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

PETITION OF THE ENERGY PRODUCERS AND USERS COALITION FOR MODIFICATION OF DECISION 10-12-035

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Pursuant to Rule 16.4 of the Commission's Rules of Practice and Procedure, the Energy Producers and Users Coalition (EPUC)[1] submits this Petition for Modification of Decision 10-12-035, which adopted the *Qualifying Facility and Combined Heat and Power Program Settlement Agreement* (Settlement). The Petition proposes no change to the Settlement, but seeks clarification of the pricing authority underlying certain Settlement procurement options.

I. RULE 16.4(d) STATEMENT

More than a year has passed since the effective date of D.10-12-035. This Petition has been deferred until now for two reasons. First, interested parties began discussing this issue nearly two years ago, with the supervision of the Commission's

[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 of Elk Hills, Inc.

Legal Division, and hoped to reach a common understanding. No common understanding was reached. In addition, an answer to this question has become more pressing because parties have now executed contracts that will be directly affected by the Commission's determination.

II. INTRODUCTION

The Settlement provides several procurement options with Commission-approved capacity prices and short-run avoided cost (SRAC) energy prices.[2] EPUC requests clarification that these SRAC-based power purchase agreements (PPAs) were adopted by the Commission under the Public Utilities Regulatory Policies Act of 1978 (PURPA). Federal law compels this conclusion; apart from PURPA, the Commission has no legal authority to set wholesale prices. By clarifying its jurisdiction, the Commission will clarify the obligations of combined heat and power (CHP) facilities under the laws and regulations governing wholesale pricing.

Decision 10-12-035 adopts a range of contracting and pricing options for CHP facilities participating in the Settlement. The Commission has established SRAC energy prices and capacity prices for Transition, Legacy and Optional As-Available PPAs.[3] A utility may also use this administratively determined pricing in bilateral contracting or modifications of existing Legacy PPAs.[4] Neither the Settlement nor D.10-12-035, however expressly addresses legal authority for the Commission to set SRAC-based pricing.

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[2] The term "SRAC-based" in this Petition means the form of pricing established in Term Sheet §10, which includes SRAC energy prices and designated capacity prices as provided in Term Sheet § 3.2.1 and § 4.6.2.2.

[3] *CHP Program Settlement Agreement Term Sheet* (Term Sheet), §10.1.1, at 45 (2010). While the prices for these contracts include capacity and energy prices, the Petition refers to the overall pricing structure as "SRAC-based" pricing.

[4] *See* Term Sheet, §4.3, at 20-21.

Federal law compels the conclusion that the Commission must have intended for all SRAC-based contracts to be a part of its ongoing implementation of PURPA. The Commission's sole jurisdiction to set wholesale prices resides in PURPA. Moreover, in a 2013 order finding Transition PPAs to be grounded in PURPA, FERC observed: "*the QF/CHP Settlement …. is one of the California Commission's procurement programs established pursuant to PURPA*."[5]

Clarification of the authority underlying SRAC-based pricing would ensure that CHP facilities are fully aware of their obligations and rights under the PPAs. If the PPA is offered under a PURPA state implementation plan, the CHP facility is "*exempt from most provisions of the [Federal Power Act], including section 205*."[6] A QF cogeneration facility selling power solely under such an implementation plan is not required to maintain Market Based Rate Authority under FERC regulations.[7] Instead, the state ensures the reasonableness of wholesale power prices.

The Commission should 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.

III. CERTAIN SETTLEMENT CONTRACT OPTIONS RELY ON ADMINISTRATIVELY DETERMINED PRICING.

The Commission has played a material role in determining wholesale power prices for certain contracts under the Settlement. In adopting the Settlement, the Commission administratively established prices, including SRAC energy prices and

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5 *Order Dismissing Filing,* 143 FERC ¶ 61,222 (2013), ¶18.

