

129 FERC ¶ 61,141
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Suedeem G. Kelly, Marc Spitzer,
and Philip D. Moeller.

CALifornians for Renewable Energy, Inc.

Docket No. EL09-73-000

v.

Pacific Gas & Electric Company and California
Energy Commission

ORDER DISMISSING COMPLAINT

(Issued November 19, 2009)

1. In this order, we dismiss a complaint filed on September 8, 2009 by CALifornians for Renewable Energy, Inc. (CARE) against Pacific Gas and Electric Company (PG&E) and the California Energy Commission (CEC), alleging that PG&E has been operating one of its generation stations without permits required by the Clean Air Act¹ and that the CEC has been allowing continued operations of the generation station by approving PG&E's amended permit in August 2009.

I. CARE's Complaint

2. On September 8, 2009, CARE filed a complaint² requesting that the Commission impose civil penalties on PG&E under Part II of the Federal Power

¹ 42 U.S.C. §§ 7401 *et seq.* (2006).

² On September 10, 2009 and October 2, 2009, CARE supplemented its complaint by filing a copy of the document titled "Gateway Generating Station Teleconference Notes" and a copy of a brief filed in the proceeding involving PG&E's Gateway Generating Station before the State of California Energy Resources Conservation and Development Commission.

Act (FPA)³ for operating the Gateway Generating Station without a permit required under the Clean Air Act. CARE argues that PG&E's operation of the Gateway Generating Station without required permits violates section 4A of the Natural Gas Act⁴ (NGA) and sections 31(a) and 222 of the FPA,⁵ as well as the Commission's rules.⁶

II. Notice of Filing and Responsive Pleadings

3. Notice of CARE's complaint in Docket No. EL09-73-000 was published in the *Federal Register*,⁷ with interventions and protests due on or before September 28, 2009. CEC and PG&E filed answers to and motions to dismiss CARE's complaint. On October 13, 2009, CARE filed an answer to the motions to dismiss. No motions to intervene in this proceeding were filed.

4. In its answer and motion to dismiss, CEC argues that CARE's complaint must be dismissed because section 201(f) of the FPA⁸ precludes complaints against state agencies and the Commission has consistently relied upon FPA section 201(f) to dismiss complaints against state agencies.⁹ CEC further argues

³ CARE appears to refer to section 316A of the FPA, 16 U.S.C. § 825o-1 (2006).

⁴ 15 U.S.C. § 717c-1 (2006).

⁵ 16 U.S.C. §§ 823b(a) and 824v (2006).

⁶ CARE appears to refer to *Prohibition of Energy Market Manipulation*, Order No. 670, FERC Stats. & Regs. ¶ 31,202, *reh'g denied*, 114 FERC ¶ 61,300 (2006) (Order No. 670). Order No. 670 implemented new section 4A of the NGA and new section 222 of the FPA, as added to the statutes by the Energy Policy Act of 2005 (EPAct 2005). *See* Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (2005), sections 315 and 1283, respectively. *See also* 18 C.F.R. §§ 1c.1 and 1c.2 (2009).

⁷ 74 Fed. Reg. 49373 (2009).

⁸ 16 U.S.C. § 824(f) (2006).

⁹ CEC cites to *Wis. Pub. Power, Inc. SYS v. Wis. Pub. Serv. Corp.*, 83 FERC ¶ 61,198, at 61,855 (1998); *Pac. Water & Power, Inc. v. State of Cal.*, 51 FERC ¶ 61,080, at 61,179-80 (1990); and *CARE v. CPUC*, 119 FERC ¶ 61,058, at P 45 n.48 (2007).

that state sovereign immunity under the United States Constitution bars the instant complaint.¹⁰

5. In its answer and motion to dismiss, PG&E argues that CARE's complaint fails to meet the legal standard established for complaints under Rules 203 and 206 of the Commission's Rules of Practice and Procedure.¹¹ PG&E also states that CARE has failed to state a legally recognizable claim that the Commission has the statutory or regulatory power to address¹² and to demonstrate that CARE has the standing to pursue its claim.¹³ PG&E also adds that CARE's complaint is unsupported by any facts that would constitute a cause of action within the Commission's jurisdiction and thus should be dismissed pursuant to Commission precedent.¹⁴

6. In addition, PG&E states that it has been in recent settlement negotiations with the Environmental Protection Agency regarding the status of its permit for the Gateway Generating Station. PG&E adds that it acted in good faith in constructing the generation facility in question and believes that it has a valid permit to operate it; however, it has entered into a consent decree with the United States to resolve the permit issues.

7. In its answer to the motions to dismiss, CARE states that it disagrees with PG&E's argument that the Commission lacks jurisdiction over the issues related to PG&E's permit to operate the Gateway Generation Station. CARE argues that the Commission has the authority to oversee permits and licenses under section 31(a) of the FPA.¹⁵ CARE also disagrees with the CEC's position that the Commission is precluded from entertaining private party complaints against state agencies.

¹⁰ CEC cites to *Fed. Maritime Com'n v. South Carolina State Ports Auth.*, 535 U.S. 743 (2002) and *New York v. U.S.*, 505 U.S. 144 (1992).

