145 FERC ¶ 61,002
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. Docket No. EL07-40-001

v.

California Public Utilities Commission,
Pacific Gas and Electric Company,
Metcalf Energy Center, LLC,
and the Los Medanos Energy Center, LLC

ORDER DENYING REHEARING

(Issued October 1, 2013)

1. On April 19, 2007, the Commission dismissed CAlifornians for Renewable Energy, Inc. (CARE)'s complaint against the California Public Utilities Commission (CPUC), Pacific Gas & Electric Company (PG&E), Metcalf Energy Center, LLC (Metcalf), and the Los Medanos Energy Center, LLC (Los Medanos) (collectively, Respondents).[1] CARE's complaint sought Commission rejection of CPUC-approved,

[1] *CAlifornians for Renewable Energy, Inc. v. California Public Utilities Commission, et al.*, 119 FERC ¶ 61,058 (2007) (Order Dismissing Complaints). The Order Dismissing Complaints addressed CARE's complaints in two dockets, EL07-37-000 and EL07-40-000. The two dockets were not consolidated, and CARE only requested rehearing in Docket No. EL07-40-000, which concerned the contract between PG&E and Metcalf/Los Medanos.

wholesale, long-term, market-based rate contracts. The Order Dismissing Complaints dismissed CARE's complaint; CARE mischaracterized the relevant case law, in particular certain Ninth Circuit cases,[2] and CARE did not provide any factual support for its allegations that the challenged contracts were unjust and unreasonable. On May 10, 2007, CARE filed a request for a rehearing. For the reasons discussed below, the request for rehearing will be denied.

I. Background

2. CARE's original complaint in the underlying docket challenged the CPUC-approved power purchase agreements between PG&E and subsidiaries of Calpine Corporation: Metcalf and Los Medanos, LLC. CARE wanted Commission review of the agreements, claiming that recent Ninth Circuit Court decisions "call into question the FERC's decades-old approach to reviewing bilateral, wholesale power contracts."[3]

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 Commission considers market conditions and determines that the rate is just and reasonable and was negotiated in a functional marketplace. CARE concluded that the contracts at issue (which were not filed with or reviewed by the Commission) violate the filed rate doctrine which, CARE asserted, required that rates must be filed with and approved by the Commission and must be formally noticed

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[2] CARE refers to the following recent decisions by the United States Court of Appeals for the Ninth Circuit (Ninth Circuit): *Pub. Util. Dist. No. 1 v. FERC*, 471 F.3d 1053 (9th Cir. 2006) *(Snohomish)*; *Pub. Util. Com'n of the State of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006) (*CPUC*); *Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004) (*Lockyer*).

[3] CARE Complaint, Docket No. EL07-40-000, at 2, referring to *Snohomish*.

[4] *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*); *see* CARE Complaint, Docket No. EL07-40-000, at 3.

60 days in advance of commencement of services. In addition, CARE stated that it sought Commission review of the CPUC's decisions approving the contract in question because the CPUC failed to properly address the Commission's regulatory authority over wholesale electricity contracts in violation of the Federal Power Act (FPA).[5]

4. The Commission found CARE mischaracterized the Ninth Circuit's decisions in *Snohomish*, *CPUC*, and *Lockyer*.[6] The Commission also disagreed with CARE's contention that, under *Snohomish* and *CPUC*, market-based rate contracts enjoy no *Mobile-Sierra* price certainty unless the contract is submitted in advance for review by the Commission. The Commission also found that CARE failed to present any factual support for its allegations that the challenged contracts are unjust and unreasonable.

5. The Order Dismissing Complaints found *Lockyer* specifically upheld the Commission's general approach to approval of market-based rates and thus there was no need to submit the challenged contracts for prior review.[7] The Commission found that an *ex ante* finding of the absence of market power, coupled with the Electric Quarterly Reports filing and effective regulatory oversight, qualifies as sufficient prior review for market-based rate contracts to satisfy the notice and filing requirements of FPA section 205.[8]

6. Next, the Commission found that CARE's allegations that the challenged contracts were unjust and unreasonable lacked specific evidence in support of this allegation.[9] The Commission noted that, because the sellers under the contracts in question had been granted market-based rate authority, the wholesale contracts that they entered into are presumed to be just and reasonable. The Commission also noted that the buyers and

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[5] CARE Complaint, Docket No. EL07-40-000, at 4.

[6] Order Dismissing Complaints at P 8.

[7] *Id.* P 41.

[8] *Id.*

[9] *Id.* P 42.

sellers under these contracts continue to support them, and the Commission added that buyers and sellers alike must be able to rely on stable long-term contracts to ensure reliable and adequate service.

7. Accordingly, the Commission dismissed CARE's complaint.

II. Discussion

A. CARE's Request for Rehearing

8. CARE's request for rehearing appears to make the following arguments. First, CARE seems to reiterate that it opposes the existing market-based rate program for wholesale energy contract and contends that the 2000-01 western energy crisis occurred because the market-based rate program does not work. CARE contends each contract should be individually reviewed by the Commission. CARE adds that the contract in question was negotiated without a representative for the residential ratepayers or small businesses that will be the end-users under the contract.[10]

9. Second, CARE apparently disagrees with what it describes as the Order Dismissing Complaints' statement that the "only problem with market based-rate contracts occurred during the 2000-01 period because of a confluence of factors…."[11]

10. Third, CARE seems to state that the power plants related to the contracts in question "are in an environment justice area," and that siting them in that area is a violation of the Equal Protection Clause.[12]

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[10] CARE Rehearing Request at 1-2.