6 Id. ¶14.

7 18 CFR §601 [exempting QFs from Sec. 205 regulation]; 18 CFR §35.36, *et seq*.[regulations regarding market-based rate authority].

capacity prices, for Transition, Legacy QF PPAs and Optional As-Available PPAs.[8] It also leaves open the option to use this pricing structure for bilateral agreements.[9]

The Commission's dominant role in setting SRAC-based prices is evident throughout the Settlement. Every element of the price paid under SRAC-based PPAs has been administratively determined. Facilities selling under these PPAs receive energy payments based on formulas adopted in D.10-12-035; the utilities calculate the SRAC price monthly using these formulas "*pursuant to D.10-12-035*" and Resolution E-4246.[10] The energy price includes:

- a variable operations and maintenance (VOM) component approved "*per D.07-09-040 and CPUC Resolution E-4246*;"[11]
- Commission-approved time of use factors;[12] and
- a burnertip gas price "*per 07-09-040 and CPUC Resolution E-4246*."[13]

The capacity prices for these PPAs, like some elements of the energy price, were determined by the Commission in D.07-09-040.[14]

While there are two elements of the SRAC energy price that rely on market indices, even these elements require administrative choice and adjustment. The SRAC formula relies on a burnertip gas price in calculating the energy payment.[15] The commodity component uses market indices selected from a range of possible indices,

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8 D.10-12-035, Appendix A; Term Sheet, §10, at 45-46.
9 Term Sheet, §4.3, at 20-21.
10 *See, e.g.*, PG&E posting http://www.pge.com/b2b/energysupply/qualifyingfacilities/prices/; *see also* SCE posting https://www.sce.com/wps/portal/home/regulatory/renewable-alternative-power/qualifying-facilities-data-documents/!ut/p/b0/04_Sj9CPykssy0xPLMnMz0vMAfGjzOINLdwdPTyDDTwtfAKNDTydnDz9zdxMjA28jfSDU_P0C7IdFQGGI783/ .
11 Term Sheet, §10.2.1.1, at 46.
12 *Id.* §10.2.1.1, at 46-47.
13 *Id.* §10.2.1.1, at 46.
14 *See id.* §4.6.2.2, at 22.
15 *Id.* (variable BTGP).

and the Commission approved these particular indices.[16] The end-use transportation rate used in the formula is administratively determined by the Commission in natural gas distribution company rate cases. Importantly, SRAC formulas used by the Commission even prior to the Section 201(m) termination – which were a part of the Commission's implementation of PURPA -- also used these gas-price indices.[17] The Commission also notes in D.10-12-035 that the heat rate element of the SRAC formula will transition in 2015 from an administratively determined heat rate to a market-based heat rate.[18] Even these "market-based" heat rates, however, cannot be found explicitly in the market, but will be derived from market-based energy prices through administratively determined calculations.[19]

The Commission's strong hand in price development will continue in overseeing Settlement implementation. The Settlement and all Settlement PPAs are subject to Commission approval and oversight. Section 16.1 of the Term Sheet conditioned the Settlement on Commission approval.[20] Section 4.10 makes clear that all PPAs of five years or more require "*advance CPUC approval according to existing CPUC policy*."[21] While contracts of less than five years are not subject to the CPUC-approval advice letter process, the Settlement contemplates that these agreements will rely on the pro forma PPAs containing SRAC pricing as approved by the Commission with the Settlement.

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16 *See* Resolution E-4246, pp. 26-27.
17 *See, e.g.*, id. at 4-8.
18 D.10-12-035, pp. 19-20.
19 *See* Resolution E-4246, pp. 28-31.
20 D.10-12-035, Appendix A; Term Sheet, §16.1, at 61.
21 Term Sheet, § 4.10.3, at 25.

All elements of SRAC-based prices were directly and expressly determined in D.07-09-040, Resolution E-4246 and D.10-12-035. These prices, therefore, were not set by the market, but have been administratively determined.

IV. NEITHER THE SETTLEMENT NOR D.10-12-035 EXPRESSLY STATES WHETHER CERTAIN PPAS ARE ADMINISTERED BY THE COMMISSION UNDER PURPA.

Neither the Settlement nor D.10-12-035 expressly states whether SRAC-priced contracts are administered by the Commission under the federal delegation of authority under PURPA. Certain Settlement provisions, however, strongly suggest that the SRAC-priced contracts -- indeed the entire Settlement -- are a part of the state's implementation of PURPA.

The Settlement Term Sheet mentions PURPA in several places, but fails to specify whether SRAC-priced PPAs fall within the Commission's PURPA authority.

- Section 1.1.2 states that an objective of the settlement is to *"[c]reate a smooth transition from the existing QF CHP PURPA Program to a State-administered CHP Program*."

