

133 FERC ¶ 61,194
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. CP10-5-000

Williams Northwest Pipeline

ORDER DENYING COMPLAINT

(Issued December 3, 2010)

1. On October 8, 2009, CALifornians for Renewable Energy, Inc. (CARE), on behalf of itself and CARE member Mary Benafel, filed a complaint against Williams Northwest Pipeline (Northwest),¹ alleging that in 2007, Northwest constructed a pig receiver, a 16-inch valve, fencing, a road, and a driveway on the Lane County, Oregon property of Mary Benafel's son, Christian Berger, for which she is attorney-in-fact (the Berger/Benafel property), without providing adequate notice or possessing the necessary property rights to do so. CARE alleges that Northwest's actions constitute trespass and violate the Fifth Amendment of the U.S. Constitution, section 7(h) of the Natural Gas Act (NGA) governing eminent domain procedures,² section 157.203(d) of the blanket certificate provisions of the Commission's regulations,³ and the anti-fraud provisions of the NGA and Federal Power Act (FPA) enacted by the Energy Policy Act of 2005.⁴ CARE relies on various provisions of the NGA and FPA to support a claim for civil

¹ Although CARE's complaint was filed against "Williams Northwest Pipeline," as Northwest is sometimes referred to, Northwest's legal name is "Northwest Pipeline GP."

² 15 U.S.C. § 717f(h) (2006).

³ 18 C.F.R. § 157.203(d) (2010).

⁴ Pub. L. No. 109-58, 119 Stat. 594 (2005) (codified in various titles of the U.S.C.).

penalties and damages. CARE also claims that the Commission's Enforcement Hotline (Hotline), which it names as a respondent in the instant complaint, mishandled CARE's informal complaint lodged in June 2009.⁵

2. As discussed below, the Commission denies the complaint based upon its findings that: (1) the facilities at issue constitute auxiliary facilities, the construction of which requires no section 7(c) certificate authority and no landowner notification; and (2) the issue whether a 1964 easement agreement governing Northwest's existing right-of-way over the Berger/Benafel property provides the necessary property rights for the construction of the facilities at issue is a question of contract interpretation for a court of appropriate jurisdiction.

I. Background

3. The Berger/Benafel property is located at 2696 Moon Mountain Drive, Eugene, Oregon, in Section 4, Township 18 South, Range 3 West in Lane County. The property is a contiguous parcel consisting of three Judkins Heights Subdivision lots numbered 14, 15, and 16, and Ms. Benafel resides at the property.⁶ Northwest operates a natural gas pipeline across the Berger/Benafel property and, by agreement dated March 8, 1964, and amended November 16, 1978, 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.⁷

4. Prior to Northwest's construction of the pigging facilities on the Berger/Benafel property in 2007, Northwest's facilities were located mostly 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. A six-foot chain link fence surrounded these above-ground facilities, enclosing a 12-by-12 foot area in the northeast

⁵ Section 385.102 of the Commission's regulations precludes the Commission from being named a respondent in a complaint because the Commission does not fall within the definition of a "person" under section 385.102(d). As the Hotline is part of the Commission, it is not an appropriate respondent and we will not consider the Hotline as such. However, while the Hotline cannot be a respondent in this case, we will address in this order whether the Hotline appropriately handled CARE's informal complaint.

⁶ Lot 16 fronts onto Moon Mountain Drive, but lots 14 and 15 are located on Moon Mountain Court, a short, dead-end street.

⁷ See Easement Agreement and Amendment to Easement Agreement at Exhibit 3 of Complaint. The 1978 amendment altered the boundaries of the original easement to include a small portion of lot 15 within the easement, but did not materially amend the language setting forth the nature or use of the easement. See Complaint at 6, n. 2.

corner of lot 14. Prior to 2007, Northwest accessed the block valve from the back of lot 14, by crossing property owned by Dave and Shannon Tom (the Toms) located on Augusta Street, which property shares the rear boundary of lot 14 and is also covered by an easement held by Northwest.

