UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

ALLCO FINANCE LIMITED,	**) Docket Nos. EL23-92-000**
CHELSEA SOLAR LLC, and	**) QF13-402-008**
APPLE HILL SOLAR LLC	**) QF13-437-001**
	)

ANSWER OF THE VERMONT PUBLIC UTILITY COMMISSION OPPOSING PETITION FOR ENFORCEMENT UNDER THE PUBLIC UTILITY REGULATORY POLICY ACT OF 1978

On August 14, 2023, Allco Finance Limited and its affiliates, Chelsea Solar LLC and Apple Hill Solar LLC (collectively "Allco") petitioned this Commission to initiate an enforcement action against the Vermont Public Utility Commission ("Vermont" or "VPUC") on grounds that it had failed to implement section 210 of the Public Utility Policy Act of 1978 (PURPA). Vermont filed a timely notice of intervention on August 24, 2023, concurrently requesting additional time to secure outside counsel and to submit a response to the petition. The Commission subsequently extended the period for comments and answers to September 15, 2023 and, pursuant to Rule 213 VPUC files this response to Allco's petition. Vermont also requests that the Commission designate the following additional persons for service:

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The gravamen of Allco's petition is that 30 V.S.A. § 8005a "is an implementation by the VPUC of PURPA" and that it improperly "empowers the VPUC to exclude all non-hydroelectric QFs greater than 2.20 megawatts ("MWs") from participating in solicitations for energy and capacity for Vermont's utilities." Petition at 1.[1] But the very predicate for Allco's petition—that §8005a constitutes an "implementation of PURPA"—is false. As Vermont has pointed out in response to two previous, unsuccessful Allco or Allco affiliate petitions—and as this Commission has recognized—§8005a is not the means by which the state implements PURPA. Rather, it is an *option* for certain small QFs.[2] Contrary to Allco's claims, *no* QF is barred from selling its capacity and energy to Vermont's utilities. But as this Commission pointed out a decade ago, they may do so under the Commission's 4.100 program,[3] reference to which is conspicuously, but inexplicably absent from Allco's petition.

Even assuming, however, that Vermont's special Standard Offer Program[4] for small QFs under 2.2 MW is treated as a PURPA implementation plan, its bidding mechanism[5] and limitation to certain types and sizes of facilities[6] are Commission-recognized means to establish

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[1] Allco's objection that the statute improperly excludes renewable generating facilities larger than 2.2 MW is somewhat confusing. Its central contention is that it had two solar facilities, both under 2.2 MW, that should have received offers, but were improperly treated as a single 4 MW facility by the VPUC.

[2] *See*, *Otter Creek Solar LLC*, 143 FERC ¶ 61,282 at P 4 (2013)("The standard offer SPEED program is an *optional* program available to certain small renewable QFs. QFs also may participate in the Vermont Commission's longstanding Rule 4.100 program.")(emphasis added)(footnotes omitted), *order denying reconsideration*, 146 FERC ¶ 61,192 (2014); Notice of Intervention and Protest of the Vermont Public Service Board, Otter Creek Solar LLC et al, Docket No. EL17-16 et al (filed Nov. 30, 2016), pp. 3-7.

[3] *Otter Creek Solar LLC, supra*, 143 FERC ¶ 61,282 at P 4.

[4] Vermont's Standard Offer Program was originally entitled its SPEED program. See n.11, *infra*. References to the Standard Offer Program, hereinafter, unless indicated otherwise, are to both the SPEED program and the Standard Offer Program.

[5] *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 FERC ¶ 61,265 at 63,301 (1998) (observing that even by 1998 "well over half the states … use[d] competitive bidding to one degree or another in setting avoided cost rates.").

[6] *California Pub. Utils. Comm'n, et al.*, 133 FERC ¶ 61,059 at 61,267 (2010). (recognizing that where state sets separate requirements for different types of facilities, separate avoided costs would apply to each);*see also*, *Californians for Renewable Energy v. CPUC*, 922 F.3d 929, 937 (9th Cir. 2019) ("[W]here a utility uses energy from a QF to meet a state RPS, the avoided cost must be based on the sources that the utility could rely upon to meet the RPS.").

avoided cost. And its determination whether particular facilities are eligible to participate—here, Allco's facilities—is a matter of *application* of valid PURPA rules, not implementation, and thus exclusively within the province of state courts to review.[7] Indeed, Allco availed itself of that avenue of review and lost.[8] PURPA's statutory scheme does not give it a second, federal bite at the apple.

