

139 FERC ¶ 61,117
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

CALifornians for Renewable Energy, Inc.,
(CARE) and Barbara Durkin

Docket No. EL11-9-001

v.

National Grid, Cape Wind, and the Massachusetts
Department of Public Utilities

ORDER DENYING REQUEST FOR REHEARING

(Issued May 17, 2012)

1. This order addresses CALifornians for Renewable Energy, Inc.'s (CARE) request for rehearing of the Commission's November 7, 2011 order, which dismissed the complaint filed by CARE and Barbara Durkin against National Grid, Cape Wind Associates (Cape Wind), and the Massachusetts Department of Public Utilities (Massachusetts Commission) (collectively respondents).¹ For the reasons discussed below, we deny CARE's request for rehearing.

Background

2. On December 1, 2010, CARE and Barbara Durkin (collectively, Complainants) filed a complaint, claiming reliance on certain sections of the Federal Power Act (FPA)² and Rule 206 of the Commission's Rules of Practice and Procedure,³ against respondents. Complainants appeared to allege, among other things, that the

¹ *CALifornians for Renewable Energy, Inc (CARE) and Barbara Durkin v. National Grid, Cape Wind and the Massachusetts Department of Public Utilities*, 137 FERC ¶ 61,113 (2011) (November 7 Order). The complaint did not specify the Massachusetts Attorney General as a respondent, but CARE nevertheless requested that the Commission investigate its activities undertaken with other respondents. *Compare* Complaint at 1, 4 *with* Complaint at 5.

² 16 U.S.C. §§ 824d, 824e, 825e, 825h (2006).

³ 18 C.F.R. § 385.206 (2011).

Massachusetts Commission violated the FPA and the Public Utility Regulatory Policies Act of 1978 (PURPA)⁴ by approving a contract for purchases of capacity and energy that exceeds the utility's avoided cost cap and which also usurps the Commission's exclusive jurisdiction to determine the rates for wholesale sales of electricity under its jurisdiction. Complainants also appeared to allege that respondents are engaging in manipulative and fraudulent activities and that Cape Wind is affiliated with international criminal organizations.

3. The Commission dismissed the complaint finding that the Complainants' filing failed to state what conduct violated the statutes, much less specify the sections of the statutes that allegedly had been violated and precisely why or how they had been violated. In addition, the Commission found that it was unclear from the complaint the relief that Complainants sought. Finally, the Commission found that the Complainants had failed to provide factual support, as opposed to unsubstantiated allegations, for the claims made in their complaint as required by Rule 206 of the Commission's Rules of Practice and Procedure,⁵ and that Complainants had failed to submit a pleading that meets the Commission's filing requirements contained in Rule 203.⁶

Discussion

4. The Commission will deny CARE's request for rehearing. CARE's request for rehearing is no clearer than its original complaint. The request is generally comprised of the Complainant's⁷ simply excerpting portions of the November 7 Order and then posing questions with regard to those portions of the order,⁸ with the remainder of the pleading containing unsubstantiated allegations of unlawful conspiracy and of denial of CARE's constitutional rights.

5. CARE raises several arguments in support of its assertion of an unlawful conspiracy. The initial argument is that the Commission's November 7 Order "sustains the unlawful civil conspiracy of the Respondents to violate Complainant's rights under

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

⁵ 18 C.F.R. § 385.206 (2011).

⁶ 18 C.F.R. § 385.203 (2011).

⁷ The request for rehearing was submitted by CARE and signed by its representatives. Ms. Barbara Durkin is not referenced in the pleading nor did the pleading include a signature line or signature for her. For purposes of addressing the rehearing request, the Commission will hereafter refer to CARE as the "Complainant."