5. By letter dated April 2, 2007, Northwest notified Christian Berger that, in order to comply with the U.S. Department of Transportation's Pipeline Integrity Rule of 2003,⁸ Northwest intended to construct a pig launcher and receiver to enable it to perform inspections of its pipeline facilities between the Albany and Eugene Compressor Stations on the 16-inch Eugene-to-Grants Pass Line No. 2243, and that it would be locating the pig receiver and appurtenant facilities within Northwest's existing easement on a portion of its pipeline facilities "lying within Section 4 Township 18S, Range 3W, W.M., Lane County, Oregon."⁹ 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.¹⁰ Northwest also stated in the letter that it was interested in compensating Mr. Berger for an exclusive access point to the right-of-way from "Moon Mountain Drive,"¹¹ rather than from Augusta Street via a path across the Tom's property.

6. In late April or early May, Northwest commenced construction of the facilities on the Berger/Benafel property,¹² and on May 28, 2007, Northwest placed the facilities, which allow Northwest to internally inspect its line from milepost 0.0 to milepost 6.05, into service. The specific facilities Northwest constructed are: (1) a pig receiver, comprising multiple pipes with diameters of up to 24 inches, and standing approximately

⁸ 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).

⁹ See Exhibit 7 of Complaint.

¹⁰ The letter included a proximity map showing the 16-inch Eugene/Grants Pass Line (2443), the existing right-of-way, and the proposed pigging facilities. See Exhibit 8 of Complaint. On April 11, 2007, Northwest also e-mailed to Mr. Berger a copy of the April 2, 2007 letter and proximity map.

¹¹ It appears from a review of the maps included with the complaint, which indicate that lot 14 abuts Moon Mountain Court, and the actual location of the concrete apron/driveway that Northwest constructed, that Northwest was seeking an access point off of Moon Mountain Court, not Moon Mountain Drive.

¹² While Ms. Benafel attests that Northwest commenced construction on the Berger/Benafel property on May 3, 2007, Northwest states that it commenced construction on April 28, 2007.

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.¹³

7. Subsequent to the April 2, 2007 notification letter, Northwest and Mr. Berger and Ms. Benafel have been engaged in negotiations regarding compensation for the alternate access point to the right-of-way from Moon Mountain Court, as well as for the option of purchasing various parcels of property from Mr. Berger. Both parties obtained appraisals of the Berger/Benafel property. In May 2007, Northwest offered Mr. Berger and Ms. Benafel \$15,000 to purchase lot 14 and, subsequently, on October 1, 2009, it offered the parties \$60,000 to purchase lot 14 and a portion of lot 15, and offered to install a cedar fence. However, Mr. Berger and Ms. Benafel obtained a property appraisal in April 2008 that calculated the value of the alleged partial taking of their property, together with damages to the remainder of the property, to be \$235,000. Ultimately, although negotiations occurred intermittently for a period of time, no resolution was reached.

8. By letter dated June 19, 2009, CARE submitted an informal written complaint against Northwest to the Hotline.¹⁴ 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.¹⁵

9. On October 8, 2009, CARE filed the instant formal complaint against Northwest and the Hotline, on behalf of Ms. Benafel.¹⁶ The issues raised by CARE's complaint and Northwest's answer are discussed below.

¹³ The complaint includes documentation that shows that Northwest applied for and obtained from the City of Eugene, Oregon, permits to construct the concrete apron and the chain link fence. Ms. Benafel maintains that the permits each bear a different incorrect address for the construction property, and reflect properties that have never been owned by Mr. Berger. However, it is unclear whether the alleged incorrect street numbers are actually street numbers or are some other internal designation used in the City of Eugene's computer system.

¹⁴ Exhibit 23 of Complaint.

¹⁵ Exhibit 25 of Complaint.