This section does not state whether the transition will be deemed to conclude during or at the end of the Settlement term. Moreover, while §1.2.5.4 suggests that the new program will include "market-based compensation", the Settlement explains how market prices will be used. As discussed in Section III of this Protest, an administratively determined price can still employ market-based elements.

- Section 3.1.4 acknowledges the existence of an "*under 20 MW nameplate PURPA must-take obligation*" as further described in Section 4.5 and referenced throughout the Term Sheet.

The PURPA reference here pertains to the mandatory purchase obligation of PURPA, which is not at issue.

- Section 4.2.2.1 provides that *"[a] CHP Facility must meet the federal definition of a qualifying cogeneration facility under 18 CFR §292.205 implementing PURPA*."

This provision suggests that PURPA continues to have relevance under the Settlement.

- Section 4.2.4.2 prohibits parties from asserting that "*the prices in the PPAs executed as a result of the* ***CHP RFOs or bilateral negotiations*** *are inconsistent with the Buyer's avoided costs as defined by PURPA*."

Unlike the SRAC pricing stipulated in Transition, Legacy QF and Optional As-Available PPAs, prices resulting from CHP RFOs or bilateral negotiations are not required to be SRAC-based. Section 4.2.4.2 does not prohibit a party from arguing that SRAC-based prices are inconsistent with Buyer's avoided costs as defined by PURPA, suggesting that SRAC prices are indeed based in PURPA. In fact, nothing in §3, §4.5 or §10 similarly governs SRAC-priced PPAs.

Certain Settlement provisions suggest that the Settlement often used PURPA in a mandatory purchase obligation context.

- Section 14.1.1 references the must-take obligation under PURPA: *"[i]f the CPUC adopts the Settlement and FERC terminates, subject to reinstatement, the PURPA must take obligation for QFs over 20 MW, the IOUs will withdraw with prejudice all SRAC retroactive price adjustment claims and challenges and such claims and challenges cannot be revived*."

- Section 15 discusses the utility application under Section 210(m) of PURPA to eliminate their mandatory purchase obligations, as referenced in Section 16.2.1.

- Section 4.5 includes in the "CHP Procurement Process" a "PURPA Program for *QFs 20 MW or Less";*

This section discusses "*the PURPA must-take obligation program*," supporting the conclusion that "PURPA" was again used here to refer to the must-take obligation.

These and other similar references in the Term Sheet demonstrate an implied Commission intent to implement SRAC-based contracts within the Commission's

delegation of federal wholesale authority under PURPA. Consequently, a Commission determination is necessary to give parties full notice of their obligations under Section 205 of the FPA and their Settlement PPAs. Failure to make this determination leaves uncertainty as to whether the Commission has set SRAC pricing under its PURPA authority or under the FPA.

Likewise, D.10-12-035 does not directly address the issue. The decision uses the term PURPA neutrally in a historical background discussion.[22] In several other instances, it uses PURPA in the context of the mandatory purchase requirement.[23] Other references are to the termination of the PURPA mandatory purchase obligation before FERC.[24] While the discussion uses the term "*PURPA termination application*," the context of the discussion is the anticipated utility filing to terminate the mandatory purchase obligation pursuant to Section 210(m) of PURPA.[25] Nothing in the decision suggests that the Commission intended to comprehensively abandon its long-standing authority under PURPA.

Despite the limited use of the Settlement and D.10-12-035 in resolving the question of legal authority for SRAC-based pricing, Section 15.1 of the Settlement suggests an intent to rely on the Commission's PURPA authority. Settlement §15.1 provides the right to file for reinstatement of "*a particular IOU's PURPA purchase obligation if the IOU breaches its obligations under the Settlement*…."[26] The Settlement parties did not create this right; rather, the right to reinstatement of the purchase

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22 D.10-12-035, pp. 5-6.
23 *Id.* at 23 & 24.
24 *Id.* at 55.
25 *Id.*
26 D.10-12-035, Appendix A; Term Sheet, §15.1.10, at 59.

obligation was created under PURPA and is governed by FERC regulations.[27] In other words, FERC's termination of the utilities' purchase obligations did not represent an abandonment of the goals of PURPA[28] nor its oversight of state implementation under the statute. FERC simply changed the manner in which PURPA's goals are implemented in California.

