

135 FERC ¶ 61,158  
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. (Care),

v.

Docket No. CP10-5-001

Williams Northwest Pipeline

ORDER DENYING REHEARING

(Issued May 19, 2011)

1. On January 3, 2011, CALifornians for Renewable Energy, Inc. (CARE) filed a request for rehearing of the Commission's order denying CARE's complaint against Williams Northwest Pipeline (Northwest).<sup>1</sup> For the reasons discussed below, the Commission will deny CARE's request for rehearing.<sup>2</sup>

**I. Background**

2. Christian Berger owns property at 2696 Moon Mountain Drive, Eugene, Oregon. His mother, Mary Benafel, lives on the property. Northwest operates a natural gas pipeline across the Berger/Benafel property. The property is a contiguous parcel

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<sup>1</sup> *CALifornians for Renewable Energy, Inc. v. Williams Northwest Pipeline*, 133 FERC ¶ 61,194 (2010) (Complaint Order). Although CARE's complaint was filed against "Williams Northwest Pipeline," Northwest's legal name is "Northwest Pipeline GP."

<sup>2</sup> On March 11, 2011, Commissioner Cheryl A. LaFleur issued a memorandum to the file in sixty dockets, including Docket No. CP10-5, documenting her decision, based on a memorandum from the Office of General Counsel's General and Administrative Law section, dated February 18, 2011, not to recuse herself from considering matters in those dockets.

consisting of three lots numbered 14, 15, and 16.<sup>3</sup> By agreement dated March 8, 1964, and amended November 16, 1978, Northwest holds an easement covering most of lot 14 and a small portion of lot 15, which allows the company “to construct, entrench, maintain and operate a pipe line . . . over, under and through. . .” the covered property.<sup>4</sup> Prior to Northwest’s construction of the pigging facilities at issue in this case, the majority of Northwest’s facilities were underground within the easement on lot 14, with the exception of a small block valve comprising approximately eight feet of pipeline rising five feet above the ground.<sup>5</sup>

3. By letter dated April 2, 2007, Northwest notified Mr. Berger that, in order to comply with the U.S. Department of Transportation’s Pipeline Integrity Rule of 2003,<sup>6</sup> Northwest intended to construct a pig launcher and appurtenant facilities on a portion of its pipeline facilities “lying within Section 4 Township 18S, Range 3W, W.M., Lane County, Oregon.”<sup>7</sup> Northwest’s letter indicated that all of the construction activities would take place on land within its existing easement and pursuant to the terms of the easement, and named Mr. Berger as an affected landowner, but did not contain a clear description of the precise location of the proposed facilities. The letter also stated that Northwest was interested in compensating Mr. Berger for an exclusive access point to the right-of-way and block valve across the Berger/Benafel property, rather than from its existing access path across property owned by Dave and Shannon Tom (the Toms), which shares the rear boundary of lot 14 and is also covered by an easement held by Northwest.

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<sup>3</sup> Lot 16 fronts onto Moon Mountain Drive, but lots 14 and 15 are located on Moon Mountain Court, a short, dead-end street.

<sup>4</sup> See Easement Agreement and Amendment to Easement Agreement at Exhibit 3 of CARE’s October 18, 2009 Complaint. The 1978 amendment altered the boundaries of the original easement to include a small portion of lot 15, but did not materially amend the language setting forth the nature or use of the easement. See Complaint at 6, n. 2.

<sup>5</sup> Also, a six-foot chain link fence surrounded these above-ground facilities, enclosing a 12-by-12 foot area in the northeast corner of lot 14.

<sup>6</sup> See *Pipeline Safety: Pipeline Integrity Management in High Consequence Areas (Gas Transmission Pipelines)*, 68 Fed. Reg. 69,778 (Dec. 15, 2003); and 49 C.F.R. Part 192, Subpart O - Pipeline Integrity Management (2003).

<sup>7</sup> See Exhibit 7 of Complaint.

4. However, it appeared from a proximity map attached to the April 2007 notification letter that Northwest planned to locate the pigging facilities on the Toms' property and to use the Berger/Benafel property only as a workspace.<sup>8</sup> In addition, prior to notifying Mr. Berger of the proposed construction, Northwest sent a letter to the Toms on February 28, 2007, which it referred to as a "45-Day Landowner Notification," informing the Toms of Northwest's intent to construct the pigging facilities under the automatic authorization provisions of the Commission's blanket certificate program.<sup>9</sup>

5. Thus, in the spring of 2007, Ms. Benafel and Mr. Berger were surprised when Northwest commenced construction of the facilities on their property and not on the Toms' property. The specific facilities Northwest constructed were: (1) a pig receiver, comprising multiple pipes with diameters of up to 24 inches and standing approximately eight to ten feet above ground; (2) a permanent gravel road; (3) a concrete apron or driveway access point from Moon Mountain Court onto lot 14; and (4) a chain link and barbed wire fence (constructed in late 2007) around the pig receiver. On May 28, 2007, Northwest placed the facilities into service.