¹⁶ The complaint includes an affidavit by Ms. Benafel, entitled "Declaration of Mary Benafel" (Decl. of Benafel), and 25 exhibits.

II. Public Notice, Interventions, and Answer

10. Public notice of CARE's complaint was issued on October 13, 2009.¹⁷ On October 27, 2009, Northwest filed an answer to the complaint, denying CARE's allegations and requesting summary dismissal of the complaint. No motions to intervene, notices of intervention, or protests were filed in response to the complaint.

III. Discussion

A. Regulatory Authority to Construct Facilities and Notice of Construction

11. CARE maintains that Northwest was required to comply with section 157.203(d) of the Commission's regulations providing that blanket certificate holders, such as Northwest, make a good faith effort to notify all affected landowners, in writing, at least 45 days before commencing construction under a blanket certificate.¹⁸ CARE states that the notice required by section 157.203(d)(1) must include a description of the effect the construction activity will have on the landowner's property and a description of available procedures for resolving disputes arising from the blanket certificate activity, including that of the Hotline.

12. CARE argues that Northwest violated section 157.203(d)(1) because Northwest failed to: (1) notify, or make a good faith attempt to notify, Mr. Berger or Ms. Benafel in writing at least 45 days before commencing construction on the Berger/Benafel property in late April or early May of 2007; (2) include Northwest's dispute resolution mechanisms and the Hotline telephone number in the April 2, 2007 letter Mr. Berger received from Northwest; and (3) accurately describe and depict the location of the construction. With respect to the location of the construction, CARE contends that Northwest misrepresented the true effects that construction activity would have on the Berger/Benafel property by indicating on the proximity map attached to the April 2, 2007 letter and April 11 e-mail, and in conversations with Ms. Benafel, that the pig receiver would be located not on the Berger/Benafel property, but on the Toms' property. CARE asserts that it was not until Northwest broke ground on the Berger/Benafel property that Ms. Benafel learned that the majority of the pig receiver would be located on the Berger/Benafel property. CARE alleges that Northwest's failure to meet the minimal notice requirements of section 157.203(d) deprived Mr. Berger and Ms. Benafel of the

¹⁷ See 74 Fed. Reg. 53,492 (Oct. 19, 2009).

¹⁸ 18 C.F.R. § 157.203(d) (2010).

opportunity to meaningfully protect their property rights, and that this failure nullifies Northwest's blanket certificate authorizations. CARE requests civil penalties of \$50,000 per day.

13. In its answer, Northwest states that it did not construct the facilities pursuant to its blanket certificate and, therefore, it is not in violation of the notice requirement of section 157.203(d). Rather, Northwest asserts that the pigging facilities are auxiliary facilities, as defined in section 2.55(a) of the Commission's regulations, the construction of which requires no section 7(c) certificate or advance landowner notification.

14. Section 2.55 of the Commission's regulations provides that, for purposes of section 7(c) of the NGA,¹⁹ the word "facilities" as used therein, shall be interpreted to exclude auxiliary installations and replacement facilities. Section 2.55(a)(1) defines "auxiliary installations" as

Installations (excluding gas compressors) which are merely auxiliary or appurtenant to an authorized or proposed transmission pipeline system and which are installations only for the purpose of obtaining more efficient or more economical operation of the authorized or proposed transmission facilities, such as: *Valves; drips; pig launchers/receivers; yard and station piping; cathodic protection equipment; gas cleaning, cooling and dehydration equipment; residual refining equipment; water pumping, treatment and cooling equipment; electrical and communication equipment; and buildings.*²⁰

15. Thus, as it is specifically identified in the regulation, the pig receiver constructed by Northwest in this case is an auxiliary installation and, as such, is not subject to the requirements of section 7(c) and the Commission's implementing regulations in Part 157 and, therefore, requires no certificate authority for its construction. The fence surrounding the pig receiver, which is necessary for public safety and the protection of the facility, and the driveway and road providing access to the pig receiver, are

¹⁹ Section 7(c) provides in relevant part: "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefore, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations" 15 U.S.C. § 717f (c) (2006).

