

145 FERC ¶ 61,003
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

CALifornians for Renewable Energy, Inc.

v.

Docket No. EL07-49-002

California Public Utilities Commission,
California Department of Water Resources,
Pacific Gas and Electric Company, and
City and County of San Francisco

CALifornians for Renewable Energy, Inc.

v.

Docket No. EL07-50-001

California Public Utilities Commission,
Southern California Edison Company, and
Blythe Energy, L.L.C.

ORDER DENYING REHEARING

(Issued October 1, 2013)

1. On September 24, 2007, the Commission dismissed two virtually identical complaints filed by CALifornians for Renewable Energy, Inc. (CARE) seeking Commission review and rejection of certain wholesale power sale contracts.¹

¹ *CALifornians for Renewable Energy, Inc. v. California Public Utilities Commission, et al.*, 120 FERC ¶ 61,272 (2007) (Order Dismissing Complaints) (dismissing two virtually identical complaints by CARE in Docket Nos. EL07-49-000 and EL07-50-000).

On October 24, 2007, CARE filed a request for rehearing in both proceedings. For the reasons discussed below, the requests for rehearing will be denied.

I. Background

2. In the Docket No. EL07-49-000 complaint, CARE sought to abrogate a California Public Utilities Corporation (CPUC)-approved allocation of a contract originally between the California Department of Water Resources (CDWR) and the City and County of San Francisco (San Francisco) to Pacific Gas & Electric Company (PG&E). Under the allocation, PG&E assumed CDWR's obligations under the contract at issue for operational purposes.

3. In the Docket No. EL07-50-000 complaint, CARE challenged the CPUC's establishment of a hearing regarding Southern California Edison Company's (SoCal Edison) application to enter into a power purchase agreement with Blythe Energy, LLC (Blythe).

4. In both complaints, CARE argued that a series of decisions by the Ninth Circuit "effectively gutted FERC's decade-old approach to bulk power markets,"² leaving market-based rate contracts with "no presumption of legality." CARE argued that the decisions in *Snohomish* and *CPUC* expanded an earlier court decision in *Lockyer* "to erode further the price certainty of market-based sales and make new and ineluctably fatal demands of FERC's market-based pricing program."³ According to CARE, the court in *Snohomish* and *CPUC* held that a wholesale power purchase contract pursuant to the Commission's market-based rate program enjoys no *Mobile-Sierra*⁴ price certainty unless the contract is presented in advance to the Commission for review and the

² CARE Complaint, Docket No. EL07-49-000, at 4 (citing *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006) (*Snohomish*), *aff'd sub nom. Morgan Stanley Capital Group, Inc. v. Publ. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008); *Pub. Util. Com'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (*CPUC*), *vacated by Public Utilities Com'n of California v. FERC*, 550 F.3d 767 (2008); and *Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*), *cert denied sub nom. Coral Power, LLC v. Cal. Ex rel. Brown*, 127 S.Ct. 2972 (2007)).

³ CARE Complaint, Docket No. EL07-50-000, at 4.

⁴ See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (*Sierra*).

Commission considers market conditions and determines that the rate is just and reasonable and was negotiated in a functional marketplace.

5. CARE therefore claimed that the contracts at issue (which were not filed with or reviewed by the Commission) violate the filed rate doctrine which, CARE argued, requires that rates be filed with and approved by the Commission and formally noticed 60 days in advance of commencement of services. CARE also asked that the contracts in question be abrogated as unjust and unreasonable. In the alternative, CARE asked that the Commission reform the contracts to provide for just and reasonable pricing, and reduce the contracts' duration. CARE also alleged that the contracts at issue impose a financial burden on ratepayers and pose a threat to reliability.