Neither the Settlement nor the Commission's decision approving the Settlement unequivocally answers the question of whether Optional As-Available and other SRAC-priced contracts are administered under the state's PURPA authority. Federal law, however, compels the conclusion that the SRAC-priced contracts are a part of the state's implementation of PURPA.

V. FEDERAL LAW COMPELS THE CONCLUSION THAT SRAC-BASED PRICES ARE ADMINISTERED PURSUANT TO THE STATE'S IMPLEMENTATION OF PURPA.

The Federal Power Act gives FERC exclusive power to regulate the sale of power in interstate commerce, including wholesale power prices.[29] PURPA provides for a delegation of that authority to the state solely for the implementation of FERC's regulations under PURPA.[30] Unless wholesale pricing is regulated by the state

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[27] 18 CFR §292.311.

[28] *See New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, FERC Stats. & Regs. ¶31,233, ¶37 (2006).

[29] 16 USC §§824, 824d, 824e. FERC has exclusive jurisdiction over the "transmission of electric energy in interstate commerce," and over the "sale of electric energy at wholesale in interstate commerce," and over "all facilities for such transmission or sale of electric energy." 16 USC §824(b); *see, e.g.*, Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354 (1988); Pennsylvania Power & Light Company , 23 FERC ¶ 61,006 at 61,018, reh'g denied, 23 FERC ¶ 61,325 (1983); Southern Company Services, Inc., 37 FERC ¶ 61,256 at 61,652 (1986).

[30] *See* 16 USC § 824a-3(f) (2006); 18 CFR § 292.304 (2010); *California PUC, et al.,* Order on Petition for Declaratory Order, 132 FERC ¶ 61,047, ¶18 (2010).

pursuant to its authority under PURPA, California has no legal authority to set and administer a wholesale price.[31]

FERC clearly articulated these foundational principles when it addressed California's AB 1613 combined heat and power (CHP) program.[32] In that proceeding, the Joint Utilities (SCE, PG&E and SDG&E) argued that the CPUC's decision implementing AB 1613 was "*preempted by the [Federal Power Act] insofar as it sets rates for electric energy that is sold at wholesale*."[33] The CPUC argued that in setting power prices for CHP facilities under AB 1613, it was not setting a price for wholesale power sale. Rather, the CPUC was "*requiring California utilities under its jurisdiction to offer to purchase electricity at a CPUC-set price intended to encourage development of highly efficient CHP generators in order to reduce greenhouse gas emissions*."[34]

FERC disagreed. It stated:

> *The Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities. While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority.*[35]

The Commission's establishing of a price under AB 1613 was not, FERC concluded, simply "*an 'offering price' by a purchaser of power*."[36]

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31 132 FERC ¶61,047, ¶17.
32 *Id.*, ¶64.
33 *Id.* ¶1.
34 *Id.* ¶ 4.
35 *Id.* ¶64.
36 *Id.*

While the Settlement, unlike AB 1613, does not require the utilities to purchase power under the mandatory purchase obligation, the conclusion reached by FERC applies to certain parts of the Settlement PPAs. Any of the PPAs with SRAC energy prices must be administered under PURPA. Indeed, SRAC pricing by its very nature is based in PURPA.[37]

FERC has confirmed that at least one SRAC-priced PPA – the Transition PPA -- is an implementation of California's wholesale authority delegated under PURPA. FERC issued decisions in three cases that confirm the characterization of the Transition PPA as a contract under PURPA.[38] FERC observed that Transition PPAs were a part of the move under the Settlement from a PURPA to a non-PURPA regulatory structure.[39] In addition, it observed:

> *[W]e 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.*[40]

Finally, it observed 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***."[41] On these grounds, FERC concluded that Transition PPAs are administered under the delegation of authority under PURPA to the state.[42] In finding that the Transition PPA was approved pursuant to the state's authority under PURPA, FERC also implicitly concluded that no FERC rate approval,

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37 *Southern California Edison,* Order Dismissing Filing, 143 FERC ¶ 61,222, ¶18 (2013).
38 *Id.*
39 *Id.* ¶17.
40 *Id.* ¶18 (emphasis supplied). FERC carried its conclusion to the Transition PPA between Berry Petroleum and Southern California Edison Company. *Order Granting Rehearing and Dismissing Refund Report*, 143 FERC ¶ 61,223, ¶14 (2013).
41 143 FERC ¶ 61,222 at ¶18 (emphasis supplied).
42 *Id.*

including market-based rate authority, was required for the performance of the Transition PPAs.[43]

