.

Other issues raised by these parties' Responses are addressed in the Petition.

II. RESPONSE TO CCC

A. EPUC Does Not Seek a Ruling on Contracts Resulting from an RFO Process.

CCC argues that EPUC has asked the Commission to clarify whether "*bilateral and **RFO** contracts where parties have agreed to SRAC pricing*"[3] are a part of the State's continuing implementation of PURPA. CCC's characterization of the Petition goes beyond EPUC's intent. The Petition requests that the Commission "*modify D.10-12-035 to clarify that Optional As-Available and **other SRAC-based PPAs** are a part of the state's implementation of PURPA.*"[4] While EPUC intended to include within the scope of this request certain as-available bilateral contracts, it does not seek a ruling on contracts that are the product of an RFO process.

CCC's confusion suggests that the Petition's reference to "bilateral" contracts requires further clarification. The Petition addresses contracts that arise from an existing as-available form, such as the OAA or the Standard Offer No. 1, but have been customized for reasons unique to a facility. While EPUC would argue that these contracts are for all practical purposes standard as-available contracts, a utility may seek to characterize the contract as a "bilateral" agreement. It is precisely these sorts of agreements, not agreements resulting from an RFO, that EPUC intended to include within the scope of its Petition.

To be clear, EPUC requests a ruling that two categories of contracts are part of the Commission's implementation of PURPA: (1) OAA contracts and (2) other

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[3] Id.

[4] Petition at 3.

customized as-available contracts (a) based on standard as-available forms, (b) including SRAC pricing and (c) resulting from negotiations that do not arise from a utility RFO. While EPUC has observed that all CHP Settlement agreements arguably are PURPA contracts,[5] the Petition requests clarification of the PURPA status of only "standardized" as-available agreements.

B. CCC's Contention that Only Contracts with "Mandated" SRAC Prices are Part of the Commission's PURPA implementation is Unfounded.

CCC argues that SRAC-priced contracts are a part of the Commission's implementation of PURPA only when SRAC prices are "mandated" by the State.[6] It argues that SRAC-priced bilateral contracts are not PURPA contracts because "*avoided cost pricing is merely the price settled upon by contracting parties*."[7] CCC cites no authority for this misplaced conclusion.

FERC has not made the distinction articulated by CCC between SRAC prices that are "mandated" and those that are not. In *Watson*,[8] as echoed in *Berry*,[9] FERC relied on the presence of SRAC pricing in concluding that Transition Agreements under the CHP Settlement were part of the State's implementation of PURPA.[10] In so doing, FERC presents Watson's supporting position as follows:

> *Watson Cogeneration notes that the pricing in the Watson PPA is the standard Short Run Avoided Cost pricing for QFs approved by the California Commission, based on avoided cost principles under PURPA.*[11]

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5 Petition at 13.
6 CCC Response, pp. 9-10
7 Id. at 10.
8 *Southern California Edison, Order Dismissing Filing*, 143 FERC ¶ 61,222, ¶18 (2013) (*Watson*).
9 *Order Granting Rehearing and Dismissing Refund Report*, 143 FERC ¶ 61,223, ¶14 (2013) (*Berry*).
10 *Watson*, 143 FERC ¶ 61,222at ¶15.
11 Id. at ¶18.

FERC further stated:

> *We thus find that the Transition PPAs were approved pursuant to the California Commission's implementation of section 210 of PURPA. In this regard, we further note, the Transition PPAs, including the Watson PPA, possess a number of attributes that are characteristic of PPAs entered into pursuant to a state regulatory authority's implementation of PURPA; these attributes include* ***the fact that the contracts are priced at an avoided-cost rate established by the California Commission****, and are approved by the California Commission.*

Nowhere in *Watson* does FERC suggest that only "mandated" SRAC rates would be considered "*characteristic of PPAs entered into pursuant to a state regulatory authority's implementation of PURPA*."

In addition, CCC's argument that some SRAC priced contracts require market based rate authority (MBRA) and others do not makes no practical sense and would result in duplicative regulation. SRAC prices were set and approved by this Commission under D.07-09-040 and D.10-12-035; the State has thus deemed these rates to be reasonable. Why would the State ask facilities to submit to a second round of price regulation, through an MBRA filing with FERC? Wholesale prices should be overseen by FERC, under the Federal Power Act, or by the State, under PURPA. If the State has already deemed these prices reasonable in its implementation of PURPA, as evidenced by *Watson*, there is simply no good reason to require a facility to seek MBRA from FERC.

Even if CCC had a basis for its conclusion, the question of whether a price is "mandated" is a difficult question in the context of the CHP Settlement. Assume, for example, that a facility seeks to enter into an as-available agreement, but the circumstances require a customization of an as-available agreement (e.g., integrating a small renewable facility behind the same point of interconnection).