²⁰ 18 C.F.R. § 2.55(a)(1) (2010) (emphasis added).

appurtenant to the pig receiver and, therefore, also constitute “auxiliary installations” under section 2.55(a)(1) for which no certificate authority is required.

16. Since these pigging facilities qualify as auxiliary facilities which, by definition, are excluded as “facilities” subject to the requirements of section 7 of the NGA and Part 157 of the Commission’s regulations, Subpart F of Part 157, governing blanket certification,²¹ is necessarily inapplicable to Northwest’s construction of the pigging facilities.²² Therefore, the facilities were not constructed pursuant to Northwest’s blanket certificate authority and Northwest was not required to comply with the landowner notification requirements of section 157.203(d). Thus, the Commission finds that Northwest did not violate section 157.203(d)(1) which requires that landowners affected by covered construction activities be given 45 days’ written notice and provided information concerning the Hotline.²³ Accordingly, the Commission denies CARE’s request for civil penalties.

17. While Northwest was not required to provide any notice to Mr. Berger or Ms. Benafel prior to commencing construction, or to comply with any of the landowner notification requirements of section 157.203(d)(1), the record reflects that approximately 30 days prior to commencing construction, Northwest in fact did notify Mr. Berger, as an affected landowner, of its plans to construct a pig receiver on its facilities, albeit in an attempt to negotiate an alternative access point to the new facilities.²⁴ The record also reflects that, prior to notifying Mr. Berger of the pigging facilities, 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 blanket certificate program.

²¹ See 18 C.F.R. §§ 157.203 and 157.208 (2010).

²² See 18 C.F.R. § 157.202(b)(3) excluding from the definition of “facilities” subject to the Commission’s blanket certificate regulations “the items described in § 2.55 of this chapter.”

²³ Nor was Northwest required to have complied with the landowner notification requirement in section 157.6(d) of the regulations, since such notification is required only for the construction or abandonment of facilities encompassed by the term “facilities” in section 7(c) of the NGA and, as explained above, under section 2.55, the pigging facilities are not subject to section 7(c) or the Part 157 regulations implementing section 7(c).

²⁴ See Letter dated April 2, 2007 from Northwest to Christian Berger at Exhibit 7 of CARE’s complaint.

18. Northwest's letter to the Toms referring to the blanket certificate regulations may have caused Ms. Benafel to believe that Northwest was required to comply with the blanket certificate regulations and that she was entitled to, but deprived of, the 45-days' notice required under the blanket certificate regulations. However, given that section 2.55(a) specifically excludes facilities such as the ones at issue from the certification requirements of NGA section 7(c), Northwest did not construct the facilities pursuant to its blanket certificate authority and Northwest committed no impropriety with respect to notice of construction.

19. It does appear from the proximity map attached to the April 2, 2007 notification letter and subsequent e-mailed version of the letter that Northwest originally planned to locate the pigging facilities on the Toms' property and to use the Berger/Benafel property only as workspace. Thus, the notice provided to Mr. Berger from Northwest did not reflect the ultimate location of the facilities. It is understandable that Mr. Berger and Ms. Benafel were surprised by the unexpected construction of the facilities on their property. However, as explained above, Northwest had no obligation under the NGA or the Commission's regulations to provide any notification to landowners affected by of the construction of the pigging facilities, since they are auxiliary facilities not subject to the Commission's regulations implementing section 7(c).

B. Northwest's Possession of Property Rights to Construct Facilities

20. A natural gas company must hold the requisite rights to property necessary for the construction or operation of its facilities. While section 2.55(a) of the Commission's regulations excludes auxiliary installations from the requirements of section 7(c), thereby allowing the construction of such facilities to take place without section 7(c) certificate authority, it does not eliminate the obligation under state and local laws to possess the relevant property rights.