⁸ CARE's Request for Rehearing at 11-14, 19-20.

the First Amendment.”⁹ In support of this contention, the Complainant states that the Commission’s dismissal of the complaint is a continued “pattern and practice of retaliatory discrimination against CARE and its members for participating in protected activities under the Constitution including under the First, Fifth, and Fourteenth Amendments.”¹⁰ Further, the Commission’s admonishment of parties whose pleadings fail to make an adequate proffer of evidence by including pertinent information and analysis to support a claim is the basis for this discrimination, in that it does not afford non-attorney members of the public participation in the Commission’s decision making processes.¹¹ This, according to Complainant, constitutes a joint effort by the Commission and Respondents acting in retaliation “for the rights exercised by Complainants under the First Amendment to the United States Constitution, including but not limited to the right to freedom of speech and the right to petition the government for redress of grievances, and have acted to burden, deter and/or chill the exercise of such rights by Complainants, by seeking to bar Complainants from petitioning [the Commission] and exercising free speech rights therein.”¹²

6. The November 7 Order did none of the above. The November 7 Order served as an additional reminder¹³ as to how CARE might comply with Rule 206 of

⁹ *Id.* at 6.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 8. Complainant also asserts that this behavior has violated its equal protection rights under the Fifth and Fourteenth Amendments.

¹³ See November 7 Order, 137 FERC ¶ 61,113 at n.79, referencing National Grid Answer at 2, n.4, citing *CALifornians for Renewable Energy, Inc. v. Pacific Gas & Electric Co.*, 129 FERC ¶ 61,141 (2009); *CALifornians for Renewable Energy, Inc. v. California Pub. Utils. Comm’n*, 129 FERC ¶ 61,075 (2009), *reh’g denied*, 131 FERC ¶ 61,102 (2010); *CALifornians for Renewable Energy, Inc. v. California Pub. Utils. Comm’n*, 120 FERC ¶ 61,272 (2007) (dismissing two CARE complaints); *CALifornians for Renewable Energy, Inc. v. California Pub. Utils. Comm’n*, 119 FERC ¶ 61,058 (2007) (dismissing two CARE complaints); *CALifornians for Renewable Energy, Inc. v. California Indep. Sys. Operator Corp.*, 117 FERC ¶ 61,072 (2006); *CALifornians for Renewable Energy, Inc. v. Calpine Energy Servs., L.P.*, 106 FERC ¶ 61,055 (2004), *reh’g denied*, 107 FERC ¶ 61,238 (2004); *CALifornians for Renewable Energy, Inc. v. British Columbia Hydro and Power Auth.*, 98 FERC ¶ 61,085 (2002); *CALifornians for Renewable Energy, Inc. v. Indep. Energy Producers, Inc.*, 93 FERC ¶ 61,294 (2000). Accord *CALifornians for Renewable Energy, Inc. v. Pacific Gas and Electric Company*, 134 FERC ¶ 61,060, *reh’g denied*, 134 FERC ¶ 61,207 (2011).

Commission's Rules of Practice and Procedure when filing complaints.¹⁴ Rule 206 of the Commission's Rules of Practice and Procedure is designed to enable the Commission to understand a complaint in order to appropriately act upon it. Rule 206 requires, *inter alia*, that a person filing a complaint clearly identify the action or inaction that constitutes an alleged violation and explain how the action or inaction violates the applicable statutory standard or regulatory requirement; and state the specific relief requested.¹⁵

7. The Commission should not have to guess at what a complainant wants addressed and the basis for the complaint. Moreover, the requested relief contained in a complaint necessarily must be within the Commission's jurisdiction. In its complaint, CARE requested that this Commission reverse a decision of the Massachusetts Commission which was based on a state law and rule on the sufficiency of the notice issued by the Massachusetts Commission.¹⁶ Rather than appeal the Massachusetts Commission's order, as other parties did,¹⁷ the Complainant filed a complaint with this Commission. However, this Commission does not have jurisdiction to rule on these matters. In sum, the Commission did not err by requiring complainants to comply with the Commission's rules regarding complaints before the Commission or by requiring that the Commission have jurisdiction over the subject matter of the complaint.

8. Complainant's second contention is that the "Respondents are participating in a civil conspiracy with the intended purpose to violate 18 C.F.R. § 1c, and defraud individual electricity ratepayers and taxpayers, including Complainants, of billion dollars."¹⁸ CARE cites to cases defining "conspiracy," but does not connect those citations to facts alleged, or to alleged violations of the FPA, PURPA or the Commission's regulations.