The Settlement contracts for facilities with a nameplate of greater than 20 MW are not a part of a PURPA mandatory purchase obligation. The mandatory purchase obligation, however, is not the entirety of PURPA. As FERC stated in addressing the Watson Transition PPA:

> *While SoCal Edison is correct that the mandatory purchase obligation was terminated effective November 23, 2011, that does not mean that the transition PPAs, including the Watson PPA, were not approved pursuant to a state regulatory authority's implementation of section 210 of PURPA.*[44]

Indeed, PURPA serves a purpose apart from the mandatory purchase obligation. The CPUC's exercise of PURPA authority to set and oversee SRAC prices eliminates the need for FERC to monitor the price, terms and conditions of SRAC-based wholesale transactions under its market based rate authority.

Despite the termination of the utilities' mandatory purchase obligations, PURPA remains foundational in setting prices for wholesale power transactions. Federal law compels the conclusion that SRAC-priced, Commission-approved contracts are a part of the Commission's implementation of PURPA.

VI. THE COMMISSION HAS THE JURISDICTION TO DECIDE THIS MATTER.

The characterization of the Transition PPA under PURPA was addressed by FERC. The issue as presented in this Petition, however, resides with this Commission.

The Petition seeks modification of D.10-12-035 as adopted by the Commission. The modification turns on whether the Commission intended to exercise its delegation

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43 *Id.*

44 *Id.* ¶17.

of federal authority in adopting and administering the Settlement. Importantly, the Petition does not challenge whether D.10-12-035 was a proper implementation of its delegated authority.

The fact that FERC has addressed the status of Transition PPAs does not mean that a decision on the issues presented in this Petition should be referred to FERC. FERC's decisions in the Transition PPA cases[45] were not an exercise of its jurisdiction, but a statement by FERC that it had no jurisdiction over the price and terms of the Transition PPAs.[46] If anything, the FERC decision in *Watson* could be viewed as dispositive in this case.

FERC determined that the Transition PPAs were part of the state's implementation of PURPA because the Transition PPAs:

> *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.*[47]

In fact, it is arguable that the FERC decision is dispositive for *all* Settlement PPAs. FERC observed that the utilities' purchase obligations were terminated effective November 23, 2011; the Settlement, however, was established prior to that date. Consequently, FERC determined:

> *the obligation [to transition from a PURPA regime to a non-PURPA regime] is a part of a continuing obligation to buy from QFs that the Commission relied on in terminating PG&E's, SoCal Edison's and SDG&E's mandatory purchase obligation, i.e., the requirement to enter into new obligations and contracts.*[48]

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45 143 FERC ¶61,222; 143 FERC ¶61,223.
46 143 FERC ¶61,222 at ¶18.
47 *Id.* ¶18.
48 *Id.* ¶17.

FERC concluded: "*the QF/CHP Settlement pursuant to which the Watson PPA was established is one of the California Commission's procurement program established pursuant to PURPA*."[49]

While this Petition does not seek to answer the question of whether all Settlement contracts are part of the Commission's continuing PURPA regime, FERC's *Watson* decision provides a foundation for such a conclusion. At a minimum, however, FERC's prior decisions are not an obstacle, but instead provide clear guidance in responding to this petition.

VII. CONCLUSION

For all of the foregoing reasons, EPUC requests modification of D.10-12-035 to clarify that PPAs executed under the Settlement are administered by the Commission under PURPA if they are priced at SRAC.

Respectfully submitted,

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[49] *Id.* ¶18.

Proposed Findings of Fact and Conclusions of Law

New Finding of Fact:

1. Legacy, Transition, Optional As-Available PPAs, including PPAs for facilities with a nameplate capacity of greater than 20 MW, set a fixed, escalating avoided cost capacity price and an energy price equal to the utility's short-run avoided cost; this avoided cost pricing may also be incorporated into certain bilateral PPAs executed under the Settlement with Commission approval.

New Conclusion of Law:

1. While nothing in this Settlement or adopted PPAs creates a mandatory purchase obligation under §210 of PURPA, to the extent a PPA executed under the Settlement includes avoided cost pricing, which will be administered by this Commission, the PPA is deemed a part of the Commission's implementation of PURPA's delegation of authority to set wholesale prices.