

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeem G. Kelly.

Californians for Renewable Energy, Inc.

v.

Docket No. EL04-11-000

Calpine Energy Services, L.P. and the
California Department of Water Resources

ORDER DISMISSING COMPLAINT

(Issued January 28, 2004)

1. In this order, the Commission dismisses the Californians for Renewable Energy, Inc.'s (CARE's) complaint against Calpine Energy Services, L.P. (Calpine) and the California Department of Water Resources (CDWR), regarding four contracts entered into between Calpine and CDWR as part of a settlement resolving claims against Calpine in Docket No. EL02-60-000, et al.

I. Background

2. On May 1 and 2, 2002, the California Public Utilities Commission (CPUC) and the California Electricity Oversight Board (CEOB) filed notices of withdrawal of their complaints against Calpine in Docket Nos. EL02-60-000 and EL02-62-000.¹ Pursuant to Rule 216(b)(1) of the Commission's Rules of Practice and Procedure,² the withdrawals became effective on May 16 and 17, 2002 by operation of law because the notices were unopposed and the Commission did not disallow the withdrawals. The notices of withdrawal resulted from a settlement (Settlement) which resolved, inter alia, all claims against Calpine arising from the complaints filed in Docket Nos. EL02-60-000 and

¹ Public Utilities Commission of California v. Sellers of Long Term Contracts, 99 FERC ¶ 61,087 (2002) (Public Utilities Commission).

² 18 C.F.R. § 385.216(b)(1) (2003).

EL02-62-000. As part of the Settlement, CDWR and Calpine executed four renegotiated contracts (Renegotiated Contracts) which superceded and replaced the Calpine contracts which had been challenged in that proceeding.

3. On May 2, 2002, as a result of the Settlement, the State of California filed a notice of withdrawal of the complaint filed against Calpine in Docket No. EL02-71-000. The Settlement was filed as an attachment to the notice of withdrawal. CARE filed a protest to that notice of withdrawal, which was subsequently dismissed by the Commission.³

4. On October 20, 2003, in Docket No. EL04-11-000, CARE filed a complaint against Calpine and CDWR, alleging that the Renegotiated Contracts were unjust and unreasonable and, alternatively, contrary to the public interest. CARE requests that the Commission abrogate the Renegotiated Contracts ab initio. CARE also alleges that CDWR improperly allowed Calpine to abrogate the terms that would have required Calpine to meet specific construction milestones and provide timely status reports. CARE claims that CDWR knowingly paid unreasonable prices and agreed to onerous terms because CDWR sought to protect the interests of Investor Owned Utilities and sellers, like Calpine. CARE believes that these Renegotiated Contracts were politically motivated. CARE also argues that Calpine and CDWR failed to file their Renegotiated Contract rates pursuant to Section 205 of the FPA and requests that the Commission initiate refund proceedings pursuant to Section 206 of the FPA.

5. CDWR filed a motion to dismiss with prejudice and a general denial. Calpine filed an answer which includes an amendment to one of the Renegotiated Contracts revising its performance milestone language. CARE filed a response.

II. Notice of Filing

6. Notice of CARE's filing was published in the Federal Register, 68 Fed. Reg. 74,952 (2003), with comments, interventions and protests due on November 10, 2003.

7. The CEOB and Pacific Gas and Electric Company filed timely motions to intervene.

³ State of California ex rel. Bill Lockyer, et al., v. British Columbia Power Exchange Corp., 99 FERC ¶ 61,247 at 62,061 (May 31 Order), reh'g denied, 100 FERC ¶ 61,295 (2002) (September 23 Order).

III. Discussion

A. Procedural Issues

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2003), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2003), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept CARE's answer and will, therefore, reject it.

B. CARE's Complaint

10. We will dismiss CARE's complaint as an untimely, collateral attack on our prior orders.

11. The Settlement and Renegotiated Contracts were attached to the notice of withdrawal filed in Docket No. EL02-60-000 on May 2, 2002, and the Settlement was attached to the notice of withdrawal that was filed in Docket No. EL02-71-000 on May 2, 2002. CARE could have challenged the Renegotiated Contracts in Docket No. EL02-60-000, et al., if CARE had intervened in that proceeding in a timely manner as it had in other Commission proceedings at that time and before,⁴ but it did not. If CARE had intervened, it could have protested the notices of withdrawal, and in turn the Renegotiated Contracts, within the time allotted by Rule 216(b) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.216(b) (2003). Instead, CARE waited until the Commission had acted, and then CARE filed a request for rehearing of the Commission's order on the merits in Docket No. EL02-60-000, et al.,⁵ which was properly dismissed because CARE had failed to intervene in the proceeding.⁶ Moreover,

⁴ CARE made a timely filing in Docket No. EL02-71-000, as noted above, and, in fact, that filing pre-dated our orders in Docket No. EL02-60-000, et al. Compare May 31 Order, 99 FERC at 62,060 with Public Utilities Commission, 99 FERC at 61,376-77; see also September 23 Order, 100 FERC at P 5 & n.3.

⁵ Public Utilities Commission of California v. Sellers of Long Term Contracts, 103 FERC ¶ 61,354 (2003).

⁶ Public Utilities Commission of California v. Sellers of Long Term Contracts, 105 FERC ¶ 61,182 at P 30 (2003). In CARE's request for rehearing, it did not raise any concerns with the Renegotiated Contracts.

CARE filed an answer and protest to the notice of partial withdrawal of the complaint against Calpine in Docket No. EL02-71-000. That protest challenged the fairness of the terms of the Settlement and the terms of the Renegotiated Contracts. On May 31, 2002, the Commission dismissed CARE's protest as outside the scope of that proceeding.⁷

12. Now, CARE files a new complaint with respect to these same Renegotiated Contracts, almost eighteen months after the withdrawals at issue became effective in Docket No. EL02-60-000, et al., and after the Commission dismissed CARE's challenge to these same Renegotiated Contracts in Docket No. EL02-71-000. This complaint seeks essentially the same relief that CARE's earlier filings sought – a rejection of the Renegotiated Contracts ab initio.⁸ CARE's complaint is an untimely, collateral attack on the Commission's previous orders and seeks to circumvent the Commission's rules and procedures, and we will dismiss it.

The Commission orders:

CARE's complaint is hereby dismissed, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

⁷ May 31 Order, 99 FERC at 62,061.

⁸ CARE has not argued nor provided evidence that circumstances have changed and that the Renegotiated Contracts have become unjust and unreasonable or contrary to the public interest in the eighteen months subsequent to the withdrawals becoming effective.