

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Californians for Renewable Energy, Inc.

v.

Docket No. EL04-11-001

Calpine Energy Services, L.P. and the
California Department of Water Resources

ORDER DENYING REHEARING

(Issued June 2, 2004)

1. In this order, the Commission denies rehearing of its dismissal of the Californians for Renewable Energy, Inc.'s (CARE's) complaint against Calpine Energy Services, L.P. (Calpine) and the California Department of Water Resources (CDWR), regarding four contracts entered into between Calpine and CDWR as part of a settlement resolving claims against Calpine in Docket No. EL02-60-000, et al.

I. Background

2. On May 1 and 2, 2002, the California Public Utilities Commission and the California Electricity Oversight Board filed notices of withdrawal of their complaints against Calpine in Docket Nos. EL02-60-000 and EL02-62-000.¹ Pursuant to Rule 216(b)(1) of the Commission's Rules of Practice and Procedure,² the withdrawals became effective on May 16 and 17, 2002 by operation of law because the notices were unopposed and the Commission did not disallow the withdrawals. The notices of withdrawal resulted from a settlement (Settlement) which resolved, inter alia, all claims against Calpine arising from the complaints filed in Docket Nos. EL02-60-000 and EL02-62-000. As part of the Settlement, CDWR and Calpine executed four renegotiated contracts (Renegotiated Contracts) which superceded and replaced the Calpine contracts which had been challenged in that proceeding.

¹ Public Utilities Commission of California v. Sellers of Long Term Contracts, 99 FERC ¶ 61,087 (2002).

² 18 C.F.R. § 385.216(b)(1) (2003).

3. On May 2, 2002, as a result of the Settlement, the State of California filed a notice of withdrawal of the complaint filed against Calpine in Docket No. EL02-71-000. The Settlement was filed as an attachment to that notice of withdrawal. CARE filed a protest to the notice of withdrawal, which was subsequently dismissed by the Commission.³

4. Over a year later, on October 20, 2003, in Docket No. EL04-11-000, CARE filed a new complaint against Calpine and CDWR, alleging that the Renegotiated Contracts were unjust and unreasonable and, alternatively, contrary to the public interest. CARE requested that the Commission abrogate the Renegotiated Contracts ab initio.

5. On January 28, 2004, the Commission dismissed CARE's complaint because it was an untimely, collateral attack on the Commission's previous orders and sought to circumvent the Commission's rules and procedures.⁴ On February 23, 2004, as amended March 14, 2004, CARE filed a timely request for rehearing.

II. Discussion

6. CARE claims that the Commission has created circumstances that do not allow CARE to procedurally address new material facts regarding Calpine's alleged breach of the terms and conditions of one of the Renegotiated Contracts. CARE claims that the question of whether a material breach of the Renegotiated Contracts has occurred with respect to specific construction milestones and monthly status reports has not been addressed in any other proceeding. CARE's arguments are without merit. In its complaint, CARE sought the same relief - rejection of the Renegotiated Contracts ab initio - that it had sought in Docket No. EL02-71-000 and could have sought in Docket No. EL02-60-000, et al.,⁵ if it had intervened in that proceeding. CARE had procedural avenues at its disposal to address its concerns; however, CARE was either unsuccessful or chose not to use those avenues.

³ State of California ex rel. Bill Lockyer, et al., v. British Columbia Power Exchange Corp., 99 FERC ¶ 61,247 at 62,061, reh'g denied, 100 FERC ¶ 61,295 (2002).

⁴ Californians for Renewable Energy, Inc. v. Calpine Energy Services, L.P., et al., 106 FERC ¶ 61,055 (2004) (January 28 Order).

⁵ CARE argues that the Commission erred by stating that the Commission's regulations compel CARE to file an intervention in a section 206 complaint proceeding. CARE misconstrues the January 28 Order. The Commission did not state that CARE was compelled to intervene in Docket No. EL02-60-000, et al. The Commission stated that CARE could have intervened in that proceeding and thus had the opportunity to shape the record, arguments and decision on, among other things, the withdrawal of the

(continued...)

