

142 FERC ¶ 61,143  
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.  
Michael E. Boyd  
Robert M. Sarvey

v.

Docket No. EL13-32-000

Pacific Gas and Electric Company  
Contra Costa Generating Station LLC  
for the Oakley Generating Station

ORDER DISMISSING COMPLAINT

(Issued February 25, 2013)

1. On December 28, 2012, CALifornians for Renewable Energy, Inc. (CARE), Michael E. Boyd, and Robert M. Sarvey (collectively, complainants) filed a complaint, claiming reliance on certain sections of the Federal Power Act (FPA)<sup>1</sup> and Rule 206 of the Commission's Rules of Practice and Procedure,<sup>2</sup> against Pacific Gas and Electric Company (PG&E), and Contra Costa Generating Station LLC for the Oakley Generating Station (CCGS) (collectively, respondents). The complaint is unclear, but it appears that the complainants allege, among other things, that a power purchase agreement approved by the California Public Utilities Commission (California Commission) (Decision 12-12-

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<sup>1</sup> 16 U.S.C. §§ 824d, 824e, 825e, 825h (2006).

<sup>2</sup> 18 C.F.R. § 385.206 (2012).

035)<sup>3</sup> violates certain provisions of the FPA and the Public Utility Regulatory Policies Act of 1978 (PURPA).<sup>4</sup> Specifically, CARE contends that the approved “contract for capacity and energy...exceeds PG&E’s avoided cost cap”<sup>5</sup> and that “the contract fails to constitute contract rates that are presumed to meet the ‘just and reasonable’ standard of the Federal Power Act and therefore the contract must be reviewed by the Commission under the *Mobile-Sierra* public interest standard first in order to exercise FERC’s exclusive jurisdiction to determine the wholesale rates for electricity under its jurisdiction....”<sup>6</sup>

2. In this order, we dismiss the complaint for failure to state a valid claim. The contract approved by the California Commission is not for the sale of electric energy let alone a sale from a qualifying facility (QF); from our reading of the complaint, we can see no allegation which involves our authority under either the FPA or PURPA. Complainants fail to state what conduct they believe violates the statutes, much less specify precisely how sections of the FPA or PURPA have been violated. Moreover, complainants have failed to provide relevant factual support, as opposed to unsubstantiated allegations, for the claims made in their complaint as required by Rule 206. Similarly, complainants have failed to submit a pleading that meets the Commission’s filing requirements contained in Rule 203.<sup>7</sup>

## **I. Complaint**

3. Complainants characterize the California Commission’s decision as being in violation of PURPA, the FPA, and *Mobile-Sierra* because it permits the recovery of capital costs for the construction of generating facilities which exceeds PG&E’s avoided cost cap.<sup>8</sup> Complainants then contend that investor-owned utilities have entered into contracts with entities like CCGS which violate the requirements of PURPA and

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<sup>3</sup> *Application of Pacific Gas and Electric Company (U39E) for Approval of Amended Purchase and Sale Agreement Between Pacific Gas And Electric Company and Contra Costa Generating Station LLC and for Adoption of Cost Recovery and Ratemaking Mechanism*, Decision 12-12-035 (December 28, 2012) (Decision 12-12-035).

<sup>4</sup> See 16 U.S.C. §§ 796, 824a-3 (2006).

<sup>5</sup> Complaint at 2.

<sup>6</sup> *Id.* at n. 2 (citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956) (*Mobile*), and *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956) (*Sierra*) (*Mobile-Sierra*)).

<sup>7</sup> 18 C.F.R. § 385.203 (2012).

<sup>8</sup> Complaint at 3.