6. Subsequent to the April 2, 2007 notification letter, negotiations began between Northwest and Mr. Berger and Ms. Benafel regarding compensation for the alternate access point to the right-of-way, as well as for the option of purchasing various parcels of property from Mr. Berger. Although the negotiations occurred intermittently for approximately two years, no resolution was reached.

7. By letter dated June 19, 2009, CARE submitted an informal written complaint against Northwest to the Commission's Enforcement Hotline (Hotline).<sup>10</sup> After consideration of CARE's allegations and additional information obtained from Northwest, the Hotline staff notified CARE and Ms. Benafel via telephone of its opinion that Northwest had not acted unlawfully or improperly. In a July 20, 2009 e-mail to Ms. Benafel, the Hotline staff confirmed that it "[did] not agree with your [Ms. Benafel's] position," explained why it could not provide its non-binding recommendations in writing, and concluded the inquiry without further action.<sup>11</sup>

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<sup>8</sup> The proximity map showed the existing 16-inch Eugene/Grants Pass Line (2443), the existing right-of-way, and the proposed pigging facilities. *See* Exhibit 8 of Complaint.

<sup>9</sup> *See* Exhibit 6 of Complaint.

<sup>10</sup> Exhibit 23 of Complaint.

<sup>11</sup> Exhibit 25 of Complaint.

8. On October 8, 2009, CARE filed a formal complaint against Northwest, on behalf of Ms. Benafel.<sup>12</sup> On October 27, 2009, Northwest filed an answer to the complaint, denying CARE's allegations and requesting summary dismissal of the complaint.

9. The issues CARE raised on rehearing are discussed below.

## **II. Discussion**

### **A. Northwest's Obligation to Invoke Eminent Domain Procedures of NGA Section 7(h) Prior to Construction of Facilities**

#### **Complaint Order**

10. In its complaint, CARE contended that Northwest's sole property rights in the Berger/Benafel property are those enumerated in the 1964 easement and 1978 amendment thereto, and that Northwest's construction of the pigging facilities exceeded the scope of the easement.<sup>13</sup> CARE further contended that, without the necessary property rights to construct the pigging facilities on the Berger/Benafel property, Northwest was required to obtain additional rights in the property through eminent domain under section 7(h) of the Natural Gas Act (NGA).<sup>14</sup> Without eminent domain rights, CARE asserted that Northwest's construction of the pigging facilities and structures constituted a trespass on the Berger/Benafel property and/or, in the alternative, an unlawful taking of private property for public purposes without just compensation in violation of the Fifth Amendment of the Constitution. CARE also alleged that by failing to initiate a condemnation proceeding before construction of the facilities, Northwest violated the procedures mandated by section 7(h) of the NGA and the Fifth Amendment.<sup>15</sup>

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<sup>12</sup> The complaint also named the Hotline as a respondent to the complaint. The complaint included an affidavit by Ms. Benafel, entitled "Declaration of Mary Benafel" (Decl. of Benafel), and 25 exhibits.

<sup>13</sup> CARE asserted that the easement grants Northwest a limited right to construct certain enumerated facilities – i.e., only pipelines, pipeline valves, and pipeline fittings – and that neither the pig receiver, the chain link and barbed wire fence, or the concrete driveway and gravel road is a "pipeline, valve, or fitting" within the meaning of the easement language. CARE did not dispute that the facilities are located within the physical footprint of Northwest's existing easement on the Berger/Benafel property.

<sup>14</sup> 15 U.S.C. 717f (2006).

<sup>15</sup> CARE requested that Northwest pay \$235,000 in damages for the alleged wrongful taking of the Berger/Benafel property and civil penalties of \$1,000,000 for knowingly and willingly violating section 7(h).

