

149 FERC ¶ 61,251
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

Energy Producers and Users Coalition

Docket No. EL15-14-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued December 18, 2014)

1. On November 4, 2014, Energy Producers and Users Coalition (Energy Coalition) filed a Petition for Declaratory Order (Petition) requesting that the Commission find that the California Public Utilities Commission's (California Commission) approval of as-available energy procurement options relying on short-run avoided cost (SRAC) pricing (As-Available Options) as part of a settlement was an exercise of the state's authority under section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).¹ In this order, we grant Energy Coalition's Petition.

I. Background

2. In 2010, the California Commission approved a settlement among qualifying facility (QF) and combined heat and power (CHP) resources, investor-owned utilities, and consumer groups (QF/CHP Settlement).² The QF/CHP Settlement set forth rates and terms governing procurement of energy from QF and CHP resources. Energy Coalition states that, under the QF/CHP Settlement, Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E) have made As-Available Options available to QF/CHP facilities utilizing either a *pro forma* power purchase agreement (PPA) or a bilateral PPA.³ The QF/CHP Settlement includes *pro forma* contracts to be used for each type of procurement,

¹ 16 U.S.C. § 824a-3 (2012).

² *Decision Adopting Proposed Settlement*, Docket No. A.08-11-001 (California Public Utilities Commission Dec. 21, 2010).

³ Petition at 3 (citing Petition, Attachment 2 (Settlement Term Sheet) § 4.6).

including a Transition PPA⁴ and an As-Available PPA.⁵ The QF/CHP Settlement further provides that As-Available Options will be priced at SRAC.⁶ SRAC was established in the California Commission's 2007 QF Policy Decision.⁷

3. Energy Coalition states that it originally sought clarification from the California Commission that the California Commission's approval of the As-Available Options was pursuant to the state regulatory authority's implementation of PURPA, by filing a Petition for Modification of the QF/CHP Settlement, specifically requesting a determination on that issue.⁸ The California Commission denied Energy Coalition's Petition for Modification and declined to issue guidance addressing the basis of its authority.⁹ The California Commission stated that it did "not have authority to issue a declaratory judgment or cause to issue an advisory opinion" on the issue.¹⁰

4. Energy Coalition argues before us that the California Commission's approval of the As-Available Options set forth in the QF/CHP Settlement, in fact, constitutes an exercise of the state's authority to implement PURPA. In support of its argument,

⁴ The QF/CHP Settlement established a Transition Period beginning on the QF/CHP Settlement Effective Date (November 23, 2011) and extending to July 1, 2015, during which a CHP QF selling to an investor-owned utility under an preexisting CHP QF contract that will expire during the Transition Period, may sign a Transition PPA with the same investor-owned utility to continue selling to that utility, for a term not to exceed the end of the Transition Period.

⁵ *Decision Adopting Proposed Settlement*, Docket No. A.08-11-001 (California Public Utilities Commission Dec. 21, 2010) at 67.

⁶ Petition, Attachment 2 (Settlement Term Sheet) § 10.1.

⁷ *Opinion on Future Policy and Pricing for Qualifying Facilities*, Docket No. R.04-04-003 (California Public Utilities Commission Sept. 25, 2007), *adopted in Decision Adopting Proposed Settlement*, Docket No. A.08-11-001 (California Public Utilities Commission Dec. 21, 2010).

⁸ Petition at 2.

⁹ *Id.* (citing Petition, Attachment 1 (*Decision Denying Petition to Modify Decision 10-12-035*, Docket No. A.08-11-001 (California Public Utilities Commission Oct. 2, 2014))).

¹⁰ *Decision Denying Petition to Modify Decision 10-12-035*, Docket No. A.08-11-001 (California Public Utilities Commission Oct. 2, 2014) at 4.

