

129 FERC ¶ 61,075
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

CALifornians for Renewable Energy, Inc.

Docket No. EL09-65-000

v.

California Public Utilities Commission,
Southern California Edison Company, and
the California Independent System Operator Corporation

ORDER DISMISSING COMPLAINT AND
DENYING MOTION TO DISQUALIFY

(Issued October 28, 2009)

1. In this order, we dismiss a complaint filed on July 16, 2009 by CALifornians for Renewable Energy, Inc. (CARE) against the California Public Utilities Commission (CPUC), the California Independent System Operator Corporation (CAISO) and Southern California Edison Company (SoCal Edison). As discussed in detail below, CARE has failed to provide any factual support for the allegations raised in its complaint as required by Rule 206 of the Commission's Rules of Practice and Procedure.¹ CARE has similarly failed to submit a pleading that meets the Commission's filing requirements contained in Rule 203.² Accordingly, we dismiss the complaint. Finally, we deny the Motion for Disqualification filed by the CPUC requesting that the President of CARE, Michael E. Boyd, be prohibited from participating in proceedings at the Commission.

¹ 18 C.F.R. § 385.206 (2009) (Rule 206).

² 18 C.F.R. § 385.203 (2009) (Rule 203).

I. CARE's Complaint

2. The CARE complaint appears to raise three issues. First, CARE is dissatisfied with the CPUC-administered programs benefiting small solar power installations and argues that such programs should be coupled with FERC-mandated payments under an avoided cost standard.³ Second, CARE objects to the siting and construction of the Tehachapi Renewable Transmission Project (Tehachapi).⁴ Finally, CARE contends that small solar distributed generators are denied access to wholesale energy, capacity, and ancillary services markets.⁵

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

3. Notice of CARE's complaint in Docket No. EL09-65-000 was published in the *Federal Register*,⁶ with interventions and protests due on or before August 11, 2009. The CPUC filed an answer, Motion to Dismiss, Motion to Disqualify, and Notice of Intervention. The CAISO filed an answer and Motion for Summary Disposition. SoCal Edison filed an answer to CARE's complaint.⁷

4. Motions to Intervene were filed by the Acton Town Council (Acton),⁸ Pacific Gas & Electric Company (PG&E). The City of Santa Clara, California and the M-S-R Public Power Agency filed a joint Motion to Intervene.

5. On August 26, 2009, CARE filed an answer to respondents' motions and requested leave to respond to the answers filed by the respondents. On August 28, 2009, CARE submitted several documents to the Commission without any explanation. On September 8, 2009, the CPUC filed a Motion for Leave to Answer and Answer.

³ CARE Complaint, Docket No. EL09-65-000, at 2-3, 9-10 (filed July 16, 2009).

⁴ *Id.* at 1-3, 7.

⁵ *Id.* at 2-3, 10-11.

⁶ 74 Fed. Reg. 37700 (2009).

⁷ While SoCal Edison labeled its filing an answer, the company requested dismissal of the complaint for the same jurisdictional and procedural reasons offered by the CPUC and the CAISO.

⁸ In its Motion to Intervene, Acton contends that, based on CARE's conclusions in the complaint, most if not all of the Tehachapi segments which run through Acton should not be approved. Acton Motion to Intervene at 2. Acton did not file any comments supporting this contention.

III. Motions to Dismiss and Answers to the Complaint

6. In its Answer and Motion to Dismiss,⁹ the CPUC contends that because it is a constitutionally-established state agency, CARE has no legal basis to file a complaint against the CPUC with the Commission.¹⁰ Furthermore, the CPUC claims that CARE also has no legal basis to request that the Commission interfere with pending CPUC proceedings or CPUC solar energy and renewable projects programs.¹¹