11. In the Complaint Order, the Commission found that the issue raised by CARE involved the interpretation of the language of the easement. The Commission held that the interpretation of such a property contract is a matter for a court of appropriate jurisdiction, not for the Commission, which possesses no jurisdiction over, or expertise in, such matters.<sup>16</sup> Thus, the Commission denied CARE's requests for damages and penalties. In addition, the Commission found that Northwest was not required to seek eminent domain to obtain property rights in the Berger/Benafel property prior to construction, since Northwest was relying on rights it believed it possessed under the existing easement. The Commission noted, however, that such reliance was at Northwest's own risk in the event a state or federal court found that the easement did not provide Northwest the necessary rights to construct the facilities.<sup>17</sup>

### **CARE's Request for Rehearing**

12. CARE maintains that Northwest was required to seek property rights in the Berger/Benafel property through eminent domain prior to constructing the pigging facilities. CARE asserts that if only a court is competent to determine whether Northwest possessed the necessary property rights under the easement to construct the facilities, then only a court is competent to determine whether Northwest was required to seek eminent domain to construct the facilities. CARE contends that the Commission's holding that Northwest did not violate section 7 of the NGA by constructing facilities without invoking eminent domain is in error.

13. CARE also asserts that the 1964 easement governing Northwest's right-of-way over the Berger/Benafel property does not provide for the construction of "auxiliary installations" or "auxiliary facilities."<sup>18</sup> CARE asserts, therefore, that Northwest did not

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<sup>16</sup> Complaint Order, 133 FERC ¶ 61,194 at P 26.

<sup>17</sup> *Id.* P 27.

<sup>18</sup> In its complaint, CARE alleged that Northwest, as a blanket certificate holder, violated section 157.203(d) of the Commission's regulations by failing to provide to Mr. Berger and Ms. Benafel 45 days' written notice of construction on the Berger/Benafel property, failing to include Northwest's dispute resolution mechanisms and the Hotline telephone number in the April 2, 2007 letter Mr. Berger received from Northwest, and failing to accurately describe and depict the location of the construction. The Complaint Order held that the pigging facilities were "auxiliary installations" under section 2.55(a)(1) of the regulations and not "facilities" subject to the requirements of NGA section 7 and Subpart F of Part 157 of the regulations governing blanket certification. Thus, the Complaint Order found that Northwest did not violate the landowner notification requirements in section 157.203(d). CARE did not request rehearing of this finding.

hold the necessary property rights to construct the pigging facilities under its existing easement and that this demonstrates that Northwest was required to secure additional rights in the property prior to construction.

### **Commission Holding**

14. To construct natural gas facilities, a natural gas company must have authorization under the NGA to construct such facilities and the requisite property rights under state and local law necessary to locate the facilities on a particular parcel of land. While the Commission expects that the company will possess the requisite property rights before it commences construction of the facilities, it is general real property and trespass laws, and not the NGA itself, that requires that property rights be secured in advance of starting construction. Thus, when filing an application to construct facilities under section 7 of the NGA, a natural gas company need not have already obtained the property rights to construct the project, i.e., a company may still be negotiating with landowners to acquire property rights through purchase or lease when it files its application. If these negotiations are not fruitful, the Commission's authorization to construct provides the company with the opportunity to obtain the needed property rights through eminent domain under NGA section 7(h).

15. In this case, the Complaint Order found that Northwest possessed the requisite authority under the NGA to construct the pigging facilities, since the facilities were "auxiliary installations" under section 2.55(a)(1) of the Commission's regulations.<sup>19</sup> Apparently, Northwest believed that the 1964 easement agreement provided it with the right to construct the facilities on the Berger/Benafel property. Since Northwest believed that it already possessed the necessary property rights to construct the facilities, Northwest did not opt to initiate eminent domain procedures under section 7(h).

16. Section 7(h) provides a right, not an obligation, to seek eminent domain prior to construction<sup>20</sup> since, as stated above, the company may also lease the land for its facilities or acquire the land through purchase. Northwest was not required by section

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<sup>19</sup> Complaint Order, 133 FERC ¶ 61,194 at P 15 and 16.

<sup>20</sup> Section 7(h) provides that: "[w]hen any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it *may* acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts." (Emphasis added.)

7(h), or any provision of the NGA, to seek eminent domain prior to beginning construction, especially if it believed that it already possessed the necessary property rights. However, as the Commission stated in the Complaint Order, Northwest's reliance on the 1964 easement to provide it with rights to construct the pigging facilities on the Berger/Benafel property was at its own risk, i.e., if it is ultimately determined by a court that Northwest lacked the necessary property rights under the easement and violated the property rights of Mr. Berger and Ms. Benafel, Northwest may be subject to fines and/or damages.<sup>21</sup>

17. CARE also alleges that the easement does not provide the property rights necessary for Northwest to construct the auxiliary facilities. The Complaint Order held that the interpretation of the language of easement is a matter for a court of appropriate jurisdiction, not the Commission, which possesses no jurisdiction over, or expertise in, such matters.<sup>22</sup> The Commission reaffirms that holding here. By raising the property rights issue here, CARE is simply pursuing the issue in the wrong forum.