21. CARE argues that Northwest did not hold the necessary property rights to construct the pig receiver, fence, and gravel road on the Berger/Benafel property under its existing easement, and that it failed to secure additional rights in the property prior to construction.²⁵ Therefore, CARE asserts that Northwest's construction of the pigging facilities and structures constitutes 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.

²⁵ CARE does not dispute that the facilities are located within the physical footprint of Northwest's existing easement on the Berger/Benafel property.

22. CARE asserts 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.²⁶ CARE argues 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 also contends that the right of ingress and egress to and from the right-of-way delineated in the easement does not encompass the right to construct a permanent gravel road in the easement area.

23. Further, CARE maintains that the original parties to the easement anticipated that all or most of the grantee's facilities constructed on the property would be located underground, given that the original pipeline, with the exception of the single block valve, was buried one foot below ground and has remained so for 40 years, the language of the easement describes a right-of-way to “entrench” a pipeline, and the grantor reserved the right to build “a road, reservoir, or other structure” on top of the right-of-way. CARE argues that Northwest's installation of major above-ground facilities is an unreasonable use of the existing right-of-way given the language of the easement and the decades-long practice of subsurface use. CARE requests \$235,000 in damages, plus interest, and attorney and appraisal fees for the wrongful taking of the Berger/Benafel property.

24. CARE contends that Northwest was required to obtain the allegedly-necessary additional rights in the property through eminent domain under section 7(h) of the NGA.²⁷ CARE states that when a holder of a certificate of public convenience and necessity cannot secure the necessary property rights by contract, the certificate holder must exercise its right of eminent domain, by initiating a condemnation proceeding in state or federal court, prior to the actual taking of property. CARE contends that by failing to initiate a condemnation proceeding before construction of the facilities,

²⁶ The easement grants a “right of way and easement to construct, entrench, maintain and operate a pipe line with necessary valves and fittings thereto (said pipe line, valves and fittings being hereinafter sometimes collectively called the ‘facilities’) over, under and through the hereinafter described land . . . ,” along with “the right of ingress and egress to and from the said right of way from the intersection of said right of way with Augusta Street or other dedicated streets or roads, with the right to use existing roads, for the purpose of constructing, inspecting, repairing and maintaining the facilities and the removal or replacement of same at will, either in whole or in part, and the replacement of said pipe line with either like or different size pipe.”

²⁷ 15 U.S.C. 717f (2006).

Northwest has violated the procedure mandated by section 7(h) of the NGA and the Fifth Amendment of the Constitution. In addition, CARE notes that Northwest has in the past, in another case, similarly commenced construction of a gas pipeline on private property without property rights, prior to exercising its right of eminent domain, offering the landowner compensation only after beginning construction.²⁸ CARE requests that civil penalties of \$1,000,000 be assessed against Northwest for knowingly and willingly violating section 7(h).

25. In its answer, Northwest maintains that it constructed the subject facilities under its rights as specified in the existing easement. Accordingly, Northwest argues that it was not required to invoke the eminent domain process and, therefore, has not violated the eminent domain procedures of section 7(h) by failing to do so or to otherwise comply with the eminent domain procedures. Northwest contends that although it had the right under the existing easement to construct the facilities and structures, it has been reasonable in its negotiations with Mr. Berger and Ms. Benafel regarding compensation for the alternate access point and wishes to resolve the matter to both parties' satisfaction. Northwest states that it would be willing to pursue arbitration to resolve the dispute, since the easement agreement provides that disputes over damages are subject to arbitration.

26. The main issue raised by CARE in its complaint is whether Northwest's existing, 1964 easement agreement permits the construction of the pig receiver, chain link fence, gravel road, and driveway apron within the existing right-of-way on the Berger/Benafel property. The resolution of this issue involves the interpretation of the language of the easement. 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. Moreover, nothing in the NGA gives the Commission the authority to impose damages.²⁹ Consequently, the Commission denies CARE's request for \$235,000 in damages, plus interest, and attorney and appraisal fees.