Vermont discusses all of these points in more detail below.

I. Allco's contention that Vermont has redefined the size of QFs under PURPA conflates the eligibility requirements under Vermont's optional Standard Offer Program with QF eligibility under VPUC Rule 4.100.

At the heart of Allco's petition is its dissatisfaction with the fact that its solar facility, adjudged by VPUC to be 4 MW in size rather than two separate 2 MW facilities,[9] did not qualify for participation in the Standard Offer Program, which limits qualified bidders to renewable energy facilities smaller than 2.2 MW. According to Allco, 30 V.S.A. § 8005a "is an

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[7] 16 U.S.C. § 824a-3(g);*see also*, *Exelon Wind 1, L.C.C v. Nelson*, 766 F.3d 380, 388 (5th Cir. 2014).

[8] *Petition of Chelsea Solar LLC, pursuant to 30 V.S.A. § 248, for a certificate of public good authorizing the installation and operation of the* "*Willow Road Project,*" *a 2.0 MW solar electric generation facility on Willow Road in Bennington, Vermont*, No. 17-5024-PET, 2019 WL 2524170, at *42 (VPUC June 12, 2019), *aff'd, In re Petition of Chelsea Solar LLC*,2021 VT 27, 214 Vt. 256, 254 A.3d 156 (Vt. 2021)). As the VPUC explained:

> We look to the plain language of the statutory definition of "plant" as it existed when the Developer first filed for a standard-offer contract in 2013:
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> > "Plant" means an independent technical facility that generates electricity from renewable energy. A group of facilities, such as wind turbines, shall be considered one plant if the group is part of the same project and uses common equipment and infrastructure such as roads, control facilities, and connections to the electric grid.
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> These two facilities, unlike what was presented to the Vermont Supreme Court in 2014, use common equipment and infrastructure to connect to the electric grid. The interconnection of both facilities requires the construction of a new, mile-long distribution line that would be owned by GMP but paid for by the facilities' common developer. But for the existence of this shared distribution line, neither facility could connect to the electric grid. We conclude that this shared line makes the two facilities a single plant as defined in 30 V.S.A. § 8002.

[9] *Id*.

implementation by the VPUC of PURPA" that unlawfully "empowers the VPUC to exclude all non-hydroelectric QFs greater than 2.20 megawatts ("MWs") from participating in solicitations for energy and capacity for Vermont's utilities." Petition at 1. There are several fundamental flaws in this assertion.

First, the original SPEED Program was not a PURPA program and VPUC's successor Standard Offer Program is not either. This Commission has long ago stated that a state may encourage the development of renewable generation in a variety of ways independently of PURPA.[10] Vermont's SPEED program was one of them. As this Commission stated in rejecting a PURPA enforcement petition by Allco's Otter Creek subsidiary a decade ago:

> In Vermont, QFs [] still have the option to participate in a program that has been found consistent with PURPA [the Rule 4.100 program]. Those Vermont QFs that choose to participate in the SPEED program are agreeing to the rates that result from that program. Nothing in the Commission's regulations limits the authority of either an electric utility or a QF to agree to rates for any purchases or terms or conditions relating to any purchases which differ from the rates or terms or conditions which would otherwise be required by the Commission's regulations.[11]

[10] As the Commission stated in 1995:

> The Commission believes that states have *numerous ways outside of PURPA* to encourage renewable resources. As a general matter, states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or deny certification of other types of facilities if state law so permits. They also, assuming state law permits, *may order utilities to purchase renewable generation*.

So. Cal. Edison Co., 71 FERC ¶ 61,269, 62,080 (1995) (denying reconsideration) (emphasis added).

[11] *Otter Creek, supra* at P. 4.

While the SPEED program was subsequently modified by the state in 2012,[12] and replaced in part in 2016,[13] it and its successor Standard Offer Program have always been separate from the Rule 4.100 program, which, while also since updated, [14] remains the state's chosen