Energy Coalition contends that the California Commission would have no ability to adopt SRAC-based pricing for wholesale as-available power sales but for its authority to implement PURPA.¹¹ Energy Coalition also notes that contracts based on the As-Available Options require sellers to maintain QF certification and adhere to the requirements for QF status throughout the life of their PPAs. Energy Coalition similarly avers that the California Commission must review and approve contracts executed under the QF/CHP Settlement. As support for its argument, Energy Coalition cites to *Southern California Edison Co.*,¹² in which this Commission determined that the California Commission's approval of a Transition PPA, also priced using SRAC, was pursuant to the California Commission's implementation of PURPA.¹³

II. Notice and Responsive Pleadings

5. Notice of Energy Coalition's filing was published in the *Federal Register*, 79 Fed. Reg. 68,236 (2014), with interventions or protests due on or before December 4, 2014. NRG Companies, Chevron Products Company,¹⁴ SDG&E, SCE, and PG&E filed timely motions to intervene. On December 4, 2014, SCE, PG&E, and SDG&E (collectively, Protesters) filed a protest (Protest).

6. The Protesters state that there are four categories of *pro-forma* PPAs that were adopted as part of the QF/CHP Settlement: (1) Transition PPAs; (2) CHP Request for Offers Pro-Forma PPA for CHP Facilities Participating in Solicitation (CHP RFO PPA); (3) QF PPA for facilities 20 MW or less (Under 20 MW PPA); and (4) As-Available PPAs.¹⁵ The Protesters request that the Commission find that the As-Available PPAs are not entered into pursuant to a state regulatory authority's implementation of PURPA.

¹¹ Petition at 4.

¹² *Southern California Edison Co.*, 143 FERC ¶ 61,222 (2013).

¹³ Petition at 4.

¹⁴ Chevron Products Company is a division of Chevron U.S.A. Inc.

¹⁵ Protest at 1-2 (citing *Application of Southern California Edison Company (U338E) 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*, Docket No. A.08-11-001, et. al. (California Public Utilities Commission Dec. 21, 2010) App. A, Attachment A, exhibits 4-7).

7. The Protesters argue that the QF/CHP Settlement was contingent upon the Commission issuing an order terminating the Protesters' obligation to purchase electricity at avoided cost from QFs over 20 MW pursuant to section 210(m) of PURPA.¹⁶ The Protesters state that the QF/CHP Settlement provides for a continuation of the QF program *under PURPA* for QFs 20 MW or less, and that such QFs will have a QF PPA.¹⁷ The Protesters suggest that the Settlement's omission of the "under PURPA" language with respect to the three other PPA categories applicable to facilities over 20 MW is indicative that the settling parties understood that those PPAs were not pursuant to PURPA.¹⁸

8. The Protesters state that, to date, the Commission has reviewed two of the three categories of PPAs for facilities over 20 MW. The Protesters state that the Commission has found that the CHP RFO PPAs are not PURPA contracts.¹⁹ In contrast, the Commission has found that the Transition PPAs are PURPA contracts. The Protesters argue that the Commission should find that the final category of PPAs, the As-Available PPAs, are not PURPA contracts.²⁰

9. The Protesters state that, in finding that Transition PPAs are PURPA contracts, the Commission explained that the Protesters' mandatory PURPA purchase obligation had been terminated only with respect to "the requirement that parties enter into *new* obligations or contracts to purchase electric energy and capacity from qualifying cogeneration and small power production QFs with net capacity in excess of 20 MW on a service territory-wide basis."²¹ The Protesters state that the QF/CHP Settlement "established an obligation for PG&E, [SCE], and SDG&E to transition from a PURPA regime to a non-PURPA regime" and found that the Transition PPAs were "part of that continuing PURPA obligation during the transition from PURPA to the market, and are

¹⁶ 16 U.S.C. § 824a-3(m) (2012). The Commission granted the PURPA section 210(m) petition in *Pacific Gas and Electric Co.*, 135 FERC ¶ 61,234 (2011).

¹⁷ *Id.* at 3 (citing Petition, Attachment 2 (Settlement Term Sheet) §§ 4.5.1 and 4.5.2 (emphasis added)).

¹⁸ *Id.* at 3, 20.

¹⁹ *Id.* at 7 (citing *Sycamore Cogeneration Co.*, 142 FERC ¶ 61,101, at P 27 (2012)).

²⁰ *Id.* at 4.