Commission regulations and serve to undermine small power production facilities. They also contend that PG&E has refused to enter into a contract with CARE's QF members and fails to offer PURPA-compliant avoided cost contracts.<sup>9</sup>

4. Weaved in complainants' pleading is also the contention that, since the California Commission does not offer new QFs and cogenerators payment of capital costs, the inclusion of capital recovery in the PG&E and CCGS Amended Purchase and Sale Agreement (Amended PSA) renders the California Commission-approved contract in violation of PURPA and the FPA.<sup>10</sup> Further, along the same line, complainants maintain that since the approved contract is above the California Commission's approved market price referent, and likewise is above PG&E's avoided costs, the contract violates the just and reasonable rates standard under the FPA, the public interest standard under *Mobile-Sierra*, the Commission's implementation regulations under PURPA or violates all of the above.<sup>11</sup>

5. At the end of the complaint, complainants then list a number of arguments under the caption, "Additional Requirements of Rule 206." After listing certain sections of the aforementioned regulation, CARE surmises that the California Commission's approval of the contract between PG&E and CCGS at a rate above PG&E's avoided cost is in violation of sections 205 and 206 of the FPA and imposes a financial burden on California ratepayers, QFs and cogenerators. Moreover, they contend that no pending proceeding provides an adequate opportunity for the Commission to address the totality of respondents' misconduct and the injuries complained of. They then insert a repeated recital of the previous FPA, PURPA, and *Mobile-Sierra* argument with a request that the Commission abrogate the contract. Further, they note that the attachment of the California Commission Decision 12-12-035 and a declaration of Mr. Boyd are being submitted in support of their complaint. Finally, complainants assert that they do not believe that dispute resolution could resolve the complaint.

## **II. Notice of Filings, Motions to Intervene, and Responsive Pleadings**

6. Notice of CARE's, Mr. Boyd's, and Mr. Sarvey's complaint in Docket No. EL13-32-000 was published in the *Federal Register*,<sup>12</sup> with interventions and protests due on or before January 24, 2013.

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<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.* at 7.

<sup>11</sup> *Id.* at 9.

<sup>12</sup> 78 Fed. Reg. 2390 (2013).

7. On January 24, 2013, PG&E and CCGS filed answers.

8. PG&E requests the Commission to dismiss the complaint against it and CCGS. PG&E puts forth four basic arguments for support of its request. Specifically, PG&E asserts that: (1) the complaint fails to satisfy the requirements of Rules 203 and 206; (2) the complaint misrepresents the relevant facts and fails to state a claim under sections 205 and 206 of the FPA or PURPA; (3) the California Commission had authority to approve the Amended PSA and the complaint is an improper collateral attack on the California Commission's decision; and (4) the allegations contained in the complaint are vague, unclear and meritless.

9. First, PG&E cites to the requirements of Rule 203 regarding the minimum requirements for pleadings filed with the Commission and Rule 206 pertaining to the requirements for complaints, and then notes the complainants' continuous inability to comply with these requirements.<sup>13</sup> PG&E then points out that this complaint suffers from the same flaws evident in all of CARE's numerous previous complaints and it too fails to comply with Rules 203 and 206.<sup>14</sup> PG&E avers that the complaint does not explain how any action or inaction of PG&E and CCGS violates sections 205 and 206 of the FPA or PURPA and instead is a criticism of a state commission's decision.<sup>15</sup>

10. Next, PG&E asserts that complainants have misrepresented the relevant facts pertaining to the state action taken. Specifically, PG&E points to the language in the complaint wherein the complainants describe the transaction between PG&E and CCGS as a "Power Purchase Agreement,"<sup>16</sup> and notes that the transaction is, in fact, squarely within the jurisdiction of the state commission. PG&E explains that CCGS will construct a 586 MW combined cycle facility to be located in Oakley, California, and upon completion of construction, PG&E will assume ownership and operate the facility (Oakley Project).<sup>17</sup> PG&E also notes that it submitted an application for approval of the Amended PSA to the California Commission, which in turn, after an evidentiary proceeding, determined that the terms were just and reasonable and would benefit PG&E's customers.<sup>18</sup>

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<sup>13</sup> PG&E Answer at 3-4.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 5-6.

<sup>16</sup> *Id.* at 6.

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> *Id.* at 8.

