

134 FERC ¶ 61,060  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;  
Marc Spitzer, Philip D. Moeller,  
John R. Norris, and Cheryl A. LaFleur.

CALifornians for Renewable Energy, Inc.

Docket Nos. EL10-84-000  
EL10-84-001

v.

Pacific Gas and Electric Company, Southern California  
Edison Company, San Diego Gas & Electric Company  
and the California Public Utilities Commission

ORDER DISMISSING COMPLAINT

(Issued January 28, 2011)

1. On September 1, 2010, pursuant to the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>2</sup> CALifornians for Renewable Energy, Inc. (CARE) filed a Complaint against Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SoCal Edison), San Diego Gas & Electric Company (SDG&E), and the California Public Utilities Commission (CPUC) (collectively, Respondents), alleging, among other things, that Respondents are violating the FPA by approving contracts with rates for capacity and energy that exceed the utilities' avoided cost cap and that also usurps the Federal Energy Regulatory Commission's (FERC or Commission) exclusive jurisdiction to determine the rates for wholesale sales of electricity under its jurisdiction. On October 20, 2010, CARE filed an Amended Complaint, in which CARE objects to a proposed settlement currently being considered by the CPUC.

2. In this order, we dismiss the CARE Complaint. As discussed in detail below, CARE has failed to provide any factual support for the allegations raised in its complaint as required by Rule 206 of the Commission's Rules of Practice and Procedure. CARE

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<sup>1</sup> 16 U.S.C. §§ 824d, 824e, 825e, and 825h (2006).

<sup>2</sup> 18 C.F.R. § 385.206 (2010).

has similarly failed to submit a pleading that meets the Commission's filing requirements contained in Rule 203.<sup>3</sup>

## **I. Background of Relevant Proceedings**

3. In general, CARE claims that two orders recently issued by the CPUC violate our Declaratory Order.<sup>4</sup> Below is a brief summary of our Declaratory Order and the two CPUC orders<sup>5</sup> at issue in CARE's complaint.

### **A. The Commission's Declaratory Orders**

4. On May 4, 2010, the CPUC submitted a petition for declaratory order in which it requested that the Commission find that the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generating facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements is not preempted by either federal law or the Commission's regulations. On May 11, 2010, PG&E, SoCal Edison, and SDG&E filed a separate petition for declaratory order arguing that the CPUC's decision is preempted by the FPA insofar as it sets rates for electric energy that is sold at wholesale.

5. Specifically, through Assembly Bill (AB) 1613,<sup>6</sup> the California legislature requires "electrical corporations" in California (i.e., investor-owned utilities (IOU) regulated by the CPUC) to offer to purchase, at a price to be set by the CPUC, electricity that is generated by certain CHP generators and delivered to the grid. The legislation requires California electrical corporations to file standard ten-year purchase contracts (AB 1613 feed-in tariffs) with the CPUC that require the electrical corporations to offer to purchase, at the CPUC-set price, electricity generated by CHP generators.

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<sup>3</sup> 18 C.F.R. § 385.203 and 18 C.F.R. § 385.206 (2010).

<sup>4</sup> *California Public Utilities Commission*, 132 FERC ¶ 61,047 (2010), *clarification granted and reh'g dismissed*, 133 FERC ¶ 61,059 (2010), *reh'g denied*, 134 FERC ¶ 61,044 (2011) (Declaratory Order).

<sup>5</sup> The two CPUC orders at issue are the *Application of Pacific Gas and Electric Company*, D. 10-07-042 (July 29, 2010) and *Application of Pacific Gas and Electric Company for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms*, D. 10-07-045 (July 29, 2010).

<sup>6</sup> AB 1613, Waste Heat and Carbon Emissions Reduction Act, Cal. Pub. Util. Code §§ 2840, *et seq.* (Stats. 2007, ch. 713 § 1).

6. In its decision implementing AB 1613 (AB 1613 Decision),<sup>7</sup> the CPUC required California utilities under its jurisdiction to offer to purchase electricity at a CPUC-set rate intended to encourage development of highly efficient CHP generators in order to reduce greenhouse gas emissions. According to the CPUC, the rates that it required the California utilities to offer to pay to such CHP generators reflected the additional costs necessary to meet all of the environmental requirements under AB 1613. In addition, the CPUC stated that, for CHP generators located in congested areas, there would be a ten percent bonus to reflect the avoided cost of the construction of additional distribution and transmission upgrades.<sup>8</sup>

7. After considering all the arguments raised by the parties, the Commission determined that the CPUC's AB 1613 Decision constituted impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decision sets rates for wholesale sales in interstate commerce by public utilities, the Commission found that it was preempted by the FPA.<sup>9</sup> However, the Commission also found that, to the extent the CHP generators that can take part in the AB 1613 program obtain Qualifying Facilities (QF) status, the AB 1613 feed-in tariff is *not* preempted by the FPA, the Public Utility Regulatory Policies Act of 1978 (PURPA) or Commission regulations, subject to certain requirements.<sup>10</sup>

8. Specifically, the Commission found that the AB 1613 program will *not* be preempted by the FPA and PURPA as long as: (1) the CHP generators from which the CPUC is requiring IOUs to purchase energy and capacity are QFs pursuant to PURPA; and (2) the rate established by the CPUC does not exceed the avoided cost of the purchasing utility.<sup>11</sup> However, if a CHP generator is *not* a QF, the CPUC's AB 1613 Decisions are not preempted by the FPA only to the extent that the CPUC is ordering the utilities to purchase capacity and energy from certain resources, but are preempted to the

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<sup>7</sup> *Order Instituting Rulemaking on the Commission's Own Motion into Combined Heat and Power Pursuant to Assembly Bill 1613*, D.09-12-042 (Dec. 17, 2009).