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[12] Vermont's original Sustainably Priced Energy Enterprise Development Program ("SPEED") program, enacted by the state legislature in 2005, was designed to encourage the development of renewable power by the state's electric distribution utilities. The Vermont Energy Act of 2009, enacted in May 2009, modified the SPEED program to include a state-wide standard-offer program. The standard-offer program was open to SPEED projects with a nameplate capacity of 2.2 MW or less, and provided for a program cap (with certain exceptions) of 50 MW. Vermont Energy Act of 2009, VT H. 446, No. 45, § 4.The text of Act 45 is available at http://www.leg.state.vt.us/docs/2010/Acts/ACT045.pdf. May 2012 amendments to SPEED included, relevant here, provisions to increase the cumulative plant capacity of the program to 127.5 MW over a predetermined schedule. 2011, No. 170 (Adj. Sess.). The text of Act 170 is available at http://www.leg.state.vt.us/DOCS/2012/ACTS/ACT170.PDF. The modified SPEED program was what was in effect at the time Allco claimed it created a legally enforceable obligation (LEO) to purchase the output of its solar facilities. *See* Petition, p. 2n.3 and p.3 (LEOs claimed to have been created in 2013 and 2014).

[13] Public Act 56 (2015, Vt., Adj. Sess.), available at https://legislature.vermont.gov/Documents/2016/Docs/ACTS/ACT056/ACT056%20As%20Enacted.pdf, replaced the SPEED program with a similarly-structured "Standard Offer Program" as part of an act aimed at increasing the state's use of distributed renewable energy resources. Among the changes were a requirement that the seller transfer any tradeable renewable energy credits to the purchasing utility (revised 30 V.S.A. § 8005a(k)(3)).

[14] New Rule 4.100 became effective September 15, 2016. Pursuant to New Rule 4.104(B), a QF may now elect to sell its output to an Interconnecting Utility through one of the following arrangements:

1. A standard power purchase contract not to exceed seven years based on as-delivered rates (an "as-delivered contract"). *See* VPUC Rule 4.104(B)(1).
    a. The as-delivered energy rate is either the hourly real-time locational marginal price ("LMP") at the ISO New England ("ISO-NE") delivery node or, at its option, the hourly day-ahead LMP at the ISO-NE delivery node adjusted to reflect any real-time Energy Market settlement for deviation from the generation that cleared in the day-ahead Energy Market. *See* VPUC Rule 4.104(E)(1)(a).
    b. The as-delivered monthly capacity rate is based on payments received from the QF's participation in ISO-NE's Forward Capacity Market, adjusted for any performance penalties or incentives assessed or paid by ISO-NE. *See* VPUC Rule 4.104(F)(1)(a).
2. A standard-power purchase contract for a term of seven years based on time-of-obligation Rates (a "time-of-obligation contract"). *See* VPUC Rule 4.104(B)(2).
    a. Under a time-of-obligation contract, the QF has the option of choosing energy rates that are:

PURPA implementation program—available to QFs of *any* size. As VPUC's predecessor, the Vermont Public Service Board, explained in opposing Allco's 2016 PURPA enforcement petition:

> To effectuate the requirements of PURPA and section 209(a)(8), the Board promulgated General Order 65 in June 1981, establishing a rate for energy sales to utilities.1 In April 1983, the Board replaced General Order 65 with Rule 4.100 – Small Power Production and Cogeneration, a more comprehensive approach to developing avoided cost rates and the process for entering into contracts with qualifying facilities ("QFs").2 The Board's prior version of Rule 4.100 was found by the Commission to be consistent with PURPA. *See Otter Creek Solar LLC*, 143 FERC ¶ 61,282, P 4 (2013) ("*Otter Creek*"), *reconsideration denied*, 146 FERC ¶ 61,192 (2014) ("*Otter Creek* Reconsideration Order") (citing *Vt. Elec. Coop., Inc. v. Vt. Pub. Serv. Bd. and Vt. Dep't of Pub. Serv.*, 25 FERC ¶ 61,273 (1983); *Barnet Hydro Co. v. Cent. Vt. Pub. Serv. Corp.*, 95 FERC ¶ 61,257 (2001); *N. Hartland, LLC v. Cent. Vt. Pub. Serv. Corp.*, 105 FERC ¶ 61,037 (2003)).
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> In an August 22, 2014 order in Docket No. 8010, the Board directed its staff to conduct a workshop outside of that proceeding to investigate whether there was a more efficient procedural mechanism to implement PURPA than the procedures contained in Rule 4.104(E). Board staff conducted the workshop on February 19, 2015. Following that workshop, there was an opportunity for all interested stakeholders to submit comments on whether and how the Board should amend its PURPA rules and to provide specific language. The Board held a hearing on its proposed rule on February 29, 2016, and following the submission of comments and reply comments, the Final Proposed Rule was