7. SoCal Edison contends that CARE has failed to meet the basic minimal requirements for pleadings.¹² SoCal Edison also claims that CARE has failed to raise a legally recognizable claim that the Commission has the statutory or regulatory power to address. Specifically, SoCal Edison alleges that the Commission lacks jurisdiction over the state solar distributed generator programs.¹³ Similarly, SoCal Edison contends that the Commission has no jurisdiction over the certificate of public convenience and necessity that SoCal Edison filed with the CPUC regarding Tehachapi. Thus, according to SoCal Edison, the Commission cannot determine whether the line should be built or not.¹⁴ SoCal Edison further argues that CARE failed to provide any support for its claim that solar distributed generators are being denied access, or provided unequal access, to the wholesale markets.¹⁵

8. The CAISO contends that CARE's allegations regarding the California solar initiatives do not implicate the CAISO and cannot be remedied by the CAISO.¹⁶ The CAISO alleges that CARE's complaint fails to meet even the minimum requirements of the Commission's Rules of Practice and Procedure. The CAISO also contends that CARE has failed to allege any facts that would support that the CAISO has violated any

⁹ The CPUC's Motion to Disqualify will be addressed below.

¹⁰ CPUC August 11, 2009, Answer to Complaint, Motion to Dismiss, Motion to Disqualify and Notice of Intervention at 3.

¹¹ *Id.*

¹² SoCal Edison August 11, 2009 Answer at 2, citing 18 C.F.R. §§ 385.203(a) and 385.206(b) (2009).

¹³ *Id.* at 4-8.

¹⁴ *Id.* at 8-10.

¹⁵ *Id.* at 10-13.

¹⁶ CAISO August 11, 2009 Answer and Motion for Summary Judgment at 2.

tariff provision, Commission order or rule, or that the CAISO has taken any action amounting to an unreasonable denial of access to interconnection or preferential treatment.¹⁷ The CAISO requests that the Commission summarily dismiss CARE's complaint.¹⁸

IV. Commission Determination

A. Procedural Matters

9. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, timely, unopposed motions to intervene serve to make the movants parties to these proceedings.

10. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,¹⁹ prohibits an answer to an answer unless otherwise ordered by the decisional authority. In this instance, CARE's August 26, 2009 filing is not only an answer to an answer but is a response to the Motions to Dismiss and the Motion to Disqualify. Thus, we will accept CARE's August 26, 2009 filing. However, on August 28, 2009, CARE submitted additional documents in this docket without any explanation. Since CARE failed to provide any procedural basis which would support these filings, we will treat them as answers to an answer and reject the documents filed by CARE pursuant to Rule 213(a)(2).²⁰ With regard to the CPUC's answer to CARE's answer, we will accept the answer filed by the CPUC on September 8, 2009 because it provided information that assisted us in our decision-making process.

B. CARE's Complaint Fails to Meet the Requirements of Rule 203 and Rule 206

11. 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."²¹ Similarly, Rule 206 requires complainants to "[c]learly identify the action or inaction which is alleged to violate applicable statutory standards or

¹⁷ *Id.* at 3-7.

¹⁸ *Id.* at 7-8.

¹⁹ 18 C.F.R. § 385.213(a)(2) (2009).

²⁰ *Id.*

²¹ *See* 18 C.F.R. § 385.203(a) (2009).

regulatory requirements [and] [e]xplain how the action or inaction violates applicable statutory standards or regulatory requirements.”²² A complainant must state a legally recognizable claim that the Commission has the statutory or regulatory power to address.²³

12. CARE appears to claim that SoCal Edison, the CAISO, and the CPUC have denied thousands of owners of solar distributed generators access to, or provided unequal access to, wholesale energy, capacity, and ancillary services markets.²⁴

13. 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.”²⁵ CARE’s complaint fails to meet even this basic standard. CARE fails to explain what statute, regulation, open access transmission tariff, or Commission order is allegedly violated by the CPUC, CAISO or SoCal Edison. CARE also fails to identify any provision in the open access transmission tariffs of SoCal Edison and the CAISO that is unjust, unreasonable, preferential or unduly discriminatory. Accordingly, we find that CARE has failed to satisfy the Commission’s requirements for filing a complaint as set forth above.