27. The Commission further finds that Northwest did not violate the NGA by constructing the pigging facilities on the Berger/Benafel property without invoking the eminent domain procedures of section 7(h). Northwest constructed the pigging facilities on land within its existing easement across the Berger/Benafel property in its belief that

²⁸ CARE cites *Humphries v. Williams Natural Gas Co.*, 48 F.Supp. 2d 1276, 1277-79 (D. Kan. 1999), where the court allowed the landowner to sue for ejectment, trespass, and damages, finding Williams' immediate possession of the property prior to filing a condemnation action unlawful and that Williams "was not entitled to the benefits of § 717f(h) when it does not adhere to the procedure it sets forth." *Id.* at 1282.

²⁹ See, e.g., *South Carolina Public Service Commission v FERC*, 850 F.2d 288 (D.C. Cir. (1988) (Commission cannot award damages under analogous FPA.)

the terms of the easement permitted the construction of the pig receiver, fence, and gravel road on the portion of the Berger/Benafel property subject to the easement. However, Northwest's decision to proceed with construction in reliance on the rights conveyed by the existing easement agreement was at its own risk. In the event a state or federal court were to find in an action for trespass or unlawful taking that the existing easement agreement did not provide Northwest the necessary rights to construct the facilities, Northwest could be subject to monetary damages, specific performance remedies, or attorney's fees. However, given the lack of evidence that Northwest violated any provision of the section 7 of the NGA, the Commission denies CARE's request that a \$1 million civil penalty be imposed on Northwest.

C. Allegations of Fraud

28. CARE accuses Northwest of engaging in deceptive activities to defraud Mr. Berger and Ms. Benafel of their use of their property. CARE argues that near the end of April 2007, immediately before Northwest broke ground on the Berger/Benafel property, Northwest entered into an agreement to pay the Toms several thousand dollars, which CARE maintains was compensation for the construction of the pigging facilities on the Berger/Benafel property instead of on the Toms' property, as originally proposed.³⁰ CARE argues that Northwest's agreement and actions violated section 4A of the NGA and section 222 of the FPA, prohibiting energy market manipulation.³¹ CARE contends that Northwest's agreement with the Toms 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. CARE requests that the Commission impose civil penalties under section 22(a) of the NGA against Northwest for its alleged fraudulent actions and false statements of \$1 million per day from May 3, 2007, to the date of its complaint, or \$855,000,000.³²

29. Even if there were some evidence of fraud in Northwest's dealings with the landowners, CARE's reliance on the Commission's regulations prohibiting natural gas market manipulation is misplaced. Section 1c.1 prohibits fraudulent activity "in

³⁰ Complaint at 10-12; Decl. of Benafel at 13.

³¹ 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). Section (a) of that section provides that "[i]t 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, . . ."

³² See 15 U.S.C. § 717t-1(a) (2010). CARE also requests that the Commission assess all punitive damages within its authority to impose.

connection with the purchase or sale of natural gas or the purchase or sale of transportation services subject to the jurisdiction of the Commission.”³³ None of Northwest’s actions or activities in this case concern the “purchase or sale” of natural gas or transportation services. The Commission’s market manipulation regulations were not intended to govern negotiations between landowners and natural gas pipeline companies over property rights.³⁴ Accordingly, the Commission denies CARE’s request for imposition of civil penalties and punitive damages.³⁵

30. Moreover, CARE has presented no evidence that Northwest attempted to deceive Mr. Berger and Ms. Benafel with respect to the proposed location of the facilities. Ms. Benafel’s affidavit merely states that “[o]n or about April 30, 2007, the Toms informed me that they reached a settlement with [Northwest] in which [Northwest] would pay the Toms several thousand dollars.”³⁶ CARE provides 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).