²¹ *Id.* at 8 (citing *Southern California Edison Co.*, 143 FERC ¶ 61,222, at P 17) (emphasis added).

not new obligations incurred after termination of the PURPA obligation.”²² The Protesters argue that the Energy Coalition’s argument ignores the significance of the transitional nature of the Transition PPAs, which were part of the state’s implementation of PURPA because they were continuations of prior obligations to buy. The Protesters aver that the QF/CHP Settlement created a category of contracts that are in a non-PURPA regime, as compared to the Transition PPAs, which were to remain part of the PURPA regime.²³

10. The Protesters note that the Energy Coalition’s arguments rely on three features that the As-Available PPAs share with the Transition PPAs, and which led to the Commission’s conclusion that Transition PPAs are PURPA contracts: (1) the contract pricing rests largely on the SRAC pricing methodology developed by the California Commission; (2) the QF/CHP Settlement and all PPAs must be approved by the California Commission; and (3) the As-Available PPA is part of California’s implementation plan under PURPA.²⁴

11. As to the first feature, the Protesters respond that the California Commission did not set or establish any price in the As-Available PPA, but that instead, the prices in the QF/CHP Settlement were negotiated between the parties and were not mandated by the California Commission.²⁵ The Protesters assert that the pricing in the As-Available PPAs utilizes pricing components that do not reflect avoided cost. They state that the use of SRAC energy pricing is limited to no more than 20 MWh per hour of deliveries.²⁶

12. The Protesters respond that the last two features are also attributes of the CHP RFO PPAs, which the Commission has found are not PURPA contracts.²⁷ The Protesters

²² *Id.* at 8 (citing *Southern California Edison Co.*, 143 FERC ¶ 61,222 at P 17).

²³ *Id.* at 12.

²⁴ *Id.* at 10.

²⁵ *Id.* at 14 (citing *Application of Southern California Edison Company (U338E) 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*, Docket No. A.08-11-001, et. al. at 54 (Cal. Pub. Utils. Comm’n Dec., 21, 2010)).

²⁶ *Id.* at 15 (citing Petition, Attachment 2 (Settlement Term Sheet) § 4.6.2.3.

²⁷ *Id.* at 16-19 (citing *Sycamore Cogeneration Co.*, 142 FERC ¶ 61,101 at P 4 (2012)).

argue that all electricity procurement by SCE, PG&E, and SDG&E is subject to approval by the California Commission.²⁸

13. The Protesters also argue that the Commission acknowledged in *Southern California Edison Co.*²⁹ that there were some indicia that even the Transition PPAs were not PURPA contracts but rather were within the scope of the Federal Power Act. The Protesters posit that this might be because the Transition PPA, like the As-Available PPAs, contain *Mobile-Sierra* language³⁰ as well as language that the seller had to take a certain position regarding filings it would make under Order Nos. 652 and 697.³¹ The Protesters also assert that in the Recitals of the *pro forma* PPAs only the PPA for facilities 20 MW or less was actually called a “PURPA contract.”³² Additionally, the Protesters note that the Event of Default provision of the PPA for facilities 20 MW or less states that the Seller “agrees to waive any right it may have *under PURPA, or otherwise,*

²⁸ *Id.* at 17.

²⁹ 143 FERC ¶ 61,222 at P 18.

³⁰ Protest at 20 (citing As-Available PPA § 9.12). *See United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 337, 76 S. Ct. 373, 377, 100 L. Ed. 373 (1956) and *Fed. Power Comm’n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

³¹ *Id.* (citing As-Available PPA § 9.12); *see Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh’g*, 111 FERC ¶ 61,413 (2005); *Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh’g*, Order No. 697-A, FERC Stats. & Regs. ¶ 31,268, at P 391, *clarified*, 124 FERC ¶ 61,055, *order on reh’g*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh’g*, Order No. 697-C, FERC Stats. & Regs. ¶ 31,291 (2009), *order on reh’g*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010), *aff’d sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011), *cert. denied*, 133 S. Ct. 26 (2012).

³² Protest at 21 (citing *Application of Southern California Edison Company (U338E) 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*, Docket No. A.08-11-001, et. al. App. A, Attachment A, Ex. 6: Qualifying Facility PPA for facilities 20 MW or less (Cal. Pub. Utils. Comm’n Dec., 21, 2010)).

to enter into any new mandatory must-purchase contract . . .” while the As-Available PPA omits the words “under PURPA, or otherwise.”³³

14. On December 15, 2014, Energy Coalition filed an answer to the protest.

III. Discussion

A. Procedural Matters

15. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Energy Coalition’s answer and will, therefore, reject it.