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i. Standard rates, which are based on the Interconnecting Utility's avoided costs for energy, as provided pursuant to Rule 4.109 and after consideration of the factors set forth in 18 C.F.R § 292.304(e). Standard rates shall be determined at the start of the contract period and remain unchanged over the term of the time-of-obligation contract. *See* VPUC Rule 4.104(E)(2)(a).

ii. Index rates, to be updated monthly over the term of the time-of-obligation contract, which shall be calculated using on-peak and off-peak monthly forward prices on the ISO-NE system that are available on the New York Mercantile Exchange (or other accepted published commodity exchange for ISO-NE forward prices). *See* VPUC Rule 4.104(E)(2)(b).

b. Monthly rates for capacity are based on the capacity supply obligation for the month multiplied by the contractual rate specified in the contract, as adjusted for any performance penalties or incentives assessed or paid by ISO-NE. Capacity rates shall be determined at the start of the contract period and remain unchanged over the term of the time-of-obligation contract. *See* VPUC Rule 4.104(F)(2)(a).

3. A negotiated power purchase contract executed between the QF and the Interconnecting Utility (with no limit on the contract's length). *See* VPUC Rule 4.104(B)(3).

filed with the Vermont Secretary of State on July 14, 2016. New Rule 4.100 became effective September 15, 2016.[15]

Second, because it is not a PURPA program, whether Allco qualifies under the Standard Offer Program is not a PURPA issue, much less a PURPA implementation issue.

Third, contrary to Allco's assertions, VPUC hasn't redefined what constitutes a QF by imposing size limitations under its Standard Offer Program. The relevant PURPA implementation regulations are contained in VPUC Rule 4.100. They do not limit QF participation to QFs under 2.2 MW, and Allco's facility remains eligible under those regulations.

II. Vermont's Standard Offer Program does not require Allco to construct duplicative facilities in violation of PURPA

Allco maintains that it created legally enforceable obligations ("LEO") for two separate 2 MW facilities in 2013 when it executed the Standard Offer Program's standard offer contracts and that Vermont's refusal to issue certificates of public good was preempted by PURPA. Petition at 3-6. But, as noted in Section I, the Standard Offer Program is not Vermont's PURPA implementation program. While a LEO does not require an executed contract by the purchasing utility, it is implicit in the concept of a LEO that it must constitute an offer by the QF to accept its obligations under the state's *PURPA* program.[16] Allco has not, and does not, claim to have executed a LEO under VPUC Rule 4.100.

Finally, Vermont does not understand Allco's objection to the Vermont Supreme Court's affirmance of VPUC's determination that Allco was seeking approval for a 4 MW facility, not

[15] Notice of Intervention and Protest of the Vermont Public Service Board, Docket Nos. EL17-16-000, pp. 3-4 (filed Nov. 30, 2016)

[16] *See, e.g.*, 18 CFR § 292.304(d)(3). FERC's reference there to the QF's obligation to satisfy the "criteria determined by the state regulatory authority" can only logically be read to refer to the criteria established the state regulatory authority under its *PURPA* implementation program—in Vermont's case, Rule 4.100.

two separate 2 MW facilities.[17] Allco seems to claim that the Court's decision somehow involved a *Chevron*-like deference to the VPUC that "implicates the constitutional separation of powers doctrine as well as a plaintiff's constitutional right to access to the courts." Petition at 3-4 n.6. The Vermont Supreme Court has the final say on what is constitutional under state law. Even in an as-applied challenge to an agency's PURPA rules—which is what Allco implicitly claims it made when it sought review in the Vermont courts—whether the agency lawfully applied its PURPA rules to the particular facts before the state commission was exclusively a matter of state, not federal law.[18]

III. The Standard Offer Program Does Not Constitute State Regulation of the Wholesale Market.

Perhaps Allco's most curious argument is that the Standard Offer Program—whose benefits it seeks—constitutes regulation of wholesale rates and is thus preempted under the Federal Power Act. "Because a State's only authority to regulate wholesale electricity sales is derived from section 210 of PURPA," it maintains, "any State rule that conflicts with those requirements is necessarily preempted."[19] Putting aside that Allco cannot be aggrieved by its ineligibility for a program it claims is illegal, Vermont does not claim that its Standard Offer

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[17] *In re Petition of Chelsea Solar, LLC, supra* 254 A.3d 156.