D. Action on CARE’s Informal Complaint by the Hotline

31. CARE asserts that the Hotline mishandled Ms. Benafel’s initial phone calls and subsequent written informal complaint lodged with the Hotline, which CARE argues acted to delay resolution of the matter and CARE’s filing of its formal complaint with the Commission. CARE generally alleges that the Hotline staff was unhelpful, but in particular, complains of the Hotline’s refusal to provide any written basis for its decision on the informal complaint in favor of Northwest. Ms. Benafel’s affidavit attached to the instant complaint details her attempts to seek assistance from the Commission and her interactions with the Hotline.

32. Ms. Benafel states that when she spoke with a Hotline attorney in early June 2009 (after having made several calls to the Commission during the first months of the year seeking, unsuccessfully, assistance with her concerns regarding Northwest’s construction

³³ 18 C.F.R. § 1c.1 (2010).

³⁴ Section 1c.1 does not create a private right of action. *Millenium Pipeline Co. LLC*, 124 FERC ¶ 61,038, at P 1 n.1 (2008).

³⁵ CARE also relies on a number of provisions of the FPA to support its request for civil penalties. Complaint at 11. The FPA, which governs electric and hydroelectric utility companies, is not applicable to Northwest, a natural gas company. Since Northwest is not subject to the FPA, it may not be assessed penalties under the act.

³⁶ Decl. of Benafel at 13.

on the Berger/Benafel property), she was instructed to have her attorney submit a letter within a few days outlining her concerns. Ms. Benafel states that because she felt pressured to compose the complaint letter too quickly, she sought an extension, and on June 19, 2009, with the help of CARE, submitted an informal written complaint to the Hotline.³⁷ Ms. Benafel further states that on or about July 20, 2009, the new Hotline attorney who had been assigned to the case notified her (in an e-mail) that the Hotline disagreed with her position, and denied her requests for a written explanation of the Hotline's opinion.³⁸

33. The Commission has instituted a number of processes intended to make its activities as transparent as possible and to assist the public in getting concerns addressed. The Commission's Hotline, operated by the staff of the Division of Investigations of the Office of Enforcement is available to provide informal guidance to the public and informally resolve disputes on matters that fall within the Commission's jurisdiction.³⁹ The Hotline also serves as a conduit for the public and industry to inform Commission staff of potential violations of Commission statutes, rules, regulations, and orders. As provided in section 1b.21 of the Commission's Rules and Regulations, "[t]he Hotline Staff will informally seek information from the caller and any respondent, as appropriate. The Hotline Staff will attempt to resolve disputes without litigation or other formal proceedings."⁴⁰ As part of this process,

[Hotline] staff will research the legal issues raised by the inquiry and will likely consult with the staff of other Commission offices who have expertise in the subject matter of the inquiry. Although [Hotline] staff consults with other Commission staff prior to responding to an inquiry, the

³⁷ *Id.* at 31. See Exhibit 23 of Complaint.

³⁸ Decl. of Benafel at 33. See Exhibit 25 of Complaint.

³⁹ Effective May 1, 2010, pursuant to Order No. 734, *Instant Final Rule Transferring Certain Enforcement Hotline Matters to the Dispute Resolution Service*, 131 FERC ¶ 61,018 (2010), the Commission issued a final rule revising its regulations under Parts 1b and 157 to substitute the Commission's Dispute Resolution Service (DRS) for the Commission's Enforcement Hotline as the point of contact for handling dispute-related calls pertaining to the construction and operation of jurisdictional infrastructure projects, including all certificated construction projects under the NGA and licensed or exempt hydroelectric projects under the FPA. While DRS is now tasked to handle concerns like Ms. Benafel's in this matter, the complaint addresses the procedures effective in 2009. Therefore this order addresses the procedures in place at that time for the informal resolution of landowner complaints relating to jurisdictional projects.

