2. Winding Creek Solar LLC v. Peterman*, 932 F.3d 861 (9th Cir. 2019)*

Winding Creek Solar LLC (Winding Creek) brought an action seeking declaratory and injunctive relief against the California Public Utilities Commission (CPUC).{{1}} Winding Creek alleged that the Public Utility Regulatory Policies Act (PURRPA){{2}} preempted two CPUC regulatory programs for alternative energy producers and, as such, should be awarded the contract with the state utility company, Pacific Gas & Electric (PG&E). The United States District Court for the Northern District of California, finding both California's Re-MAT and Standard Contract programs in violation of PURPA, held that PURPA preempted both programs.{{3}} The district court granted summary judgment on the declaratory claim, but denied injunctive relief. Both sides appealed. Reviewing the judgment de novo, the Ninth Circuit affirmed.

Title II of PURPA facilitates the development of alternative energy sources by addressing the reluctance of traditional electric utilities to purchase power from and sell power to non-traditional facilities and by alleviating the financial burdens imposed by state and federal utility authorities. Congress delegated to the Federal Energy Regulatory Commission (FERC) the authority to promulgate rules under the statute.{{4}} First, FERC's "must-take" provision requires electric utilities to buy all the power a Qualifying Cogeneration Facility (QF){{5}} produces.{{6}} Second, the utilities must pay the same rate they would have if they had obtained that energy from a different source.{{7}} FERC's regulations guarantee QFs the choice of calculating this rate either at the time of contracting or at the time of delivery.{{8}}

The main program at issue is California's Renewable Market Adjusting Tariff (Re-MAT) program, which creates a competitive market-based rate for utilities to purchase power from QFs. In this auction, the utility offers contracts at a pre-defined price to the QFs at the head of the queue.{{9}} However, Re-MAT caps the amount of energy a utility must buy. California's three investor owned utilities are obligated to purchase in total only 750 MW statewide.{{10}} Once a utility would exceed their obligated limit for any generation category by extending their next contract, the utility can stop offering Re-MAT contracts. The second PURPA program at issue is the Standard Contract. The Standard Contract program does not cap the amount of energy a utility is obligated to buy, but instead offers an avoided-cost rate calculated using a six-variable formula, of which three variables are impossible to determine at the time of contracting.{{11}}

As a QF, Winding Creek was accepted into Re-MAT. However, by the time Winding Creek reached the top of the queue, the contract price had already dropped. Because they could not develop the solar facility at such a low price, Winding Creek rejected this and later offers. Winding Creek initially challenged the validity of Re-MAT before FERC,{{12}} but after various orders and notices of intent not to act, Winding Creek filed suit in the district court.

[[1]]Named defendants included Carla Peterman, Martha Guzman Aceves, Liane Randolph, Clifford Rechtschaffen, and Michale Picker in their official capacities as Commissioners of CPUC.[[1]]

[[2]] Public Utilities Regulatory Policies Act of 1978, 16 U.S.C. §§ 2601–2645 (2005).[[2]]

[[3]] Winding Creek Solar LLC v. Peevey, 293 F. Supp. 3d 980, 991–992 (N.D. Cal. 2017).[[3]]

[[4]] 16 U.S.C. § 824a-3a.[[4]]

[[5]] A QF is a FERC-certified alternative energy producer.[[5]]

[[6]] 18 C.F.R. § 292.303(a)(1) (2019).[[6]]

[[7]] This rate is derived from the utility's avoided costs or the costs the utility would have incurred but for the purchase from a QF. A utility can avoid costs either by purchasing the energy from some other source or by generating the energy itself. *Id.* at § 292.101(b)(6).[[7]]

[[8]] *Id.* at § 292.304(d)(2).[[8]]

[[9]] CPUC sets the initial contract price for each category of generation. Subsequent price adjustment also follows a formula set by CPUC. If QFs reject the first offer they receive, they keep their place in line until the next offering.[[9]]