<sup>8</sup> CPUC Decision 09-12-042, 2009 CPUC LEXIS 790.

<sup>9</sup> Declaratory Order, 132 FERC ¶ 61,047 at P 64.

<sup>10</sup> *Id.* P 65.

<sup>11</sup> *Id.* P 67 (citing 18 C.F.R. § 292.304 (2010)). Under section 210 of PURPA, the rules prescribed by the Commission shall not provide for a rate "which exceeds the incremental cost to the electric utility of alternative electric energy." 16 U.S.C. § 824a-3(b) (2006). Under the Commission's regulations, absent agreement of the parties to the contrary, rates shall be capped at the electric utility's full "avoided cost." 18 C.F.R. § 292.304 (2010)).

extent that the CPUC is setting rates for such wholesale transactions, as discussed above. Any CHP generator that is not a QF but is a public utility must, pursuant to section 205 of the FPA, file with the Commission the rates that it proposes to charge under the CPUC's AB 1613 tariff. Further, consistent with section 205 of the FPA, the CHP generator must demonstrate that such rates are just, reasonable and not unduly discriminatory or preferential.<sup>12</sup>

9. On August 16, 2010, the CPUC filed a request for clarification, or, in the alternative, a request for rehearing of the Declaratory Order. In this request, the CPUC stated that, based upon the findings of the Commission in the Declaratory Order, the CPUC intends to reexamine the basis of its implementation of AB 1613 by implementing it under section 210 of PURPA. Therefore, the CPUC requested clarification that it has sufficient flexibility with regard to calculating avoided cost rates so as to enable it to achieve the goals of AB 1613 to promote the development of efficient CHP generation.

10. Specifically, the CPUC requested clarification that: (1) the CPUC can require retail utilities to consider different factors in the avoided cost calculation in order to promote development of more efficient CHP facilities; and (2) "full avoided cost" need not be the lowest possible avoided cost and can properly take into account real limitations on "alternate" sources of energy imposed by state law.<sup>13</sup>

11. On October 21, 2010, the Commission granted the CPUC's request for clarification, finding that the concept of a multi-tiered avoided cost rate structure was consistent with the avoided cost requirements set forth in section 210 of PURPA and in the Commission's regulations.<sup>14</sup> In reaching this determination, the Commission specifically noted that "states are allowed a wide degree of latitude in establishing an implementation plan for section 210 of PURPA, as long as such plans are consistent with our regulations."<sup>15</sup> Moreover, the Commission also found that if the environmental costs "are real costs that would be incurred by utilities," then they "may be accounted for in a determination of avoided cost rates."<sup>16</sup> Thus, if the CPUC bases the avoided cost "adder" or "bonus" on an actual determination of the expected costs of upgrades to the distribution or transmission system that the QFs will permit the purchasing utility to

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<sup>12</sup> *Id.* P 69.

<sup>13</sup> Declaratory Order, 133 FERC ¶ 61,059 at P 7.

<sup>14</sup> *Id.* P 20.

<sup>15</sup> *Id.* P 24 (citations omitted).

<sup>16</sup> *Id.* P 31 (citation omitted).

avoid, such an “adder” or “bonus” would constitute an actual avoided cost determination and would be consistent with PURPA and Commission regulations.<sup>17</sup>

12. On November 22, 2010, the Edison Electric Institute filed a request for rehearing of the Declaratory Order. PG&E, SoCal Edison, and SDG&E filed a joint petition for rehearing, or in the alternative, reconsideration, partial vacatur or clarification of the Declaratory Order. On January 20, 2011 the Commission denied the requests for rehearing.<sup>18</sup>

### **B. The CPUC Decisions**

13. The CPUC is required by California law to adopt a long-term procurement plan for each IOU. Under its adopted long-term procurement plan, PG&E is authorized to execute long-term power purchase agreements (PPA) for new capacity, subject to the CPUC's review and approval.<sup>19</sup> In its October filings, PG&E requested CPUC approval of three PPAs. These PPAs were novations<sup>20</sup> of existing PPAs from the California Department of Water Resources (DWR) to PG&E. The novated agreements were effectively replaced by new long-term PPAs between PG&E and GWF Energy LLC

14. In its decision, the CPUC noted that previous CPUC decisions provide criteria for determining if the replacement of a DWR contract with a new long-term PPA should be approved.<sup>21</sup> Under those prior decisions, all of the criteria will be met if there is a need for the capacity, energy, and ancillary services provided by the PPA, and if the PPA is reasonably priced.<sup>22</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *California Public Utilities Commission*, 134 FERC ¶ 61,044 (2011).

<sup>19</sup> *Application of Pacific Gas and Electric Company*, D. 10-07-042 (July 29, 2010) at 5.