[18] Allco also cites a recent Second Circuit decision, *Allco Finance Limited v. Roisman*, No. 22-2276, 2023 U.S. App.LEXIS 18179 (2d Cir. July 18, 2023) as "completely rebuffing all of the VPUC's arguments that challenged Allco's PURPA complaint against the VPUC." Petition at 6. But this completely mischaracterizes the Court's decision. The only issues the Court decided were that Allco had standing, had exhausted its administrative remedies, and that the VPUC was not entitled to sovereign immunity. It did not decide the merits of Allco's PURPA complaint, but remanded that issue back to the district court. In any event, by its express terms the Court's summary order has no precedential effect. See https://scholar.google.com/scholar_case?case=605234583576690617&q=Allco+and+Roisman+and+2023&hl=en&as_sdt=4,107,122

[19] Petition at 15.

Program— *which is not a PURPA program* — is exempt under PURPA from the FPA. Rather, the Standard Offer Program is not preempted because it does not regulate wholesale rates.

Hughes v Talen addressed the issue of when a state power purchasing program constitutes preempted state regulation of wholesale rates. There, the state law required sellers to bid their capacity into a FERC-regulated wholesale power market, but the price paid to the seller would not be the FERC-regulated auction price. Instead, the seller would be paid the state-set contract price "rather than the auction price."[20] This program, the Court said, "sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators."[21] "We reject Maryland's program," it added, "*only* because it disregards an interstate wholesale rate required by FERC."[22]

The Standard Offer Program does nothing of the kind. To accept Allco's position would be to invalidate *any* contract executed by a purchasing utility with a winning bidder offering to sell it power at wholesale, whether that seller was a QF or not. But "states have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction. States may, for example, order utilities to build renewable generators themselves, or ... *order utilities to purchase renewable generation*."[23] There is no state regulation of the wholesale rate in such instances. If the seller chooses to participate in a utility's RFP—ike any seller participating in a bidding program—it has the responsibility to have secured FERC market-based rate authority. If it lacks market-based rate authority it can still bid, but its bids would be

[20] 136 S Ct. 1288, 1294-95 (2016). As the Court notes, the state contract price could be higher or lower than the FERC-regulated auction price. Id.
[21] *Id*. at 1297
[22] *Id*. at 1299 (emphasis added).
[23] *Allco Finance Ltd. v Klee*, 861 F.3d 82, 101(2d Cir. 2017) (internal citations omitted) (emphasis added).

constrained in advance by its existing filed rate, i.e., the cost-based wholesale rate that FERC had already authorized. In other words, the winning bid, by definition, will be a rate (cost or market-based) FERC has *already* authorized.[24]

It is even easier for small QFs (under 20 MW). Whether they seek to make a sale under PURPA or to make a wholesale sale outside of PURPA, they "*do not need market-based rate authority*."[25] And it is not uncommon, particularly where a QF sees a potentially more advantageous price in the wholesale market, for a QF to forgo its QF status and sell into a market, relying on its market-based rate authority, or its exemption from the need for such authority if it is a small QF. But if a QF in Vermont does not wish to be treated as a wholesale supplier outside PURPA (as would be the case if it participates in the Standard Offer Program), it would instead participate in the state's Rule 4.100 program. In that case it would be exempt from wholesale rate regulation under PURPA and would not be subject to the Standard Offer Program's size limitations. In any event, as referenced earlier, Allco is not aggrieved because its objection is not that Vermont is improperly setting wholesale rates—it wants its bids to qualify in the very program it says is preempted by the FPA.[26]

IV. Even assuming Vermont's Standard Offer Program constitutes implementation of PURPA, its conditions fully satisfy PURPA's implementation requirements.

[24] In this respect, Vermont's standard offer program does not involve the post-bidding approval by FERC at issue in *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014), *cert. denied*, 136 S. Ct. 1728, 194 L.Ed.2d 810 (2016) which, in any event, is irrelevant under governing Second Circuit case law. *Allco, supra*, 861 F.3d at 99-100. To be sure, when a QF participates in Vermont's Standard Offer Program, Vermont does not independently investigate whether the QF has market-based rate authority because the QF, being smaller than 2.2 MW does not need market-based rate authority to charge market-based rates.

[25] Frequently Asked Questions Market-Based Rates, citing 18 C.F.R. § 292.601(emphasis added), https://www.ferc.gov/power-sales-and-markets/electric-market-based-rates/frequently-asked-questions-faqs-market-based

[26] Allco's position here is quite different from its posture in *Allco, supra*. There, its complaint (which it also lost) was that Connecticut's bidding program was preempted under the FPA because it excluded small QFs, including Allco. *Allco, supra*, 861 F.3d at 95-96.