## **B. Inverse Condemnation**

### **CARE's Request for Rehearing**

18. CARE variously asserts that the Complaint Order "constituted an act of unlawful 'inverse condemnation' of the Berger/Benafel property" and/or "approv[ed] the inverse condemnation of the Berger/Benafel property by Northwest."<sup>23</sup>

### **Commission Holding**

19. While CARE's argument on this point is unclear, it appears to draw a distinction between the taking of property through an eminent domain proceeding and the taking of property without going through the eminent domain process. The logical thrust of such an argument would be that in either event, the landowner was due just compensation/damages. The Commission is not the appropriate forum in which to

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<sup>21</sup> See *id.* P 27.

<sup>22</sup> *Id.* P 26.

<sup>23</sup> Request for Rehearing at 7-8. As an example of inverse condemnation, CARE cites *United States v. Lynah*, 188 U.S. 445 (1903). In that case, the government built a dam on the Savannah River that permanently flooded a portion of the plaintiff's land used for the cultivation of rice. The court held that this was a taking, even though the government had never instituted a condemnation proceeding.

adjudicate property rights. If CARE, Mr. Berger, or Ms. Benafel believes that Northwest does not have the property rights to construct these facilities, they may bring an action in a court of appropriate jurisdiction to assert their rights.

**C. Alleged Fraudulent Actions by Northwest**

**Complaint Order**

20. CARE accused Northwest of engaging in deceptive activities to defraud Mr. Berger and Ms. Benafel of the use of their property. Specifically, CARE alleged that near the end of April 2007, Northwest entered into an agreement to pay the Toms several thousand dollars, which CARE maintained was compensation for the construction of the pigging facilities on the Berger/Benafel property instead of on the Toms' property, as originally proposed.<sup>24</sup> CARE asserted that Northwest's agreement with the Toms, as well as its actions, violated section 4A of the NGA and section 222 of the Federal Power Act (FPA), prohibiting energy market manipulation<sup>25</sup> and represented the "use or employ[ment of a] device, scheme, or artifice to defraud" Mr. Berger and Ms. Benafel of the use of their property.<sup>26</sup>

21. The Commission rejected CARE's allegations of fraud, finding that: (1) section 1c.1 prohibits fraudulent activity "in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,"<sup>27</sup> not negotiations between landowners and natural gas pipeline companies over property rights; and (2) CARE has presented no evidence that Northwest attempted to deceive Mr. Berger and Ms. Benafel with respect to the proposed location of the facilities and no indication how a payment to the Toms constitutes a device or scheme to defraud the Berger/Benafels (or why Northwest would "compensate" the Toms to construct on the Berger/Benafel property). Thus, the Commission denied CARE's request for imposition of civil penalties and punitive damages.<sup>28</sup>

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<sup>24</sup> Complaint at 10-12; Decl. of Benafel at 13.

<sup>25</sup> 15 U.S.C. § 717c-1 (2010) and 16 U.S.C. § 824v (2010), respectively. The NGA's prohibition against market manipulation is implemented in section 1c.1 of the Commission's regulations. 18 C.F.R. § 1c.1 (2010).

<sup>26</sup> CARE requested that the Commission impose civil penalties under section 22(a) of the NGA against Northwest of \$1 million per day from May 3, 2007, to the date of its complaint, or \$855,000,000. *See* 15 U.S.C. § 717t-1(a) (2010). CARE also requested that the Commission assess all punitive damages within its authority to impose.

<sup>27</sup> 18 C.F.R. § 1c.1 (2010).

<sup>28</sup> Complaint Order, 133 FERC ¶ 61,194 at P 29, 30. CARE also relied on a number of provisions of the FPA to support its request for civil penalties. Complaint at (continued)

### **CARE's Request for Rehearing**

22. CARE contends that the Commission's conclusion in the Complaint Order that CARE presented no evidence that Northwest defrauded Mr. Berger and Ms. Benafel with respect to the location of the facilities is contravened by other findings in the order. Specifically, CARE maintains that the Commission acknowledged that: (1) the record reflects that Northwest sent the Toms a 45-Day Landowner Notification letter informing the Toms of Northwest's intent to construct the pigging facilities under the automatic authorization provisions of the blanket certificate program; (2) the proximity map attached to Northwest's April 2, 2007 notification letter to Mr. Berger indicated that Northwest originally planned to locate the pigging facilities on the Toms' property and to use the Berger/Benafel property only as workspace; and (3) the notice provided to Mr. Berger from Northwest did not reflect the ultimate location of the facilities.<sup>29</sup> CARE concludes that "clearly" the agreement between the Toms and Northwest constitutes a devise or scheme to deny Mr. Berger and Ms. Benafel use of their property without just compensation.