B. Analysis

16. In *Southern California Edison Co.*,³⁴ we determined that a Transition PPA which is priced using SRAC and entered into pursuant to the QF/CHP Settlement reflects the obligation of the electric utility to purchase pursuant to PURPA, and was entered into pursuant to the state regulatory authority’s implementation of PURPA.³⁵ Similarly, here, the As-Available PPA is also priced consistent with SRAC and entered into as part of the QF/CHP Settlement.³⁶ Section 4.6.2.3 of the Settlement Term Sheet, applicable to As-Available PPAs, states that “[e]nergy scheduled on a day-ahead basis and delivered

³³ *Id.* At 21-22 (citing Under 20 MW PPA § 2.02(c) (emphasis added), and Petition, Attachment 3 (As-Available PPA) § 2.02(c).

³⁴ *Southern California Edison, Co.*, 143 FERC ¶ 61,222.

³⁵ Specifically, the Commission noted that: (1) Transition PPAs are contracts priced at an avoided-cost rate established by the California Commission and are approved by the California Commission; and (2) the QF/CHP Settlement pursuant to which Transition PPAs were established is one of the California Commission’s procurement programs established pursuant to PURPA. *Southern California Edison Co.*, 143 FERC ¶ 61,222 at PP 17-18.

³⁶ *Opinion on Future Policy and Pricing for Qualifying Facilities*, Docket No. R.04-04-003 (California Public Utilities Commission Sept. 25, 2007), *adopted in Decision Adopting Proposed Settlement*, Docket No. A.08-11-001 (California Public Utilities Commission Dec. 21, 2010).

up to 20 MW per hour ... will be priced at SRAC.”³⁷ Also, any contracts executed under the QF/CHP Settlement must be approved by the California Commission. In addition, the QF/CHP Settlement pursuant to which the As-Available PPA was established is one of the California Commission’s procurement programs established pursuant to PURPA. Finally, and importantly, contracts based on the As-Available PPA require the sellers to maintain certification as QFs and adhere to the requirements for QF status throughout the life of the PPA.³⁸ Notwithstanding the protest, which is discussed below, we thus find that the California Commission’s approval of the As-Available Options here was pursuant to the state regulatory authority’s implementation of PURPA.

17. The Protesters largely repeat the arguments that SCE made in Docket No. ER12-2397-000 in opposing a finding that the Transition PPA was jurisdictional;³⁹ those arguments are no more convincing now than they were when first made. Protesters also argue that the Commission should follow *Sycamore Cogeneration Co.*⁴⁰ where Protesters argue that the Commission found that one category of PPAs, the CHP RFO PPAs, which are part of the transition of California QFs larger than 20 MW from a pure PURPA regime to a more market-oriented regime, were not part of the state’s implementation of PURPA. Protesters argue that the As-Available PPAs are more similar to the CHP RFO PPAs than to the Transition PPAs. In that case, in fact, the Commission did not address whether the CHP RFO PPAs were or were not part of a state’s implementation of PURPA. Rather, the Commission simply noted that, in the Sycamore PPA, the affiliated parties to the PPA, Sycamore and SCE, submitted their PPA pursuant to section 205 of the FPA in response to the Commission’s requirements governing affiliate transactions, and the Commission agreed that these requirements had been satisfied; any future affiliate sales by Sycamore would require further filing. The filing, in short, was made pursuant to the FPA, and Sycamore and SCE did not ask the Commission to consider it as anything other than a filing made pursuant to the FPA – which is exactly what the

³⁷ Petition, Attachment 2 (Settlement Term Sheet) § 4.6.2.3.

³⁸ Petition, Attachment 3 (Power Purchase and Sale Agreement) § 3.17.