11. Additionally, PG&E notes its displeasure that a party, CARE and other complainants in particular, would misrepresent facts to the Commission, particularly when CARE was an active participant in the state proceeding and clearly understood the nature of the transaction. PG&E then notes that the complainants' argument that the Amended PSA violates sections 205 and 206 of the FPA and/or PURPA is baseless in that the FPA generally excludes Commission jurisdiction over facilities used for the generation of electric energy or the purchase or sale of generating facilities.<sup>19</sup> PG&E also notes that complainants' arguments comparing the purchase price of the generating facilities with avoided costs calculations is meritless considering the nature of the Amended PSA.<sup>20</sup>

12. PG&E then contends that the purchase of the Oakley Project and the inclusion of the associated costs in PG&E's retail rates are issues within the California Commission's authority and CARE's challenge of the California Commission's decision is nothing more than a collateral attack on the California Commission's decision.<sup>21</sup> Rather than file their complaint with the Commission, PG&E contends that the appropriate recourse was for the complainants to seek review or rehearing of the California Commission decision at the state level.<sup>22</sup> Finally, PG&E notes certain portions of the complaint contain vague, unclear and meritless arguments. Based on these deficiencies, PG&E urges the Commission to summarily dismiss the complaint.<sup>23</sup>

13. Like PG&E, CCGS urges the Commission to summarily dismiss the complaint. CCGS sets forth three arguments in support of its request. First, CCGS maintains that the complaint fails to comply with the Commission's Rules of Practice and Procedure. Namely, CCGS asserts that while CARE has been admonished by the Commission to adhere to the Commission's rules of practice, again, CARE has disregarded the Commission's procedural rules by filing a complaint that fails to comply with the minimum requirements of Rules 203 and 206.<sup>24</sup> While not only erroneously characterizing the Amended PSA, CCGS maintains that the complaint fails to identify

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<sup>19</sup> *Id.* at 9-10. To the extent the Oakley Project may be operational prior to the closing of the transfer of ownership to PG&E; CCGS will seek any appropriate approvals under the FPA in advance of closing. *See id.* at n. 33.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.* at 12.

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

<sup>23</sup> *Id.* at 12-15.

<sup>24</sup> CCGS Answer at 5.

how the Amended PSA violates the FPA or PURPA.<sup>25</sup> Since the complaint fails to supply the relevant facts or provide a basis for its claims, CCGS maintains that the Commission should dismiss the complaint. CCGS also points out that the complaint contains “sweeping assertions that appear to relate to California Commission policies for new QF contracts” and those assertions have no relevance to the Amended PSA or the California Commission’s actions approving it since no QF contract is at issue in this matter.<sup>26</sup> Noting the complaints’ lack of compliance with Rule 206(b)(3) – to set forth the business, commercial, economic or other issues presented by the action or inaction as such relate to or affect the complainant and Rule 206(b)(4) – that a complainant make a good faith effort to quantify the financial impact or burden created for the complainant as a result of the action or inaction, CCGS asserts that the complaint should be dismissed. Given the history of CARE’s previous filings, CCGS urges the Commission to dismiss the complaint on its merits, with prejudice.<sup>27</sup>

14. CCGS also echoes PG&E’s argument that complainants have misrepresented the nature of the Amended PSA in order to attempt to fashion a claim under section 206 of the FPA.<sup>28</sup> CCGS notes that the California Commission appropriately exercised its jurisdiction to review the reasonableness of PG&E’s rate recovery proposal pertaining to the Amended PSA and that the complainants cannot attempt to litigate retail ratemaking treatment before this Commission. Moreover, CCGS asserts that complainants’ recital to sections 205 and 206 of the FPA are not applicable since the FPA is applicable to the sale of electric energy at wholesale in interstate commerce.<sup>29</sup> CCGS asserts that this same rationale is why complainants’ challenge of the Amended PSA as being in violation of the *Mobile-Sierra* public interest standard must fail. Further, CCGS maintains that the complaint should be dismissed because, unlike complainants’ assertion, the Amended PSA does not violate PURPA, for, in fact, the facility is a non-QF, PG&E will own the facility upon completion, and the Amended PSA is not a PURPA power purchase arrangement.<sup>30</sup> Finally, CCGS contends that the complaint is “little more than collateral

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<sup>25</sup> *Id.* at 6.