[[10]] The 750 MW cap is divided equally among three types of generation: baseload; non-peaking, as-available; and peaking, as-available. This is then divided among the utilities according to their customers' share of peak electricity demand, minus any generation a utility is already obligated to purchase under prior CPUC programs.[[10]]

[[11]] The three variables are burner tip gas price, market heat rate, and a location adjustment factor. *See* Winding Creek Solar LLC, 153 FERC 61027 (Oct. 15, 2015).[[11]]

[[12]] *See* Winding Creek Solar LLC, 144 FERC 61122 (Aug. 12, 2013); Winding Creek Solar LLC, 151 FERC 61103 (May 8, 2015); Winding Creek Solar LLC, 153 FERC 61027 (Oct. 15, 2015).[[12]]

The Ninth Circuit held that PURPA preempted California's Re-MAT program because Re-MAT's cap on the amount of energy utilities must purchase from QFs and Re-MAT's pricing scheme violated the statute. The court found Re-MAT's cap violated PURPA's "must-take" provision. Re-MAT requires utilities to purchase no more than 5 MW from each source category in any two-month period, mandating that each utility must purchase only a fraction of the 750-MW statewide cap. To comply, a utility may need to purchase less energy than a QF makes available. Because such an outcome exists, the court ruled that Re-MAT violated PURPA.

The Ninth Circuit further held that Re-MAT's pricing scheme violated PURPA because PURPA requires a utility to pay QFs at an avoided-cost rate.{{13}} The Re-MAT price, which is arbitrarily adjusted every two months according to the QFs' willingness to supply energy at the pre-defined price, "strays too far afield" from a utility's but-for costs.{{14}} Thus, the Ninth Circuit found that both Re-MAT's energy purchase cap and pricing structure violated PURPA.

CPUC argued that Re-MAT's noncompliance with PURPA is not consequential because QFs may instead sell energy to utilities through the Standard Contract.{{15}} Previously, FERC held the Standard Contract to be PURPA compliant and thus upheld Re-MAT as an alternative program. However, the Ninth Circuit ruled that the Standard Contract's regulations on their face violated PURPA and, as such, did not need to defer to FERC's "unreasoned conclusion."{{16}} PURPA mandates that QFs be given a choice between calculating the avoided-cost rate at the time of contracting or at the time of delivery. Yet, the only formula CPUC provides for calculating avoided costs relies on variables that are unknown at the time of contracting. In this way, the Standard Contract fails to give QFs the option to calculate avoided cost at the time of contracting, violating PURPA.

Finally, the Ninth Circuit briefly turned to Winding Creek's appeal of the district court's denial of injunctive relief. The court found that the district court did not abuse its broad discretion to fashion equitable relief because awarding a modified contract under the preempted programs would be inappropriate.{{17}}

In sum, the Ninth Circuit affirmed the district court and held that CPUC's Re-MAT and Standard Contract programs violated PURPA, PURPA preempted both programs, and injunctive relief was inappropriate.

[[13]] The avoided cost rate is the rate the utility would have incurred obtaining energy from a source other than the QFs. 18 C.F.R. § 292.304. The court recognized that state agencies can take a variety of factors into account when calculating avoided cost. *Id*. at §§ 292.302(b), 292.304(e).[[13]]

[[14]] Winding Creek Solar LLC v. Peterman, 932 F.3d 861, 865 (9th Cir. 2019).[[14]]

[[15]] FERC concluded 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 put limits on QF contracts. *See* Winding Creek Solar LLC, 151 FERC 61103 (May 8, 2015).[[15]]

[[16]] *Winding Creek*, 932 F.3d at 865. *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2415–2417 (2019) (holding that Auer deference is only appropriate if the regulation being interpreted is "genuinely ambiguous" and the Agency's interpretation "reflect[s] fair and considered judgment" (internal quotation marks omitted)).[[16]]

[[17]] Nor is it the court's job to fashion a new contract to Winding Creek's liking. *See* Allco Renewable Energy Ltd. v. Mass. Elec. Co., 875 F.3d 64, 74 (1st Cir. 2017) (noting that federal courts are neither statutorily authorized nor competent to set avoided-cost rates).[[17]]