<sup>20</sup> Novation is the substitution of a new contract for an existing one. Novation completely extinguishes the earlier contract. *Id.* at 3 n. 1 (citation omitted).

<sup>21</sup> First, the new long-term PPA must be just and reasonable under Cal. Pub. Util. Code § 451 based on “relevant conditions, including market conditions in effect at the time of negotiation and for the period that such replacement contract would be in effect.” Second, the long-term PPA must be “at least as beneficial for ratepayers as the existing [DWR] contract.” Finally, the long-term PPA should “be reviewed by the CPUC for consistency with the long-term procurement planning criteria.” *Id.* at 36-37.

<sup>22</sup> *Id.* (citations omitted).

15. In a separate application filed in the same docket, PG&E requested CPUC approval of two contracts with Calpine Corporation (Calpine). As explained by the CPUC, these contracts resulted in the novation of an existing DWR contract from DWR to PG&E, and new long-term PPAs between PG&E and Calpine covering the same units. PG&E also provided a calculation that showed that the PPAs had a positive levelized net market value.<sup>23</sup>

16. The CPUC approved the Calpine contracts, finding that PG&E had a reasonable need for the amount of capacity and that the PPAs would maintain or improve resource adequacy relative to the DWR contracts.<sup>24</sup> The CPUC also approved PG&E's method for assessing whether the cost of the PPAs was reasonable. Based upon the information provided, the CPUC found that the cost of the PPA was reasonable. Therefore, based upon these findings, the CPUC determined that the Calpine contracts were just and reasonable under California law and approved the contracts.<sup>25</sup>

17. In a separate docket, PG&E filed another application requesting CPUC approval of three PPAs<sup>26</sup> and a purchase and sale agreement (PSA).<sup>27</sup> After considering a number of preliminary issues, the CPUC concluded that PG&E's process for soliciting and selecting offers was reasonable.<sup>28</sup> Therefore, the CPUC approved the three PPAs as reasonable and in the public interest.<sup>29</sup> However, the CPUC denied approval of the PSA.<sup>30</sup>

18. The CPUC also considered a motion for acceptance of a partial settlement agreement filed by the parties to the PPAs and the PSA. The partial settlement agreement only applied to the applicable ratemaking and cost recovery treatment for the projects

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<sup>23</sup> *Id.* at 12-13.

<sup>24</sup> *Id.* at 58-59.

<sup>25</sup> *Id.* at 60-61.

<sup>26</sup> The parties to the PPAs were Midway Sunset, Mirant Marsh Landing, and Mirant Delta LLC.

<sup>27</sup> *Application of Pacific Gas and Electric Company for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms*, D. 10-07-045 (July 29, 2010) at 2-3.

<sup>28</sup> *Id.* at 20-21.

<sup>29</sup> *Id.* at 38.

<sup>30</sup> *Id.* at 39.

approved by the CPUC in its decision.<sup>31</sup> The CPUC found that the partial settlement agreement provided a way to resolve costs without obligating either the signing parties or the CPUC to endorse any particular project.<sup>32</sup> The CPUC also found that the partial settlement agreement was just, reasonable, and in the public interest, and therefore approved it.<sup>33</sup>

## II. CARE's Complaint

19. On September 1, 2010, CARE filed a Complaint against PG&E, SoCal Edison, SDG&E, and the CPUC claiming that Respondents had conspired to violate the FPA “by approving contracts establishing rates for capacity and energy that exceeds the utilities’ avoided cost cap and which also usurps [the Commission’s] exclusive jurisdiction to determine wholesale rates.”<sup>34</sup> CARE states that since the Commission found that “the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation projects that the CPUC approved contracts for, that where (sic) not QFs, these contracts are unlawful and should be abrogated pursuant to the FPA.”<sup>35</sup>

20. CARE also contends “the CPUC approved [Renewable Portfolio Standard (RPS)] projects that are already online, under development with project names and CPUC website links to [CPUC] resolutions approving or rejecting the project should be reviewed by [the Commission] for compliance with the FPA.”<sup>36</sup> CARE again argues that the RPS contracts should be abrogated, since according to CARE, the Commission found that the “RPS contracts the CPUC approved for capacity, energy and or ancillary services” are unlawful pursuant to the FPA and that the CPUC lacks authority to set the wholesale rates.<sup>37</sup>

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<sup>31</sup> *Id.* at 43.

<sup>32</sup> *Id.* at 49

<sup>33</sup> *Id.*

<sup>34</sup> Complaint at 1.

<sup>35</sup> *Id.* at 6. CARE specifically objects to the decisions rendered by the CPUC in *Application of Pacific Gas and Electric Company*, D. 10-07-042 (July 29, 2010) and *Application of Pacific Gas and Electric Company for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms*, D. 10-07-045 (July 29, 2010).

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.*

21. CARE asserts that the price and non-price terms and conditions of the challenged contracts are unjust and unreasonable, not in the public interest, and therefore are in violation of section 206 of the FPA.<sup>38</sup> CARE also contends the challenged contracts impose a financial burden on California ratepayers.<sup>39</sup> Finally, CARE argues that the CPUC waived any claims of sovereign immunity from the Commission's authority to hear this Complaint by submitting a petition for declaratory order,<sup>40</sup> and requests that the Commission set the matter for hearing.