<sup>26</sup> *Id.* at 7.

<sup>27</sup> *Id.* at 7-8.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Id.* at 9.

<sup>30</sup> *Id.* at 11.

attacks on the PURPA policies of the [California Commission]... [and] bear no relationship to the facts or transactions associated with the contract at issue.”<sup>31</sup>

### **III. Commission Determination**

#### **A. Procedural Matters**

15. Pursuant to Rule 102(c)(2) of the Commission’s Rules of Practice and Procedure, the respondents are parties to this proceeding.<sup>32</sup>

#### **B. California Commission Decision 12-12-035**

16. California Commission Decision 12-12-035 addressed PG&E’s application requesting that the California Commission approve its Amended PSA with CCGS for the Oakley Project; pursuant to the Amended PSA, CCGS is to construct the facility and then sell it to PG&E with a commercial on-line date of June 2016. Decision 12-12-035 addressed, under state law, the issues pertaining to this agreement and was basically focused on three issues: (1) authority and need; (2) contract reasonableness; and (3) retail ratemaking and cost recovery treatment. In light of the record evidence and state law, the California Commission approved the Amended PSA.<sup>33</sup>

#### **C. The Complaint Fails To Meet the Requirements of Commission Rules 203 and 206**

17. As aptly noted by respondents, the contract in question is not a PURPA contract or one pertaining to wholesale electric rates under the FPA. Thus, for example, complainants’ assertions regarding PG&E’s avoided costs, PURPA violations, and terms or conditions for other QFs are never made clear as being relevant to the complained-of matter. As previously noted, the Amended PSA pertains to the construction of generating facilities by CCGS with a future transfer of ownership of the facilities to PG&E. The Amended PSA is not a contract for the sale of electric energy from a QF (there is no allegation that the facility is a QF nor has it been certified as a QF). Thus, the Amended PSA has no relationship to PURPA, and there is no basis for a complaint against respondents under PURPA. And to the extent the complainants challenge the recovery of retail rates as ordered by the California Commission in Decision 12-12-035 as being unjust and unreasonable under the FPA, this argument is beyond our jurisdiction. The California Commission was acting within its authority when it reviewed and approved the

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<sup>31</sup> *Id.* at 12.

<sup>32</sup> 18 C.F.R. § 385.102(c)(2) (2012).

<sup>33</sup> Decision 12-12-035.

Amended PSA thus approving the transfer of the facilities to PG&E and the inclusion of those facilities in PG&E's retail rate base.

18. Moreover, the complaint consists of a string of vague and unsupported allegations that the California Commission's approval of the Amended PSA between PG&E and CCGS violates the FPA, PURPA and Commission precedent. Despite its many assertions and allegations, the complaint fails to clearly and with specificity articulate the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements. The Commission is unable to discern the specific violations of the FPA, PURPA and Commission precedent that are alleged. Complainants have been made aware, that in the past, we have admonished parties that "rather than bald allegations, [complainants] must make an adequate proffer of evidence including pertinent information and analysis to support its claims."<sup>34</sup> The Commission has provided guidance to CARE, Mr. Boyd, and Mr. Sarvey on the Commission's Rules of Practice and Procedure and the requirements for a complaint, and the current complaint demonstrates that they have again chosen to ignore those orders and the Commission's guidance. Given the deficiencies in the complaint, the Commission again must dismiss the complaint for failure to comply with the Commission's Rules of Practice and Procedure.

The Commission orders:

The complaint filed by CARE, Mr. Boyd and Mr. Sarvey is hereby dismissed, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>34</sup> *Illinois Municipal Electric Agency v. Central Illinois Public Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996).