As discussed above, Vermont's Standard Offer Program is an *optional* program for small (less than 2.2 MW) renewable energy facilities separate from Vermont's longstanding Rule 4.100 program. The 2.2 MW limit on eligibility for the Standard Offer Program "serves the Legislature's goal of "[p]roviding support and incentives to locate renewable energy plants of small and moderate size in a manner that is distributed across the State's electric grid."[27] But even assuming, *arguendo*, that the Standard Offer Program was a PURPA implementation program, it fits comfortably within the types of PURPA implementation programs this Commission has endorsed. No less important, challenges to PURPA-compliant state programs are the exclusive domain of the state courts where Allco has tried, but failed to successfully challenge the VPUC's ruling that Allco has proposed a 4 MW project ineligible for the state's Standard Offer Program.

Parties challenging state PURPA implementation programs start with a heavy burden. The Commission is "wary of becoming entangled unnecessarily in the specifics of administering or reviewing state or local competitive power procurements (absent any facial or patent defect)." There is none here. Even at the most elemental level, Allco's petition falls dramatically short of demonstrating any defects in Vermont's standard offer program. Indeed, the precise nature of its objections to the program is difficult to discern.

Is Allco arguing that the program is defective because it involves competitive bidding, or that the program is limited to renewable energy sources, or that only renewable energy facilities under 2.2 MW are eligible to bid, or finally, that Vermont's Standard Offer Program places a cap on the amount of capacity eligible for the standard offer? It does not appear so. Rather, Allco's

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[27] *In Re Petition of Chelsea Solar LLC*, *supra*, 254 A.3d at 159.

argument appears to be that it submitted qualifying bids with two eligible plants, but the VPUC wrongly treated the two facilities as a single 4 MW plant disqualified from bidding.[28]

Even if the Commission treats Allco's petition as an objection to the exclusion of a 4 MW facility from the standard offer program or the placement of a MW cap on eligibility, such objections run counter to Commission policy. The reasons are clear and well-settled.

First, states have long used competitive bidding to ascertain utilities' avoided costs. FERC observed a quarter century ago that the difficulties in ascertaining administratively determined avoided costs under the first decade of PURPA had led "well over half the states [to] use competitive bidding to one degree or another in setting avoided cost rates."[29] The current PURPA rules expressly authorizing the use of competitive bidding were just a clarification of that reality.[30] Not only were the core features of FERC's revised PURPA rules recently affirmed in *Solar Energy Indus. Ass'n v. FERC*,[31] no party to the numerous appeals of the order questioned the use of competitive bidding to ascertain utility avoided costs.

[28] As Vermont's Supreme Court recounts in its 2021 opinion, Allco first proposed the Apple Hill and Chelsea Solar (formerly Bennington Solar) facilities as two separate 2 MW projects, but the VPUC ruled that the two projects were really one 4 MW facility because both projects were "located on the same parcel of land" and "ha[d] similar interconnection points." *In re Chelsea Solar, supra* at 159 (quoting Programmatic Changes, 2014 VT 29, ¶ 7). tTthe Vermont Supreme Court reversed the VPUC's initial determination. But, the Court found, when Allco resubmitted its application for construction of the two units, the VPUC "found that the developer's proposals had significantly changed since 2013 and that Willow Road and Apple Hill were now one "plant" given their use of common electrical infrastructure agreed to by a common developer as part of a common development scheme." *Id*. at 160-61. It was that change in facts that the Supreme Court agreed supported the VPUC's second decision.
[29] *Administrative Determination of Full Avoided Costs, Sales of Power to Qualifying Facilities, and Interconnection Facilities*, 84 FERC ¶ 61,265 at 63,301 (1998).
[30] *Qualifying Facility Rates and Requirements and Implementation Issues Under the Public Utility Regulatory Policies Act of 1978, Notice of Proposed Rulemaking*, 168 FERC ¶ 61,184 at P 86 (2019), final rule adopted, Order No. 872, 85 Fed. Reg. 54,638 (Sept. 2, 2020).
[31] No. 20-72788, 2023 WL 5691711 (9th Cir. Sept. 5, 2023)