22. CARE filed an Amended Complaint on October 20, 2010, in which it objects to a proposed settlement<sup>41</sup> currently being considered by the CPUC.<sup>42</sup> CARE contends that the proposed settlement intentionally seeks to avoid the Commission's review of the settlement before the CPUC approves it, and that CARE has had no opportunity to meaningfully participate in the CPUC process.<sup>43</sup>

23. CARE supports its contention by noting that the parties to the proposed settlement stated before the CPUC that "the application for waiver<sup>44</sup> cannot be filed at the FERC until after [the CPUC] approves the Proposed Settlement."<sup>45</sup> According to CARE, this statement supports its contention that the CPUC intends to usurp the Commission's exclusive ratemaking authority over wholesale rates. Therefore, CARE requests that the Commission review the proposed settlement.<sup>46</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.* at 4.

<sup>41</sup> "According to the parties to the proposed settlement, the proposed settlement resolves numerous QF-related disputes and is the result of more than a year and a half of settlement negotiations." CPUC November 4, 2010 Answer at 3-4. The proposed settlement does not pertain to the CPUC's approval of any PPAs.

<sup>42</sup> CARE October 20, 2010 Amended Complaint at 2.

<sup>43</sup> *Id.* at 5.

<sup>44</sup> According to CARE, this application would request that the Commission grant a waiver of the investor-owned utilities obligations under section 210(m) of PURPA. Amended Complaint at 3.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 6.

24. Further, CARE argues that the CPUC Administrative Law Judge's approval of the request for expedited review of the settlement violates CPUC rules.<sup>47</sup> CARE also alleges that the settling parties stated that they were told by CPUC staff to enter into the settlement with the specific terms that were ultimately included in that settlement.<sup>48</sup> CARE contends that the CPUC staff exercised undue influence on the settlement.<sup>49</sup>

25. Finally, CARE notes that it emailed the CPUC Administrative Law Judge and demanded that he direct the settling parties to file their proposed settlement with the Commission for initial review. In response, the CPUC Administrative Law Judge directed CARE to file an appropriate notice of *ex parte* communication. CARE interprets this to mean that the CPUC denies of its motion, which it contends demonstrates the settling parties' unlawful conspiracy with the CPUC.<sup>50</sup>

26. In light of the above, CARE requests that the Commission review the settlement for compliance with the Declaratory Order and issue a stay of the procedural schedule for the CPUC proposed settlement while the Commission considers CARE's Amended Complaint.<sup>51</sup>

### **III. Notice of Filings, Motions to Intervene and Responsive Pleadings**

27. Notice of CARE's Complaint in Docket No. EL10-84-000 was published in the *Federal Register*,<sup>52</sup> with interventions and protests due on or before September 21, 2010.

28. The CPUC filed an Answer, Motion to Dismiss, and Notice of Intervention. SoCal Edison, PG&E, and SDG&E (together, the California Utilities) filed a joint answer to CARE's Complaint. Calpine and Midway Sunset both filed Motions to Intervene and Protests.

29. Motions to Intervene were filed by the Modesto Irrigation District, GWF Energy, LLC, and the Cogeneration Association of California. The City of Santa Clara,

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<sup>47</sup> *Id.* at 7-8.

<sup>48</sup> *Id.* at 8.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 8-9.

<sup>51</sup> *Id.* at 9-10.

<sup>52</sup> 75 Fed. Reg. 54,618 (2010).

California and the M-S-R Public Power Agency filed a joint Motion to Intervene. The Mirant Parties<sup>53</sup> also filed a joint Motion to Intervene.

30. On October 5, 2010, CARE filed an answer to the CPUC's Motion to Dismiss. As discussed above, on October 20, 2010, CARE filed an Amended Complaint. Notice of CARE's Amended Complaint in Docket EL10-84-001 was published in the *Federal Register*,<sup>54</sup> with interventions and protests due on or before November 4, 2010.

31. A Motion to Intervene was filed by the Energy Producers and Users Coalition (EPUC) on October 29, 2010. On November 4, 2010, answers to CARE's Amended Complaint were filed by the CPUC, the California Utilities, and the Cogeneration Parties.<sup>55</sup>

#### IV. Initial Answers

##### A. CPUC

32. In its combined initial answer and motion to dismiss, the CPUC claims that as a state agency, it has immunity from complaints brought by private parties. Specifically, the CPUC states that the Commission lacks jurisdiction over the CPUC pursuant to section 201(f) of the FPA and *Federal Maritime Commission v. South Carolina State Ports Authority*.<sup>56</sup> The CPUC also contends that if it waived its immunity under the FPA, as CARE suggests, by filing a request for declaratory order in Docket No. EL10-64-000, any such waiver by the CPUC would be limited to matters raised in that proceeding and not extend to contracts involving other facilities covered by CARE in its present Complaint.<sup>57</sup>

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<sup>53</sup> The Mirant Parties include Mirant Energy Trading, LLC, Mirant Delta, LLC, and Mirant Potrero, LLC.

<sup>54</sup> 75 Fed. Reg. 66,744 (2010).