Under these circumstances, will the utility pay *more* for CHP power than SRAC? Will the CHP party expect *less* than SRAC? The reality is that because the CHP Settlement included SRAC pricing for the OAA program, the pricing for any as-available contract will fall at SRAC. For all practical purposes, there is no other option for a facility seeking an as-available contract.

For these reasons, the Commission, in responding to the Petition, should look at the nature of the price – an SRAC price developed and approved by the Commission. The inquiry of whether the price was "mandated" leads to an impractical conclusion and duplicative regulation.

III. RESPONSE TO THE JOINT UTILITIES

A. The Petition Seeks Clarification of this Commission's Intent in Approving the CHP Settlement in D.10-12-035, Not a Declaratory Order.

The Joint Utilities urge the Commission to reject the Petition as a request for declaratory order. The Petition does not seek a declaratory order or an advisory order, but seeks a clarification of foundational Commission policy. Moreover, even if the Petition sought such an order, the circumstances warrant an exception to the Commission's general policy against advisory opinions.

The Joint Utilities argue that any opinion issued by the Commission would be a declaratory order and would be in conflict with the agency's a longstanding policy against issuing advisory opinions or declaratory judgments.[12] The Joint Response also declares that "*EPUC admits that it is seeking [c]larification of the authority underlying*

[12] Joint Response of Southern California Edison Company, Pacific Gas and Electric Company, San Diego Gas and Electric Company to the Petition of the Energy Producers and Users Coalition for Modification of Decision 10-12-035 (Joint Response), filed March 17, 2014, p. 6.

SRAC-based pricing" to ensure that CHP facilities "*are fully aware of their obligations and rights under PURPA*."[13] The Joint Utilities misconstrue the Petition and the Commission's policy to reach their desired result.

To begin with, the Petition does not seek adjudication of any issue between a CHP facility and a utility, nor does it request a contract interpretation. While clarification of policy will assist CHP parties in their own analysis of federal requirements, the Petition does not request a ruling on the applicability of MBRA. Instead, the issue is a generic policy issue: what was the Commission's intent with respect to its implementation of PURPA when it adopted the CHP Settlement in D.10-12-035? The public should be able to rely on the Commission to explain its intent in adopting a new policy.

In addition, decisions relied on by the Joint Utilities in making this argument are readily distinguishable. The Joint Response relies on the *Application of San Diego Gas & Electric Co.*[14] This decision involved a petition by SDG&E for interpretation and enforcement of a specific power purchase agreement with Energy Factors, Inc. The Petition does not involve specific parties, nor does it ask for interpretation or enforcement of a contract. It asks a generic policy question of Commission intent.

The Joint Response also relies on *Application of Women's Energy, Inc.*,[15] in which the Commission dismissed an application by a party seeking to become an electricity provider for the Presidio of San Francisco. The Commission declined to rule because the applicant no longer appeared to "*require an order from this Commission determining the necessity of a CPCN,*" making the rehearing application on the matter

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13 Id. at 7.
14 42 CPUC2d 9 (1991).
15 75 CPUC2d 624 (1997).

unnecessary.[16] The Commission observed in passing that the application raised "*technical issues of statutory interpretation and federal constitutional law*," which raised the Commission's concern.[17] Again, this case pertained to a particular party and circumstance, and the dismissal was primarily driven by the elimination of need for the decision.

The Joint Response notes that *Women's Energy* cited *California American Water Company*[18] in observing that the Commission disfavors advisory opinions.[19] In fact, *California American Water Company* stands for a contrary proposition. In considering an application by a water utility for a certificate to take over the operations of a governmentally owned water district, the Administrative Law Judge recommended that the Commission "*depart from our general policy which does not favor the issuance of advisory opinions*"[20]:

> *While we have declared an intention to conserve our scarce judicial resources, we have recognized that matters of widespread public interest may warrant an exception …..*[21]

The Commission found that the exception was warranted, "*especially so when another agency of government would benefit from a timely expression of our views*."[22] Likewise, a resolution of the Petition's policy question would broadly benefit parties examining CHP options in California and clarify for FERC the treatment of these contracts for purposes of wholesale pricing regulation.

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16 Id. at 625.
17 Id.
18 *California-American Water Co.*, 58 CPUC2d 470 (1975) (*Cal-Am*).
19 Joint Response at 6.
20 *Cal-Am* at 476,
21 Id. at 476,
22 Id.

The Petition is not a request for a declaratory order or advisory opinion. It seeks a simple answer from the Commission on its intent in issuing D.10-12-035 and adopting the CHP Settlement. Circumstances warrant clarification from the Commission.

B. The Joint Utilities' Failure to Distinguish between PURPA's Mandatory Purchase Obligation and Other Elements of PURPA Leads to Erroneous Conclusions Regarding the Petition.