7. CARE now argues for the first time in its request for rehearing that circumstances have changed and that the Renegotiated Contracts have become unjust and unreasonable and contrary to the public interest within the eighteen months since the withdrawals of the complaints in Docket No. EL02-60-000, et al., became effective.⁶ CARE does not explain why it waited until after the January 28 Order was issued to raise for the first time on rehearing such a fundamental issue. The Commission generally looks with disfavor on parties raising on rehearing issues that should have been raised earlier.⁷ Such behavior is disruptive to the administrative process because it has the effect of moving the target for parties seeking a final administrative decision. Absent good cause, not present here, we will not consider CARE's new argument raised for the first time on rehearing.

complaints against Calpine and in turn the Renegotiated Contracts. CARE chose not to do so. CARE cannot sit on its rights and then file a new complaint which raises issues that could have been addressed in a prior proceeding. See *Pacific Gas and Elec. Co. v. Sunnyside Cogeneration Partners, L.P., et al.*, 97 FERC ¶ 61,378 at 62,727 (2001) (entities that do not act in a timely fashion to protect their interests must live with the results).

CARE also argues that the Commission erred by stating that CARE filed a request for rehearing of the Commission's order in Docket No. EL02-60-000, et al. CARE asserts that it only requested rehearing in Docket No. EL00-95-000. CARE's assertion is incorrect. On July 26, 2003, as amended on September 2, 2003 and September 5, 2003, CARE filed a request for rehearing which listed numerous docket numbers including Docket Nos. EL02-60-000, EL02-60-003, EL02-62-000 and EL02-62-003. If CARE did not seek rehearing of the Commission's order in Docket No. EL02-60-000, et al., it should not have listed those docket numbers on the pleading or raised issues related to that proceeding in that pleading.

⁶ See January 28 Order at n.8 ("CARE has not argued nor provided evidence that circumstances have changed and that the Renegotiated Contracts have become unjust and unreasonable or contrary to the public interest in the eighteen months subsequent to the withdrawals becoming effective.").

⁷ *Tenaska Power Services Co. v. Southwest Power Pool, Inc.*, 102 FERC ¶ 61,140 at P 14 (2003) (citing *Baltimore Gas & Electric Company, et al.*, 91 FERC ¶ 61,270 at 61,922 (2000); *Northern States Power Company (Minnesota), et al.*, 64 FERC ¶ 61,172 at 62,522 (1993); *Cities and Villages of Albany and Hanover, Illinois, et al.*, 61 FERC ¶ 61,362 at 62,451 (1992)).

8. Moreover, even if we were to consider CARE's new argument, CARE has not provided sufficient information to show that an investigation is warranted. Among other things, it has not clearly identified the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements and explained how the action or inaction violates applicable statutory standards or regulatory requirements.⁸ CARE has merely alleged that Calpine has materially breached one of the Renegotiated Contracts with respect to construction milestones and monthly reports and that a Commodities Futures Trading Commission Order (CFTC Order) supports CARE's claim. CARE has not shown a nexus between the alleged breach and the subject of the CFTC Order.⁹ The Commission has consistently stated that mere allegations are insufficient to mandate a hearing.¹⁰ The Commission has stated that, rather than bald allegations, the party seeking a hearing must make an adequate proffer of evidence including pertinent information and analysis to support its claims.¹¹ CARE has not provided such evidence or analysis.

The Commission orders:

CARE's request for rehearing is denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

⁸ See Rule 206 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.206 (2003).

⁹ Furthermore, on November 10, 2003, Calpine filed an answer, in this proceeding, which included an amendment to the Renegotiated Contract at issue dated October 27, 2003 in which Calpine and CDWR revised the specific milestone and monthly reporting requirements associated with that contract and agreed that Calpine will be subject to liquidated damages if it fails to meet the revised milestones. CARE has not provided evidence that Calpine has failed to meet these revised requirements.

¹⁰ Illinois Municipal Elec. Agency v. Central Illinois Public Serv. Co., 76 FERC ¶ 61,084 at 61,482-83 and n.6 (1996).

¹¹ Id.