<sup>55</sup> The Cogeneration Parties are the Cogeneration Association of California, the EPUC, the California Cogeneration Council, and the Independent Energy Producers Association of California. We note that only the EPUC and the Cogeneration Association of California filed motions to intervene.

<sup>56</sup> CPUC September 21, 2010 Answer at 10-11 (citing *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (finding that the Eleventh Amendment bars a federal agency from adjudicating complaints against state agencies by a private party)).

<sup>57</sup> *Id.* at 11-12.

33. Furthermore, the CPUC contends that CARE's Complaint does not comply with the Commission's procedural requirements. According to the CPUC, CARE failed to: (1) specify the relief requested or the basis for that relief; (2) explain how the statutory standards or the Commission's requirements were violated; (3) specify the relevant facts; or (4) attach documents and affidavits supporting the factual allegations contained in the Complaint.<sup>58</sup>

34. Additionally, the CPUC argues that CARE has neither claimed nor provided proof of any claim that the contracts that CARE is seeking to have abrogated are unjust and unreasonable.<sup>59</sup> Moreover, the CPUC notes that in the prior complaints brought by CARE, the Commission found that the terms both for rates and reliability of the contracts were just and reasonable based on the fact that the CPUC preapproved the contracts under state law.<sup>60</sup> The CPUC further argues that the Commission does not have authority over retail level purchasing decisions.<sup>61</sup>

35. The CPUC contends that the present Complaint is similar to the five prior CARE complaints against the CPUC, all of which the Commission dismissed. According to the CPUC, the Commission found those prior complaints "frivolous" based on CARE's failure to comply with Rule 203 and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>62</sup> and the fact that the Commission is not the appropriate forum for review of decisions by state agencies.<sup>63</sup> The CPUC argues that the present Complaint is a collateral attack on the Commission's dismissals of CARE's prior complaints, because, according to the CPUC, the present Complaint includes contracts which were covered in those complaints.<sup>64</sup> The CPUC contends that the "principles of res judicata and collateral

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<sup>58</sup> *Id.* at 15.

<sup>59</sup> *Id.* at 5.

<sup>60</sup> *Id.* at 14 (citing *CARE v. California Public Utilities Commission*, 119 FERC ¶ 61,058, at P 43-44 (2007); *CARE v. California Public Utilities Commission*, 120 FERC ¶ 61,272, at P 45-48 (2007)).

<sup>61</sup> *Id.* at 13 (citing *Ameren Energy Marketing Co.*, 96 FERC ¶ 61,306, at 62,189 n.18 (2001)).

<sup>62</sup> 18 C.F.R. §§ 385.203 and 385.206.

<sup>63</sup> CPUC Answer at 3 (citing *CARE v. California Public Utilities Commission*, 129 FERC ¶ 61,075, at P 11-15, 24 (2009)).

<sup>64</sup> *Id.* at 5 (citing *CARE v. California Public Utilities Commission*, 119 FERC ¶ 61,058 at P 43-48; *CARE v. California Public Utilities Commission*, 120 FERC ¶ 61,272 at P 45-50).

estoppel” apply from those prior proceedings in which the Commission served “in an adjudicatory capacity.”<sup>65</sup>

36. The CPUC argues that it has not set rates, but only preapproved contracts that were based on market-based wholesale rates.<sup>66</sup> The CPUC states that it approved these contracts in accordance with “sections 454.5(d) and 380 of the California Public Utilities Code.”<sup>67</sup> According to the CPUC, these California laws require the CPUC to: (1) preapprove the long-term procurement plan of the IOUs; (2) ensure that those contracts satisfy reserve requirement and resource adequacy needs; and (3) “promote competition in the bidding process as required pursuant to California’s Energy Action Plan.”<sup>68</sup> The CPUC claims that FERC “explicitly recognized that if a generator is not a QF, the CPUC order with regard to a contract between a retail utility and a generator is not preempted if the CPUC has not set the wholesale rate.”<sup>69</sup>

### **B. The California Utilities**

37. In their initial answer, the California Utilities also argue that CARE has failed to meet the minimal requirements imposed by Commission rules. The California Utilities note that the Commission has continually held that defective complaints must be dismissed. According to the California Utilities, CARE has failed to identify how the California Utilities violated applicable statutory standards or regulatory requirements.<sup>70</sup> The California Utilities argue that CARE has failed to clarify how the submitting of contracts to the CPUC violates the FPA. The California Utilities note that the contracts that CARE calls into question are for retail rate recovery and outside the Commission’s jurisdiction.<sup>71</sup>

38. Furthermore, the California Utilities contend that CARE has failed to show that any violation of the FPA has occurred.<sup>72</sup> The California Utilities argue that CARE’s

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<sup>65</sup> *Id.* at 14-15 (citing *Town of Norwood v. FERC*, 476 F.3d 18, 25 (1<sup>st</sup> Cir. 2007)).

<sup>66</sup> *Id.* at 4 and 8-9.

<sup>67</sup> *Id.* at 9.

<sup>68</sup> *Id.* at 6-7.

<sup>69</sup> *Id.* at 8 (citing Declaratory Order, 132 FERC ¶ 61,047 at P 69).

<sup>70</sup> California Utilities September 21, 2010 Answer at 1-2.

<sup>71</sup> *Id.* at 4.