[11] *Id*. at 6.

[12] *Id.* at 8.

11. Fourth, CARE appears to assert that energy sales are within the Commission's jurisdiction, and the Commission must provide a venue for the enforcement of applicable laws and review the contracts for just and reasonable rates.[13]

B. Commission Determination

12. We deny CARE's request for rehearing. In the first place, CARE's request for rehearing is deficient because it failed to include a Statement of Issues, as required by section 385.713(c)(2) of the Commission's regulations.[14] Order No. 663-A states that issues not itemized in a separate statement of issues are deemed waived.[15] Thus, CARE has not properly requested rehearing.

13. Moreover, it is unclear what the grounds are for its request. The Commission has had to infer the grounds for the request from the narrative included in CARE's request. However, even though the issues that CARE appears to raise are waived, on their own merits none of the issues constitutes grounds for granting rehearing.[16] Indeed, for most of CARE's arguments, it does not describe how the matter complained of constitutes an error that the Commission made in the Order Dismissing Complaints.

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[13] *Id.* at 8-10.

[14] 18 C.F.R. § 385.713(c) (2013).

[15] *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, FERC Stats. & Regs. ¶ 31,211, at PP 3-7 (2006) (cross-referenced at 114 FERC ¶ 61,284 (2006)).

[16] 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 ….).

14. CARE's first claim – that the market-based rate program is flawed and that the contracts at issue were improperly negotiated without a representative for residential ratepayers or small businesses - is not a specification of error regarding the Order Dismissing Complaints itself and is otherwise without merit. As the Commission noted in the Order Dismissing Complaints, courts have upheld the Commission's market-based rates program.[17] Also, the Supreme Court recently noted that "[b]oth the Ninth Circuit and the D.C. Circuit have generally approved FERC's scheme of market-based tariffs."[18] In addition, the contracts in question are between the generators and the public utilities as part of common business practices. And CARE did not raise the lack of representation as an issue in its complaint, focusing solely on the alleged burden to the ratepayers.[19] Thus, the alleged lack of representation did not need to be addressed in, and appropriately was not addressed in, the Order Dismissing Complaints and so cannot be raised as a specification of error now.

15. CARE's second claim – that the Order Dismissing Complaints stated that the "only problem with market based-rate contracts occurred during the 2000-01 period because of a confluence of factors…" – is a misquote and not a specification of error. The Order Dismissing Complaints described the 2000-01 energy crisis in the West as caused by a confluence of many factors.[20] Again, CARE's claim here is not a

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[17] Order Dismissing Complaints at PP 29-31 (citing *Lockyer*, 383 F.3d at 1014, and *Snohomish*, 471 F.3d at 1086).

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

[19] CARE Complaint at 10. In any event, there is no requirement in the Federal Power Act, our regulations, or either judicial or Commission precedent that power sales contracts require the participation of end-use customers in their negotiations in order to be valid.

[20] Order Dismissing Complaints at P 30 ("First, it is now well accepted that the 2000-01 energy crisis in the West was the result of a confluence of factors. These factors included: flawed market rules; inadequate addition of generating facilities in the preceding years; a drop in available hydropower due to drought conditions; a rupture of a major pipeline supplying natural gas into California; strong growth in the economy and in

(continued…)

specification of error. Instead, it appears to be only a misquoting of the Order Dismissing Complaints' language.

16. CARE's third claim – that the power plants related to the contracts in question "are in an environment justice area," and that siting them in that area is a violation of the Equal Protection Clause - is not a specification of error. CARE did not raise this issue in its original complaint, and so it was appropriately not discussed in the Order Dismissing Complaints.[21] Thus, there was no error.

17. CARE's fourth claim – that the Commission has jurisdiction over energy sales and should provide a venue for determining whether the contracts are just and reasonable - is equally not a specification of error in the Order Dismissing Complaints. And, as stated above, our market-based rate program has been upheld, and thus there was no need to formally submit those contracts for prior review.[22] In any event, CARE did have a venue to challenge the contracts: a properly supported complaint filed pursuant to FPA section 206. CARE did not file such a complaint, however.

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electricity demand; unusually high temperatures; an increase in unplanned outages of extremely old generating facilities; and market manipulation.").

[21] CARE appears to be amending its complaint via its rehearing request. We do not permit amending a complaint on rehearing since, under our Rules of Practice and Procedure, the other parties to the proceeding do not have an opportunity to answer. *See Transmission Agency of Northern California v. Pacific Gas & Electric Co.*, 85 FERC ¶ 61,320, at 62,257 (1998).

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).

[22] Order Dismissing Complaints at P 41.

18. Thus, because CARE's rehearing request is deficient for failing to include a Statement of Issues and because CARE does not raise supported claims of Commission error in its request for rehearing, we deny CARE's request for rehearing.

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.