³⁹ Southern California Edison Answer, Docket No. ER12-2397-000, at 2 (filed Dec. 17, 2012) (“It is thus SCE’s view that the Watson Transition PPA is a FERC-jurisdictional [i.e., FPA-jurisdictional] contract entered into pursuant to Watson’s Market-Based Rate authority because SCE no longer had an obligation to enter into PURPA PPAs with QFs over 20 MW at the time the Watson Transition PPA was executed.”).

⁴⁰ 142 FERC ¶ 61,101 at PP 2, 8, 13, 27 (2012).

Commission did, nothing more.⁴¹ Additionally, to the extent that Protesters argue that the As-Available PPAs do not contain avoided-cost rates, we note that some sales made pursuant to the As-Available PPAs are made at SRAC rates and others at negotiated rates. However, negotiated rates are consistent with PURPA avoided-cost rates;⁴² the mere fact that rates are negotiated does not mean that the As-Available PPAs are not pursuant to a state's implementation of PURPA.⁴³

18. Finally, while the Protesters argue that the Commission acknowledged in *Southern California Edison Co.*⁴⁴ that there were some indicia that even the Transition PPAs were made pursuant to the FPA, we disagree. The Commission found that the Transition PPAs were pursuant to the California Commission's implementation of section 210 of PURPA, and the Commission made this finding on the same grounds that the Commission is today finding that the As-Available PPAs are an implementation of PURPA. The Commission did acknowledge SCE's arguments, but definitively rejected the suggestion that those arguments warranted a finding that the PPAs were not PURPA⁴⁵ agreements and instead were FPA-jurisdictional agreements:

⁴¹ *Id.* PP 8, 10, 13.

⁴² 18 C.F.R. § 292.301(b) (2014).

⁴³ While the protesters also suggest that the lifting of the mandatory purchase obligation means that any new obligation or contracts are definitionally not pursuant to the California Commission's implementation of PURPA, we disagree. As we stated in *Southern California Edison Co.*, 143 FERC ¶ 61,222 at P 17, in lifting the mandatory purchase obligation, in response to the QF/CHP Settlement, the Commission did not write section 210 of PURPA out of existence. There can still be PPAs, like the PPA at issue here, that are an implementation of PURPA. That was true as to the Transition PPAs, and it is true as to the As-Available PPA at issue here.

We note in this regard that, under the QF/CHP Settlement, the Transition Period is identified as a period in which a CHP Facility may either obtain a new PPA (a CHP RFO PPA; a QF PPA for facilities 20 MW or less or, as relevant here, an As-Available PPA), sell into the wholesale market, shut down, or cease to export to the grid. And the Transition Period runs to July 1, 2015. Petition Attachment 2, (QF/CHP Settlement) §§ 2.1.1 and 2.1.2. Thus, the As-Available PPA at issue here is, just as the Transition PPAs at issue in *Southern California Edison Co.* were, a part of the transition from a fully PURPA regime to a more market-oriented regime.

⁴⁴ 143 FERC ¶ 61,222 at P 18.

⁴⁵ *Id.*

Although the arguments raised by SoCal Edison suggest that certain provisions of the Transition PPAs arguably could be read to indicate the California Commission did not intend the Transition PPAs to represent a continuation of the California Commission's implementation of PURPA, those arguments are not necessarily conclusive. For instance, the fact that the Transition PPAs include provisions that govern the parties' filings before the Commission suggests that the parties were concerned at that time that the agreements could be subject to the Commission's jurisdiction. However, that fact does not, in and of itself, demonstrate that the Transition PPAs at issue were not entered into pursuant to the California Commission's implementation of PURPA.⁴⁶

19. What is crucial here is that, as in *Southern California Edison Co.*: (1) the California Commission must approve these As-Available PPAs; (2) the PPAs require rates consistent with PURPA; (3) the As-Available PPAs require the CHP generating facilities to maintain QF status; and (4) the QF/CHP Settlement pursuant to which the As-Available PPA was established is one of the California Commission's procurement programs established pursuant to PURPA.⁴⁷

The Commission orders:

Energy Coalition's Petition is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

⁴⁶ *Id.*

⁴⁷ And, as noted *supra*, the As-Available PPAs are just as much a part of the implementation of the transition from a pure PURPA regime to a more market-oriented regime as were the Transition PPAs at issue in *Southern California Edison Co.*