<sup>72</sup> *Id.* at 6.

reliance on the Declaratory Order<sup>73</sup> is misplaced because the Declaratory Order is not relevant to the issue presented by CARE. According to the California Utilities, the Commission found in the Declaratory Order that the FPA preempted the CPUC's AB 1613 Decision when the CPUC set a wholesale rate by setting a QF purchase price above the utilities' avoided cost.<sup>74</sup> The California Utilities argue that CARE has not alleged that the CPUC has set a wholesale price for non-QFs or compelled the purchase from a QF at a price above a utility's avoided cost. The California Utilities argue that CARE has failed to show how the CPUC approval of a bilateral contract is the same as mandating that contract's rate be set for a specific price.

39. The California Utilities also argue that the *Pike County*<sup>75</sup> decision which provided an exception to the filed rate doctrine creates a distinction between state and federal jurisdiction. Specifically, the California Utilities argue that the Pike County court held that there exists a clear distinction between the Commission's exclusive jurisdiction to regulate wholesale rates for interstate commerce and the state utility commission's jurisdiction to review the prudence of a utility's power purchase for determining retail rate recovery and that this distinction applies to the CPUC orders at issue in the Complaint.<sup>76</sup>

### C. Midway Sunset

40. In its initial answer, Midway Sunset requests that the Commission summarily reject the Complaint. Midway Sunset contends that the CARE Complaint fails to present any basis for rejecting the CPUC actions at issue. Specifically, Midway Sunset asserts that the prices in the Midway Sunset PPA were not set through wholesale ratemaking, but rather through a competitive bidding process, within the CPUC's authority in regulating utility procurement<sup>77</sup> and thus, Midway Sunset contends that any objection to avoided costs is inapplicable to the Midway Sunset PPA. Finally, Midway Sunset contends that CARE had the opportunity to object to the CPUC approvals, and specifically to the Midway Sunset PPA, in the CPUC proceedings but did not. Midway Sunset also notes

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<sup>73</sup> *Id.* at 7 (citing Declaratory Order, 132 FERC ¶ 61,047).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 5 (citing *Pike County Light & Power Co. v. Penn. Pub. Util. Comm'n*, 77 Pa. Commw. 268, 273-274 (1983) (*Pike County*)).

<sup>76</sup> *Id.* at 5.

<sup>77</sup> Midway Sunset September 21, 2010 Protest at 3 (citing Cal. Pub. Utils. Code § 454.5(c)(3)(2010)).

that, in those proceedings, CARE identified the Midway Sunset PPA as reasonable and prudent.<sup>78</sup>

#### **D. Calpine**

41. According to Calpine, CARE argues in its Complaint that the CPUC decision which approved the Calpine contracts<sup>79</sup> amounts to impermissible wholesale rate setting similar to what was found to be impermissible in the Declaratory Order. However, Calpine contends that the Calpine contracts involve a voluntary decision by a California IOU to contract for power at a negotiated rate. Further, Calpine argues that the CPUC Decision simply approved the Calpine contracts and authorizes PG&E to recover the costs of such purchased power in its retail rates. As such, Calpine claims that the CPUC Decision is an exercise of the CPUC's well-established authority as a state regulatory commission to review the purchase of power by a California IOU, and not in any way the wholesale rate setting at issue in the Declaratory Order.<sup>80</sup> Thus, Calpine argues that the Declaratory Order has no bearing on the CPUC's Decision, nor does it preempt the CPUC from approving the Calpine contracts, and that therefore CARE's Complaint should be rejected.<sup>81</sup>

#### **E. CARE's Answer to CPUC Motion to Dismiss**

42. In its answer to the CPUC's Motion to Dismiss, CARE contends that, under the Declaratory Order, any CPUC-approved PPA would be preempted by the Commission's authority unless the Commission first has an opportunity to review the contract.<sup>82</sup> Relying on the Supreme Court's recent *Morgan Stanley*<sup>83</sup> decision, CARE contends that the CPUC only has authority to approve contracts for QFs below avoided cost and is

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<sup>78</sup> *Id.*

<sup>79</sup> Decision 10-07-042.

<sup>80</sup> Calpine Protest at 4.

<sup>81</sup> *Id.* at 6.

<sup>82</sup> CARE October 5, 2010 Answer at 2.

<sup>83</sup> *Id.* at 3 (citing *Morgan Stanley Capital Group v. Public Utility District No. 1, et al.*, 554 U.S. 527 (2008) (*Morgan Stanley*)).

limited to only review any contract to determine if it meets the Ninth Circuit's standard for evaluating a high-rate challenge and setting aside a contract rate.<sup>84</sup>

43. CARE reiterates its claim that the CPUC waived any protections that it may have had from complaint under section 201(f) of the FPA by filing a request for declaratory order. CARE also contends that the CPUC has failed to demonstrate how section 201(f) and state sovereign immunity apply where the CPUC's wholesale ratemaking authority is preempted by the Commission.<sup>85</sup>

44. CARE asserts that it is not challenging the CPUC's authority to regulate retail sales, but is challenging the CPUC's decision to authorize wholesale energy procurement and the resource portfolios of retail selling utilities, because these actions are preempted by the Commission.<sup>86</sup>