¹¹ 18 C.F.R. §§ 385.203 and 385.206 (2009).

¹² PG&E cites to *CARE v. CAISO*, 117 FERC ¶ 61,072 (2006).

¹³ PG&E cites to *La. Energy and Power Auth. v. Central La. Electric Co.*, 65 FERC ¶ 61,319 (1993).

¹⁴ PG&E cites to *Mun. Resale Serv. Cust. v. Ohio Power Co.*, 63 FERC ¶ 61,336 (1993) and *Ill. Mun. Electric Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084 (1996).

¹⁵ 16 U.S.C. § 823b (2006).

CARE appears to suggest that the CEC maybe subject to criminal penalties pursuant to 42 U.S.C. § 7413(c)(3).

III. Discussion

A. Procedural Matters

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁶ prohibits an answer to an answer unless otherwise ordered by the decisional authority. In this instance, CARE's October 13, 2009 filing is not an answer to an answer but is a response to the motions to dismiss. Thus, we will accept CARE's October 13, 2009 filing.

B. Commission Determination

9. The Commission's Rules of Practice and Procedure require a complainant to meet certain minimum requirements. Specifically, Rule 203 requires that all pleadings contain the "relevant facts," and the "position taken by the participant... and the basis in fact and law for such position."¹⁷ Similarly, Rule 206 requires complainants to "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or regulatory requirements [and] [e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements."¹⁸ A complainant must state a legally recognizable claim that the Commission has the statutory or regulatory power to address.¹⁹

10. CARE appears to argue that PG&E's alleged operation of the Gateway Generating Station without required permits and the CEC's approval of PG&E's amended permit violate section 4A of the NGA, section 222 of the FPA, and Order No. 670. Section 4A of the NGA makes it unlawful for any person, directly or indirectly, to use and employ any manipulative or deceptive device in connection with the purchase or sale of natural gas and transportation services subject to the Commission's jurisdiction. Section 222 of the FPA contains the identical prohibition involving the purchase and sale of electric energy and transmission services. Order No. 670 implements both section 4A of the NGA and section 222

¹⁶ 18 C.F.R. § 385.213(a)(2) (2009).

¹⁷ See 18 C.F.R. § 385.203(a) (2009).

¹⁸ 18 C.F.R. § 385.206(b) (2009).

¹⁹ See, e.g., *Californians for Renewable Energy v. Cal. Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,072, at P 8-11 (2006).

of the FPA and specifies that it is unlawful to: (1) use a fraudulent device, scheme or artifice, or make a material misrepresentation or a material omission as to which there is a duty to speak under a Commission-filed tariff, Commission order, rule or regulation, or engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any entity; (2) with the requisite scienter; (3) in connection with the purchase or sale of natural gas or electric energy or transportation of natural gas or transmission of electric energy subject to the jurisdiction of the Commission.”²⁰

11. In the past, we have admonished parties that “rather than bald allegations, [complaining parties] must make an adequate proffer of evidence including pertinent information and analysis to support its claims.”²¹ CARE’s complaint fails to meet even this basic standard. In its complaint, CARE does not explain why PG&E’s alleged violation of the operating permit requirements constitutes a manipulative or fraudulent behavior under section 4A of the NGA, section 222 of the FPA, and Order No. 670. PG&E’s alleged wrongdoing is related to the operation of the generating facility and does not involve the purchase or sale of natural gas or transportation service under the NGA, or electric energy or transmission services under the FPA. CARE also fails to explain specifically what fraudulent device, scheme or artifice PG&E employed and whether it made any untrue statements of a material fact or any omissions and whether it committed any act or engaged in any practice or course of business for the purpose of committing a fraud or deceit in connection with the purchase or sale of electric energy or transmission services, or in connection with the purchase or sale of natural gas or transportation services. CARE also does not explain how the CEC’s regulatory decision within its jurisdiction in regard to PG&E’s operating permit was in violation of the NGA, FPA, and Order No. 670. Accordingly, we find that CARE’s allegations are not sufficient to satisfy the Commission’s requirements for filing a complaint, as set above.

12. Furthermore, CARE’s reliance on section 31(a) of the FPA to support its position is misplaced. Section 31(a) authorizes the Commission to “monitor and investigate compliance with each license and permit *issued under* [Subchapter I]...” (*emphasis added*). Subchapter I of Title 16 of the United States Code addresses the regulation of the development of water power and resources and does not apply to PG&E’s operating permit for Gateway Generating Station.

²⁰ See Order No. 670, FERC Stats. & Regs. ¶ 31,202 at P 49. See also 18 C.F.R. §§ 1c.1 and 1c.2 (2009).

²¹ *Ill. Mun. Electric Agency v. Cent. Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996).

CARE has not cited any precedent invoking the Commission's authority under Subchapter I of the FPA to monitor, regulate, or investigate operating permits for non-hydropower generating facilities issued by other federal and/or state agencies.

13. Accordingly, due to numerous deficiencies in CARE's complaint, we find that the complaint should be dismissed.²²

The Commission orders:

CARE's complaint is hereby dismissed for the reasons discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²² We also note that CARE seeks review of the CEC decision. This proceeding is not an appropriate forum to seek a review of a state agency decision.