⁴⁰ 18 C.F.R. § 1b.21(b) (2010).

opinions provided through the Hotline are informal and are not binding on the Commission or the General Counsel. If the caller requests [Hotline] staff's assistance to resolve a dispute, staff will contact the companies involved in the dispute and attempt to facilitate a resolution that avoids litigation.⁴¹

34. When CARE submitted its informal complaint letter to the Hotline, the Hotline staff began this informal process of information gathering. The Hotline staff reviewed CARE's complaint and the documentation from Ms. Benafel, obtained additional information and documentation from Northwest, and consulted with the Commission's Office of Energy Project's staff that was familiar with the project. Based on its informal examination of the issue, the Hotline staff reached a conclusion on the dispute, disagreeing with CARE's position on the issues raised which were within the Commission's jurisdiction to resolve, and concluding that Northwest had not acted unlawfully or improperly. Hotline staff rendered its non-binding advice to CARE and Ms. Benafel through phone calls to each in early July, and closed the Hotline inquiry on July 8, 2009, recommending no further action on the Commission's part. Subsequently, on July 20, 2009, Hotline staff sent an e-mail to Ms. Benafel explaining that the Hotline's advice and recommendations are confidential and generally not provided in writing.⁴²

35. Based on the above facts, the Commission finds that Hotline staff acted appropriately in the processing of Ms. Benafel's phone calls and written informal complaint. Staff followed proper procedures and provided Ms. Benafel with staff's conclusions on the matters she raised. As to the timing of the Hotline activities, 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 at any time they deem it appropriate.⁴³ Given that Northwest's final offer to purchase the Berger/Benafel property was made on October 1, 2009, it appears that CARE chose to file the complaint at such time as it determined that attempts to reach a settlement with Northwest would not be successful.⁴⁴

⁴¹ *Obtaining Guidance on Regulatory Requirements*, 123 FERC ¶ 61,157, at P 29 (2008) (Interpretative Order Modifying No-Action Letter Process and Reviewing Other Mechanisms for Obtaining Guidance).

⁴² See Exhibit 25 of Complaint.

⁴³ 18 C.F.R. § 1b.21(e) (2010).

⁴⁴ The Commission notes that Northwest constructed its facilities on the Berger/Benafel property in 2007, but Ms. Benafel did not contact the Commission until 2009, ostensibly because the parties were engaged in negotiations for the sale of the property or other landowner compensation for Northwest's expanded use of the property.

36. Moreover, the Hotline staff did not act improperly in refusing to convey the basis for its decision to CARE or Ms. Benafel in writing. Section 1b.21(a) of the Commission's regulations provides that Hotline staff may give informal staff opinions that are not binding on the General Counsel or the Commission.⁴⁵ Because Hotline staff's "informal staff opinions" are not binding, Ms. Benafel is not prejudiced by the Hotline's policy to generally not provide its advice in writing. Further, the Commission notes that even after the Hotline staff officially closed the Hotline inquiry on July 8, 2009, the Hotline staff continued to attempt to reach Ms. Benafel and CARE by telephone to verbally discuss the rationale of its opinion, and sent a final communication to Ms. Benafel by e-mail on July 20, 2009, again offering to explain the Hotline's decision by telephone. The Commission finds that the Hotline processed Ms. Benafel's telephone calls and CARE's informal complaint in a proper, timely, and professional manner.⁴⁶

The Commission orders:

The Commission denies CARE's October 8, 2009 complaint.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁴⁵ 18 C.F.R. § 1b.21(a) (2010).

⁴⁶ CARE also asserts that it has suffered unquantifiable harm to its interests in promoting sound renewable energy policy as a result of Northwest's alleged violation of the notice requirements of the Commission's blanket certificate regulations and alleged fraudulent behavior, and the Hotline staff's alleged mishandling of Ms. Benafel's Hotline inquiry and informal complaint. Complaint at 12-13. Given that the Commission finds, *supra*, that Northwest did not violate the NGA or act fraudulently, and that the Hotline staff properly processed CARE's complaint, the Commission dismisses CARE's arguments regarding damage to its organizational interests and ability to effectively represent its members' concerns.