### **Commission Holding**

23. There is no dispute that Northwest sent a "45-Day Landowner Notification" letter to the Toms informing them of Northwest's intent to construct facilities under its blanket certificate and indicating that the pigging facilities would be located on the Toms' property. However, the Commission's acknowledgement of these facts in the Complaint Order does not conflict with its findings that CARE did not provide sufficient evidence of fraud to meet the criteria of section 1c.1 of the Commission's regulations. Section 1c.1 of the Commission's regulations states, in relevant part,

- (a) It shall be unlawful for any entity, directly or indirectly, in connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission,
  - (1) To use or employ any device, scheme or artifice to defraud, . . . , or
  - (3) To engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity.

24. In the Complaint Order, the Commission concluded that Northwest's actions did not concern the purchase or sale of natural gas or transportation service. Although CARE seeks rehearing of this conclusion, it fails to articulate how Northwest's construction of the pigging facility was in connection with the purchase or sale of natural gas or

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11. The Commission held that the FPA, which governs electric and hydroelectric utility companies, is not applicable to Northwest.

<sup>29</sup> Request for Rehearing at 8-9.

transportation services. Therefore, the Commission denies rehearing of this issue. Moreover, even if the Commission were to find that the construction of the pigging facilities related to the purchase or sale of natural gas or transportation services, CARE has not demonstrated that the 45-Day Landowner Notification letter or the agreement with the Toms constituted a device or scheme to deny the Berger/Benafel's the use of their property with the requisite scienter to constitute market manipulation.<sup>30</sup>

**D. Action on CARE's Informal Complaint by the Hotline**

**Complaint Order**

25. CARE asserted that the Hotline mishandled Ms. Benafel's initial phone calls and a subsequent written informal complaint lodged with the Hotline.

26. The Complaint Order found that the Hotline staff acted appropriately in processing Ms. Benafel's phone calls and CARE's informal written complaint, i.e., the Hotline staff reviewed CARE's informal complaint and documentation provided by Ms. Benafel, obtained additional information and documentation from Northwest, consulted with Commission staff familiar with the project, and communicated its decision through telephone calls to CARE and Ms. Benafel.<sup>31</sup> Further, the Commission noted that the Hotline provides "informal staff opinions" that are not binding on the General Counsel or the Commission.<sup>32</sup>

**CARE's Request for Rehearing**

27. CARE contends that the Hotline staff and Commission staff demonstrated bias against complainant and lacked impartiality. CARE alleges that the findings in the Complaint Order that the Hotline acted appropriately are in error, as well as the finding that Hotline decisions are informal staff opinions that are not binding on the Commission. CARE asserts that once the Commission found in favor of the Hotline's informal staff opinion on Ms. Benafel's complaint, the Hotline ruling became binding and prejudicial to the complainant.

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<sup>30</sup> In the part of its pleading discussing the Hotline, CARE states that the Complaint Order admitted that "Northwest had acted unlawfully or improperly" and that "Northwest had committed fraud under its blanket certificate authority" by providing the 45-Day Landowner Notification letter to the Toms. Request for Rehearing at 11. There were no such statements in the Complaint Order.

<sup>31</sup> Complaint Order, 133 FERC ¶ 61,194 at P 34.

<sup>32</sup> 18 C.F.R. § 1b.21(a) (2010).

**Commission Holding**

28. CARE appears to believe there is bias because the Commission reached the same conclusion as the Hotline. The Commission was not bound by the Hotline's decision. Rather, the Commission reached a decision based on its independent analysis of the merits of the issues and arguments presented by CARE in its formal complaint. The only findings the Commission made related to the Hotline were that the Hotline acted appropriately and followed proper procedures to arrive at its conclusion. The Commission did not endorse the Hotline's conclusion on the merits of the issues in the informal complaint. Because the Commission arrived at the same result as the Hotline staff opinion, and not a different result, does not demonstrate bias against the complainant.

29. Contrary to CARE's assertions, the Hotline decision was not binding on CARE, Mr. Berger, or Ms. Benafel. Persons who believe they have a cause of action against an entity subject to the Commission's jurisdiction have the right to file a formal complaint, as CARE did, any time they deem it appropriate.

**The Commission orders:**

CARE's January 3, 2011 request for rehearing is denied.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.