Second, nothing in PURPA or the Commission's implementing regulations bars states from "favor[ing] particular generation technologies over others,"[32] "choos[ing] to require a utility to construct generation capacity of a preferred technology or to purchase power from the supplier of a particular type of resource."[33] "States," in short, "may wish to diversify their generation mix to meet environmental goals in a variety of ways."[34] That includes diversification to incorporate distributed generation, including small-scale solar plants. "[R]esource planning and resource decisions," after all, "are the prerogative of state commissions."[35]

Nor are states barred from setting separate avoided costs for different types of generation.[36] California, for example, has established separate avoided costs for renewable facilities under 3 MW.[37] Indeed, when states establish renewable portfolio standards, the creation of separate avoided-cost rates is a logical outgrowth of that policy choice.[38] If a utility, for example, does not have all the solar capacity needed to meet the state's renewable portfolio standards, its avoided cost will be the cost of solar capacity.[39]

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[32] *Southern California Edison Co. and San Diego Gas and Electric Co*., 70 FERC ¶ 61,215 at p. 61,676 (1995), *order on reconsideration*, 71 FERC ¶ 61,269 (1995).
[33] *Id*.
[34] *Id*.
[35] *Indep. Energy Producers v. Cal. Pub. Utils. Comm'n,* 36 F.3d 848, 856 (9th Cir. 1994).
[36] *Californians for Renewable Energy v. California Pub. Utils. Comm'n*, 922 F.3d 929, 937 (9th Cir. 2019) ("If the [state agency] chooses to calculate an avoided cost for each type of energy source, it may do so.").
[37] *Id*. at 934.
[38] *Id*. at 937
[39] *California Public Utilities Commission*, 132 FERC ¶61,047; 133 FERC ¶ 61,059 at 61,267 (2010). As FERC noted, "if a state required a utility to purchase 10 percent of its energy needs from renewable resources, then a natural gas-fired unit, for example, would not be a source `able to sell' to that utility for the specified renewable resources segment of the utility's energy needs, and thus would not be relevant to determining avoided costs for that segment of the utility's energy needs." *Californians for Renewable Energy*, *supra* at 937 (quoting *California Public Utilities Commission, supra* at 61,267).

Finally, Allco's objection to the cap on capacity that qualifies for the standard offer conflates an unlawful cap on the purchasing utilities' avoided cost with the avoided cost that results from the permissible state-set capacity target for the particular resource type that a state wants in its utilities' portfolios. Once the state meets its target for a particular type of resource with qualified bids, additional capacity of that type has no remaining capacity value to the purchasing utility.[40] As important here, if the state RPF calls for a "particular type of generator [e.g., a 2.2 MW or smaller renewable energy source]," a source that does not meet the state's specifications [e.g., a 4 MW plant] can't be considered in the bidding process for the specified resource.[41]

CONCLUSION

As demonstrated above, the Standard Offer Program that Allco alleges is an improper implementation of PURPA is not a PURPA implementation program at all. It is an *option* to certain, smaller QFs in lieu of Vermont's Rule 4.100 program that is open to *all* QFs, including Allco. On that basis alone Allco's petition should be dismissed. But even if the Standard Offer Program were treated as a PURPA implementation program, it would be fully compliant with PURPA—the program features an open bidding process to determine capacity value (i.e., avoided cost) for certain types of capacity, an approach approved both by this Commission and by the courts. Allco's argument that it had submitted two separate 2 MW offers under that program was rejected by the VPUC. And its unsuccessful appeal of that ruling to the Vermont

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[40] FERC has "made clear that an avoided cost rate need not include capacity costs (as distinct from energy costs) where a QF does not `permit the purchasing utility to avoid the need to construct a generating unit, to build a smaller, less expensive plant, or to reduce firm power purchases from another utility.'" *City of Ketchikan, Alaska*, 94 FERC ¶ 61,293 at p. 62,062-63(2001).

[41] *Californians for Renewable Energy, supra*, 922 F.3d at 937.

Supreme Court was a challenge to how the VPUC had *applied* its own rules. Again, even treating the Standard Offer Program as a PURPA program, such a challenge is reviewable only in state court. Thus, for this reason too, the Commission should dismiss Allco's petition.

Respectfully submitted,

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Counsel for the Vermont Utility Commission

September 14, 2023

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day served the foregoing document on the persons listed on the official service list maintained by the Secretary for this proceeding.

Dated in Washington, D.C. this 14th day of September, 2023.

s/ Harvey L. Reiter

Document Content(s)