6. In addition, in the Docket No. EL07-49-000 complaint, CARE stated that it sought Commission review of the CPUC's decision approving the contract in question because the CPUC failed to properly address the Commission's regulatory authority to review wholesale electricity contracts in violation of the Federal Power Act (FPA).⁵

7. Subsequently, CARE supplemented its original complaints to add resource adequacy concerns in both complaints. Specifically, in two amendments to the original complaint in Docket No. EL07-49-000, CARE stated that the challenged contract was approved by the CPUC on March 27, 2001, which was in the midst of the 2000-2001 energy crisis in California. CARE further argued that the contract at issue should be reviewed by the Commission for resource adequacy in the region because the Commission has jurisdiction over resource adequacy determinations by non-public utilities. In Docket No. EL07-50-000, CARE also argued that there are alternative locations for the construction of the proposed facility, and that the CPUC has neglected the energy efficiency program but instead has sited a new power plant on an emergency basis.

8. The Order Dismissing Complaints found that CARE had mischaracterized the relevant case law as invalidating the Commission's market-based rate program, and that the Ninth Circuit decisions did not require all market-based rate transactions to be pre-filed at or approved by the Commission.⁶ The Order Dismissing Complaints also found that CARE provided no factual support for the allegations that the challenged contracts

⁵ 16 U.S.C. §§ 796, *et seq.* (2005).

⁶ Order Dismissing Complaints, 120 FERC ¶ 61,272 at PP 1, 29-32

are unjust and unreasonable.⁷ In addition, the Commission found that the Commission proceeding is not a proper forum to challenge a contract between two exempt public utilities:⁸ CDWR and San Francisco.⁹ Accordingly, the Commission dismissed CARE's complaints.¹⁰

II. Discussion

A. CARE's Request for Rehearing

9. CARE generally disagrees that CARE mischaracterized the relevant case law as invalidating the Commission's market-based rate program.¹¹ CARE maintains that Ninth Circuit precedent requires Commission review of all contracts, and that the United States Supreme Court has agreed.¹² CARE claims that the Commission should review the particular contract disputed in EL07-50-000.¹³ CARE adds that it does not have a complete factual record to assert its claims because the Commission has denied CARE's request for a hearing with attendant discovery rights.¹⁴

10. In its rehearing request, CARE also protests the Commission's finding that a Commission proceeding is not a proper forum to challenge the contract between CDWR

⁷ *Id.* PP 45-47.

⁸ *See* 16 U.S.C. § 824(f) (2006).

⁹ Order Dismissing Complaints, 120 FERC ¶ 61,272 at P 49.

¹⁰ *Id.* P 50.

¹¹ CARE Rehearing at 4: CARE appears to include its grounds for seeking rehearing in one section of its request called "FERC findings" and in a separate section called "Statement of Issues." Although we summarize both we note that issues not itemized in a separate statement of issues are deemed waived per Order No. 663-A. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 Fed. Reg. 14,640 (March 23, 2006), FERC Stats. and Regs. ¶ 31,211 (2006).

¹² CARE Rehearing at 4.

¹³ *Id.* at 6.

¹⁴ *Id.* at 4-5.

and San Francisco, arguing that the Commission had no jurisdiction to endorse the settlement and should rescind its endorsement.¹⁵ CARE refers to its allegation in its Second Amended Complaint in Docket No. EL07-49 that San Francisco somehow received combustion turbines via a settlement that the Commission approved. However, as CARE admitted, it could only “surmise” those combustion turbines were somehow transferred, though without elaborating with any evidence, to San Francisco.¹⁶

11. CARE also claims that the Commission should order CAISO to rescind its statements concerning the siting of San Francisco’s power plant.¹⁷ CARE adds that this issue was included in the complaint CARE filed in Docket No. EL06-89. CARE adds that the Commission has directed CAISO to revise its procedures for determining Local Capacity Area Resource Requirements and that the Commission should consider CARE’s complaint in light of this Commission directive.

B. Commission Determination

12. None of the arguments enumerated in CARE’s rehearing request constitutes grounds for granting rehearing.¹⁸ Indeed, for many of the arguments made by CARE, it does not describe how the matter complained of constitutes an error that the Commission made in the Order Dismissing Complaints.¹⁹

13. CARE’s first claim – that CARE did not mischaracterize the current case law when claiming it required all market-based rate transactions must be pre-filed at or approved by the Commission - is incorrect. We reiterate that, in *Lockyer* and *Snohomish*, the court upheld the Commission’s market-based rate programs.²⁰ Also, the Supreme

¹⁵ *Id.* at 5.