A number of arguments in the Joint Response erroneously center on the mandatory purchase obligation under PURPA, conflating the obligation with other elements of PURPA. Without question, EPUC agrees with the Joint Utilities that FERC has suspended the mandatory purchase requirement under the terms and conditions of its decision. [23] But that is not the relevant question. The question under the Petition is whether the Commission adopted the CHP Settlement otherwise as a part of its state authority under PURPA.

The Joint Utilities extensively discuss FERC's ruling under PURPA Section 210(m).[24] The Joint Response represents that FERC ruled that "*new CHP obligations are no longer part of the Commission's implementation of Section 210 of PURPA*…."[25] It argues that to suggest that the PURPA purchase obligation is somehow separate and distinct from the Commission's authority to administratively set prices under PURPA is "*tortured*."[26] The Joint Utilities seem to argue that because the FERC suspended the mandatory purchase obligation under Section 210(m) of PURPA, all of the Commission's authority under PURPA was eviscerated.

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[23] The Petition confirms this point throughout. *See, e.g.,* Petition at 6, 12 and 13.
[24] Joint Response at 16-19.
[25] Id. at 16-17.
[26] Id.

CCC, like EPUC, disagrees with the Joint Utilities' conclusion. CCC maintains that *"[n]otwithstanding a potential FERC termination of the mandatory PURPA purchase obligation for certain investor-owned utilities, PURPA (and the benefits and protections it provides to QFs) continues in full force and effect.*"[27] CCC discusses FERC's conclusions in its final order implementing Section 210.

> "*a QF will retain exemption from section 205 and 206 of the FPA when its sales are pursuant to a state regulatory authority's implementation of PURPA…. Moreover, many sales made pursuant to bilateral contracts between QFs and electric utilities (including contracts at market based rates) are made pursuant to a state regulatory authority's implementation of PURPA. The change in language, providing for exemptions for QF sales made pursuant to a state regulatory authority's implementation of PURPA, will ensure that such* ***sales from QFs, even where they happen to be pursuant to a bilateral contract and at market based rates, will continue to be exempt from sections 205 and 206 of the FPA***."[28]

The FERC decision in *Watson* similarly recognizes that certain contracts that are not entered into as a part of the mandatory purchase obligation may nonetheless be a part of the state's implementation of PURPA. FERC terminated the utilities' PURPA purchase obligations on June 16, 2011.[29] Yet in Watson, issued August 3, 2012, FERC acknowledged that Transition PPAs, entered into after FERC's 210(m) order, "*were approved pursuant to the California Commission's implementation of section 210 of PURPA*."[30] Indeed, FERC went so far as to conclude that "*the* ***QF/CHP Settlement*** *pursuant to which the Watson PPA was established is one of the California Commission's procurement programs established pursuant to PURPA*."[31]

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27 CCC Response at 5.

28 Id. at 5-6 (quoting Revised Regulations Governing Small Power Production and Cogeneration Facilities, Order 671 at ¶99 (February 2, 2006).

29 Pac. Gas and Elec. Co., 135 FERC ¶61,234 (2011),

30 *Watson* at ¶18.

31 Id. (emphasis supplied).

The Joint Utilities suggest that FERC's 210(m) decision called an end to any new contract under PURPA.[32] They even suggest that EPUC is "circumventing" the Settlement by suggesting otherwise and has presented no evidence that the settling parties' adoption of SRAC pricing resulted from the Commission's implementation of PURPA.[33] To the contrary, EPUC is not bound to share the Joint Utilities' view on the Commission's intent, and substantial evidence from FERC directly supports the conclusion that the CHP Settlement is a part of the Commission's implementation of PURPA.

C. The Commission Did Not Address This Issue in D.10-12-035.

The Joint Utilities argue that the Commission has already addressed the issue presented by EPUC in a prior decision. They quote the Settlement Decision, which concluded that that the contract prices were not "*mandated*" by the Commission, nor were they an "*exercise of the Commission's ratesetting authority under PURPA*."[34] As explained in Section II.B. of this Reply, the question of whether the prices were or were not mandated is not the pivotal question; the question is whether the contracts are a part of the state implementation of PURPA. Moreover, the implication drawn out by the Joint Utilities – that no price under the Settlement was the result of implementation of PURPA -- turns *Watson*[35] and Order 671 on their heads. FERC made abundantly clear in Order 671 that even bilateral, market based contracts could be a part of the state's implementation of PURPA.[36]

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32 Joint Response at 16-19.
33 Joint Response at 9, 12.
34 Joint Response at 14 (erroneously quoting D.10-12-035).
35 *Watson* at ¶18. *("[T]he QF/CHP Settlement pursuant to which the Watson PPA was established is one of the California Commission's procurement programs established pursuant to PURPA*".)
36 *See supra* n. 31.

IV. CONCLUSION

For all of the foregoing reasons and the reasons stated in the Petition, EPUC requests that the Commission clarify its intent to implement the CHP Settlement as a part of its authority under PURPA.

Respectfully submitted,

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