45. CARE also claims that allowing the CPUC's approval of PPAs for electricity and ancillary services at wholesale rates that are above the avoided cost is prejudicial to existing QFs. Furthermore, CARE states that this action is unlawful because it fails to require wholesale electricity contract sellers to be a QF.<sup>87</sup> CARE argues that the Commission should hear the Complaint because contracts approved outside the FPA could create a risk to the bulk power system as a whole.<sup>88</sup>

46. Finally, CARE denies that it is trying to collaterally attack the Commission's dismissal of CARE's earlier complaints. CARE requests that the Commission accommodate any technical failure to meet the requirements of Rule 203 and 206.<sup>89</sup>

## V. Answers to Amended Complaint

### A. The California Utilities

47. The California Utilities request that the Commission dismiss the Amended Complaint, arguing that it also fails to meet the requirements of the Commission's rules. According to the California Utilities, the only issue raised in the Amended Complaint is that CARE is displeased with the procedural process relating to a proposed settlement

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<sup>84</sup> *Id.* at 3.

<sup>85</sup> *Id.* at 5.

<sup>86</sup> *Id.* at 6.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.*

pending before the CPUC and this issue is not a Commission jurisdictional matter.<sup>90</sup> The California Utilities contend that CARE has failed to identify any action that violates federal statutory or regulatory standards.<sup>91</sup> The California Utilities also argue that the Amended Complaint is not procedurally appropriate because the proposed amendment does not arise from the same transaction or occurrence as the subject of the original Complaint.<sup>92</sup>

### **B. Cogeneration Parties**

48. The Cogeneration Parties also oppose the Amended Complaint, arguing that it should be dismissed because CARE has failed to exhaust its administrative remedies. More specifically, the Cogeneration Parties contend that CARE's objections to the state proceeding's procedural schedule and the QF settlement must be raised before the CPUC.<sup>93</sup>

49. The Cogeneration Parties also contend that CARE contradicts the argument it raised in its initial Complaint acknowledging that a state commission could approve wholesale rates for purchases from QFs under PURPA.<sup>94</sup> In contrast, according to the Cogeneration Parties, CARE argues in its Amended Complaint that the Commission's jurisdiction over wholesale rates precludes the CPUC from approving the QF settlement, and requires that the Commission approve the QF settlement instead.<sup>95</sup>

### **C. CPUC**

50. The CPUC also opposes the Amended Complaint, and reiterates its assertion that CARE has no right to challenge CPUC decisions at the Commission, and that attempts to have the Commission interfere with ongoing CPUC proceedings further supports the CPUC's pending motion to dismiss.<sup>96</sup>

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<sup>90</sup> California Utilities November 4, 2010 Answer at 2.

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.*

<sup>93</sup> Cogeneration Parties November 4, 2010 Answer at 4-5.

<sup>94</sup> *Id.*, at 4.

<sup>95</sup> *Id.* at 5.

<sup>96</sup> CPUC November 4, 2010 Answer at 3-4.

51. The CPUC also contends that CARE erroneously presumes that the CPUC cannot preapprove the California IOUs' QF contracts.<sup>97</sup> The CPUC argues that CARE misinterprets the Declaratory Order. According to the CPUC, the Declaratory Order expressly recognized that the CPUC has the authority to decide avoided cost rates for QF contracts.<sup>98</sup> Finally, the CPUC also notes that, as CARE recognizes, the Commission will determine whether the proposed settlement may go into effect when it considers the IOUs' waiver requests.<sup>99</sup>

## **VI. Commission Determination**

### **A. Procedural Matters**

52. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, timely, unopposed motions to intervene serve to make the movants parties to these proceedings.<sup>100</sup>

53. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure<sup>101</sup> prohibits an answer to a protest, an answer, a motion for oral argument, or a request for rehearing, unless otherwise ordered by the decisional authority. However, CARE's October 5, 2010 filing is not only an answer to an answer but is also a response to the CPUC's Motion to Dismiss. Thus, we will accept CARE's October 5, 2010 filing as a response to the CPUC's Motion to Dismiss.

### **B. CARE's Complaint Fails to Meet the Requirements of Rule 203 and Rule 206**

54. The Commission's Rules of Practice and Procedure require a complainant to meet certain minimum requirements. Specifically, Rule 203 requires that all pleadings contain the "relevant facts," and the "position taken by the participant . . . and the basis in fact and law for such position."<sup>102</sup> Similarly, Rule 206 requires complainants to "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements [and] [e]xplain how the action or inaction violates applicable

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<sup>97</sup> *Id.* at 5.

<sup>98</sup> *Id.* at 6.

<sup>99</sup> *Id.* at 7-8.

<sup>100</sup> 18 C.F.R. § 385.214 (2010).

<sup>101</sup> 18 C.F.R. § 385.213(a)(2) (2010).

<sup>102</sup> *See* 18 C.F.R. § 385.203(a) (2010).

statutory standards or regulatory requirements.”<sup>103</sup> A complainant must state a legally recognizable claim that the Commission has the statutory or regulatory power to address.<sup>104</sup>

55. CARE appears to claim that: (1) the Respondents conspired to violate the FPA “by approving contracts that exceed the utilities’ avoided cost cap;” (2) the price and non-price terms of the challenged contracts are unjust and unreasonable; (3) the contracts will impose a financial burden on California ratepayers; (4) the CPUC violated the FPA by approving RPS contracts that should be reviewed by the Commission for compliance with the FPA; and (5) the CPUC waived its sovereign immunity.