¹⁴ 18 C.F.R. § 385.206 (2011).

¹⁵ *Id.*

¹⁶ See CARE's Complaint at 20-23; accord CARE's Request for Rehearing at 17-19. CARE argues on rehearing that the Commission misstated its arguments concerning the sufficiency of the notice issued by the Massachusetts Commission. Based on a review of the underlying documents, we find this argument to be without merit; the Commission paraphrased CARE's argument and reflected that the reference to the 20.7 cent price at page 20 reasonably appears to be a CARE statement rather than a quotation from a Massachusetts Commission issuance. November 7 Order, 137 FERC ¶ 61,113 at P 6.

¹⁷ See *Alliance to Protect Nantucket Sound v. Department of Public Utilities*, Case Docket SJ-2010-0537 (Massachusetts Supreme Judicial Court).

¹⁸ CARE's Request for Rehearing at 9.

9. CARE next asserts that the “Complainants pleads section 1983 as a basis for obtaining relief from Respondents”¹⁹ CARE contends that actions taken by Respondents and the Commission constitute actionable conduct under color of state law. Petitions under section 1983 are properly filed in federal or state court, not with the Commission.²⁰ Moreover, we disagree that requiring CARE to comply with Commission rules for filing a complaint violates CARE’s constitutional right to petition for relief. The Commission simply required CARE to comply with the requirements for filing a complaint, and those complaint procedures have been published since 1999²¹-- and apply to any person who files a complaint with the Commission.²² The Commission’s action did not deprive CARE of its constitutional rights.

10. As previously noted, CARE’s rehearing request consists largely of excerpting portions of the November 7 Order with CARE posing questions in response. Rule 713(c) of the Commission’s Rules of Practice and Procedure²³ requires that any request for

¹⁹ *Id.* at 10. Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

42 U.S.C. § 1983 (2011).

²⁰ Federal courts are authorized to hear cases brought under section 1983 pursuant to two statutory provisions: 28 U.S.C. § 1343(3)(2006) and 28 U.S.C. § 1331(2006); state courts may also properly hear section 1983 cases pursuant to the Supremacy Clause of Article VI of the U.S. Constitution.

²¹ *Complaint Procedures*, Order No. 602, FERC Stats. & Regs. ¶ 31,071 (1999); Order No. 602-A, FERC Stats. & Regs. ¶ 31,076 (1999); Order No. 647, 107 FERC ¶ 61,254 (2004).

²² Rule 206 (a), 18 C.F.R. § 385.206(a) (2011), provides:

(a) *General Rule.* Any person may file a complaint seeking Commission action against any other person alleged to be in contravention or violation of any statute, rule, order, or other law administered by the Commission, or for any other alleged wrong over which the Commission may have jurisdiction.

²³ 18 C.F.R. § 385.713(c) (2011).

rehearing state concisely the alleged error in the final decision or order and otherwise comply with Rule 203(a), which requires *inter alia* specification of the position being taken and the basis in fact or law for such position.²⁴ CARE did not comply with these requirements.

11. The Commission cannot be expected to discern from noncompliant pleadings what relief is requested and why. All complainants bear the burden of proof, including CARE.²⁵

The Commission orders:

CARE's rehearing request is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

²⁴ *Id.*; see 18 C.F.R. § 385.203(a) (2011).

²⁵ 16 U.S.C. § 824e(b) (2006); accord 5 U.S.C. § 556(d) (2006). The Commission has long recognized that a complainant has a burden to do more than make mere unsubstantiated allegations to warrant a hearing. See, e.g., *San Diego Gas & Electric Co. v. Century Power Corp.*, 50 FERC ¶ 61,285, at 61,916 (1990) (evidentiary hearing requires more than mere allegations, but rather an adequate proffer of evidence that such a hearing is warranted); *Interstate Power and Light Company v. ITC Midwest, LLC*, 127 FERC ¶ 61,043, at P 44 & n. 49 (2009) (same), *reh'g denied*, 135 FERC ¶ 61,162 (2011).