¹⁶ CARE Second Amended Complaint at 2.

¹⁷ CARE Rehearing at 5, 7.

¹⁸ 18 C.F.R. § 385.713 (2013).

¹⁹ 18 C.F.R. § 385.713(c)(1) (2013) (requiring parties seeking rehearing to concisely state the alleged error of the underlying order); *see also Union Electric Co. dba AmerenUE*, 120 FERC ¶ 61,015, at P 5 (2007) ([P]arties filing requests for rehearing are obligated to set forth in those documents the grounds on which they are based A request for rehearing ... must independently set forth grounds of alleged error in the order at hand).

²⁰ *Lockyer*, 383 F.3d at 1013, 1015, and 1017; *Snohomish*, 471 F.3d at 1080, 1086.

Court noted that “[b]oth the Ninth Circuit and the D.C. Circuit have generally approved FERC’s scheme of market-based tariffs.”²¹

14. CARE’s second claim - that it cannot provide a factual record without the Commission granting a hearing with “attendant discovery rights” - is insufficient to support its rehearing request. CARE needed to have presented at the outset some fact or evidence that supported its allegations; unsubstantiated allegations alone are not sufficient to warrant the Commission instituting further procedures.²² CARE did not, however.

15. CARE’s third claim – that the Commission should rescind an “endorsement” of a contract between San Francisco and the Williams Companies²³ – is not a specification of an error in the Commission’s order. In addition, if, as CARE alleges, the Commission had no jurisdiction over the contract, then the Commission sees no need to respond.²⁴ Confusingly, we note, also, that CARE seems to have sought Commission review of non-jurisdictional contracts, first in its original Complaint, then in the First Amended Complaint, and lastly in the Second Amended Complaint—but the Commission did not undertake such review.²⁵ As a result, we view CARE’s demand that the Commission rescind an “endorsement” of the contract as an attempt by CARE to amend its complaint on rehearing and have the Commission then address the contract. Since, under our Rules

²¹ *Morgan Stanley Capital Group, Inc. v. Publ. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 538 (2008).

²² *See, e.g., Californians for Renewable Energy, Inc. et al. v. Pacific Gas & Electric et al.*, 142 FERC ¶ 61,143, at P 2 (2013); *Illinois Mun. Elec. Agency v. Cent. Illinois Publ. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996) (warning “[complainant] must make an adequate proffer of evidence, including pertinent information and analysis to support its claims.”).

²³ CARE refers to the Williams Companies, Inc. and Williams Energy Marketing & Trading Company (collectively, the Williams Companies). *See* CARE Complaint March 16, 2007 in the Attached Power Purchase Agreement at 1.

²⁴ CARE does not explain which “endorsement” it alleges the Commission gave.

²⁵ CARE EL07-49-000 Complaint at 8; CARE EL07-49-000 First Amended Complaint at 2, 6; CARE EL07-49-000 Second Amended Complaint at 2.

of Practice and Procedure, the other parties to the proceeding do not have an opportunity to answer, amending a complaint via rehearing request is impermissible.²⁶

16. CARE's fourth claim – that the Commission should order CAISO to rescind its statements concerning the siting of San Francisco's power plant– is not a specification of error since the Commission did not rule on the siting of the generating plant.²⁷ CARE also has not explained the relevance of its other complaint in Docket No. EL06-89-000, which it references here and thus its request here exceeds the scope of its original complaint. In addition, this is a moot issue because the complaint in Docket No. EL06-89-000 was not only dismissed, but rehearing was recently denied.²⁸

17. Accordingly, CARE's rehearing is denied.

The Commission orders:

CARE's rehearing is hereby denied for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁶ See *Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 85 FERC ¶ 61,320, at 62,257 (1998).

²⁷ In any event, the siting of generating units is not within the scope of the Commission's authority. *E.g.*, *Montana Megawatts I, LLC*, 107 FERC ¶ 61,140, at P 6 & n.5 (2005).

²⁸ See *Californians for Renewable Energy, Inc. v. California Independent System Operator Corp.*, 117 FERC ¶ 61,072 (2006), *reh'g denied*, 142 FERC ¶ 61,161 (2013).