56. We find that CARE fails to provide sufficient information to satisfy the Commission rules applicable to complaints. With regard to the Respondents other than the CPUC, CARE has not clearly identified the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements, nor has CARE explained how the action or inaction violates these standards and requirements. CARE’s only “evidence” is two CPUC orders<sup>105</sup> which, among other things, approved various power purchase agreements entered into by PG&E. With regard to SoCal Edison and SDG&E, these companies were not involved in the proceedings which resulted in the CPUC orders at issue. Thus, CARE has proffered no evidence supporting a violation of the FPA on behalf of these parties.

Similarly, since CARE’s accusation claims that it was the act of approving the contracts which violated the FPA, CARE has failed to make any accusations with regard to PG&E, as PG&E did not “approve” the contracts at issue. Furthermore, CARE fails to state what actions PG&E took which allegedly violated the FPA. More specifically, CARE alleges that the Respondents “conspired together” but CARE fails to provide any evidence supporting the alleged conspiracy or offer any evidence supporting its allegations.

57. Similarly, although CARE alleges that the contracts approved by the CPUC exceed the avoided cost rate, CARE does not provide any support for this allegation.

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<sup>103</sup> 18 C.F.R. § 385.206(b) (2010).

<sup>104</sup> See, e.g., *CARE v. California Independent System Operator Corp.*, 117 FERC ¶ 61,072, at P 8-11 (2006).

<sup>105</sup> See *Application of Pacific Gas and Electric Company*, D. 10-07-042 (July 29, 2010) and *Application of Pacific Gas and Electric Company for Approval of 2008 Long-Term Request for Offer Results and for Adoption of Cost Recovery and Ratemaking Mechanisms*, D. 10-07-045 (July 29, 2010).

Moreover, CARE has failed to file a petition pursuant to section 210(h) of PURPA<sup>106</sup> requesting the Commission to enforce its PURPA regulations.

58. CARE also contends that the contracts are unjust and unreasonable, but offers no specific evidence to support this allegation. While CARE alleges that the contracts will impose a financial burden on ratepayers, we note that every contract imposes financial obligations on both parties to the contract. CARE fails to present any quantifiable evidence which would establish that the contracts impose such a burden as to be found to be unjust and unreasonable.

59. With regard to CARE's allegations concerning the approved RPS contracts, CARE fails to proffer any evidence or legal argument. Moreover, CARE fails to state which specific contracts it finds objectionable.

60. The Commission has repeatedly stated that a party seeking hearing must make an adequate proffer of evidence including pertinent information and analysis to support its claims.<sup>107</sup> CARE has not provided such evidence or analysis to support any of its claims.

61. Generally, a Commission proceeding is not a proper forum to challenge either a CPUC decision or a proposed settlement pending before the CPUC. These objections must be raised before the CPUC and the applicable review process.<sup>108</sup>

62. We find that CARE has mischaracterized the *Morgan Stanley* decision. Under the *Mobile-Sierra* doctrine,<sup>109</sup> the Commission must presume that a rate set by a freely negotiated wholesale-energy contract meets the statutory "just and reasonable" requirement. The presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest. In *Morgan Stanley*, the Supreme Court determined that the *Mobile-Sierra* presumption applied whether or not the Commission had an initial opportunity to review a contract rate. The Court also held that the

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<sup>106</sup> 16 U.S.C. § 824a-3(h) (2006).

<sup>107</sup> See, e.g., *Illinois Municipal Electric Agency v. Central Illinois Public Serv. Co.*, 76 FERC ¶ 61,084, at 61,482-83 and n.6. (1996).

<sup>108</sup> We would consider the concerns raised regarding the settlement or any of the PPAs if and when these documents are properly filed for review by the Commission.

<sup>109</sup> *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) and *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

presumption applies to challenges by purchasers of wholesale electricity to the same extent it had previously been applied to challenges by sellers.<sup>110</sup>

63. In the past, we have admonished parties that “rather than bald allegations, [complaining parties] must make an adequate proffer of evidence including pertinent information and analysis to support its claims.”<sup>111</sup> CARE’s Complaint fails to meet even this basic standard. Accordingly, we find that CARE has failed to satisfy the Commission’s requirements for filing a complaint as set forth above.

64. Accordingly, due to the deficiencies in CARE’s complaint, we find that the complaint should be dismissed.<sup>112</sup>

The Commission orders:

The Complaint filed by CARE is dismissed for the reasons set forth above.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>110</sup> *Morgan Stanley Capital Group v. Public Utility District No. 1, et al.*, 554 U.S. 527 (2008). Moreover, we note that CARE is relying upon the Ninth Circuit interpretation of the *Mobile-Sierra* doctrine which was overturned by the Supreme Court in *Morgan Stanley*.

<sup>111</sup> *Illinois Municipal Electric Agency v. Central Illinois Public. Serv. Co.*, 76 FERC ¶ 61,084 at 61,482.

<sup>112</sup> In light of our decision to dismiss the complaint in its entirety, we will not address the other issues raised by Respondents.