14. In addition, Rule 206(a)(8) of the Commission’s Rules of Practice and Procedure requires that documents and affidavits supporting the factual allegations of a complaint should be attached to the complaint, however, CARE failed to do so. Mr. Sarvey, CARE’s sole affiant, is not even a customer of SoCal Edison.²⁶ CARE fails to argue or explain how SoCal Edison could have possibly violated Mr. Sarvey’s rights when Mr. Sarvey is actually the customer of different utility.²⁷ Moreover, according to the CPUC, Mr. Sarvey’s bill actually demonstrates that he used more energy than he

²² 18 C.F.R. § 385.206(b) (2009).

²³ *See, e.g., Californians for Renewable Energy v. Cal. Indep. Sys. Operator*, 117 FERC ¶ 61,072, at P8- P11 (2006).

²⁴ CARE Complaint at 2, 10 and 11.

²⁵ *Illinois Municipal Electric Agency v. Central Ill. Pub. Serv. Co.*, 76 FERC ¶ 61,084, at 61,482 (1996).

²⁶ There is no indication CARE served its complaint on either PG&E or San Diego Gas & Electric Company.

²⁷ We also note that the only information provided by Mr. Sarvey is his PG&E bills from 2004, prior to the start of the solar programs at issue in this complaint.

generated.²⁸ CARE failed to produce any power sales contract between Mr. Sarvey and SoCal Edison (or even PG&E) that would support Mr. Sarvey's claim that he is not being compensated for wholesale power he sold to either entity. Furthermore, CARE has failed to allege that Mr. Sarvey actually took any steps toward participating in the wholesale market. Thus, not only does the affidavit fail to support the claim that Mr. Sarvey was unjustly or unduly discriminated against or that others received preferential treatment to his detriment, the affidavit does not support a claim for damages.

15. Accordingly, due to the myriad of deficiencies in CARE's complaint, we find that the complaint should be dismissed.

C. CPUC's Motion to Disqualify

16. In conjunction with its answer and motion to dismiss, the CPUC filed a motion to disqualify Michael E. Boyd, President of CARE from directly or indirectly participating before the Commission.²⁹ In support of this motion, the CPUC contends that CARE's present complaint is its fifth complaint filed at the Commission against the CPUC since February 22, 2007.³⁰ According to the CPUC, in each case, CARE has collaterally attacked the CPUC's decision, or, in the present case, challenged the CPUC's consideration of SoCal Edison's application.³¹

17. The CPUC argues that CARE continues to challenge the CPUC's decisions at the Commission, even though, according to the CPUC, the Commission has no jurisdiction over the CPUC. The CPUC alleges that CARE has never responded to the legal arguments in the CPUC's previous motions to dismiss.³²

²⁸ CPUC September 8, 2009, Answer to CARE's Answer at 7-8. According to the CPUC, the credit shown on the bill which Mr. Sarvey received was due to the CPUC's peak pricing retail rate design, not because of excess energy. *Id.*

²⁹ The CPUC relies on Rules 212 and 2102 of the Commission's Rules, 18 C.F.R §§ 385.212 and 385.2102, to support its request.

³⁰ The other four complaints naming the CPUC as a Respondent were in 2007. The Commission dismissed all four complaints. *See Californians for Renewable Energy, Inc. v. Ca. Pub. Utils. Comm'n*, 119 FERC ¶ 61,058 (addressing two CARE complaints) and *Californians for Renewable Energy v. Cal. Pub. Utils. Comm'n*, 120 FERC ¶ 61,272 (2007) (also addressing two CARE complaints).

³¹ CPUC's Motion to Disqualify at 25.

³² *Id.* at 26.

18. The CPUC notes that the Commission has previously dismissed other CARE complaints for their lack of compliance with the Commission's rules, but, according to the CPUC, CARE continues to ignore the Commission's requirements. The CPUC alleges that this has caused many entities to waste time and resources.³³

19. The CPUC also notes that after CARE's fourth complaint, it "warned" CARE that if CARE filed another complaint at the Commission naming the CPUC as a respondent, the CPUC will request that the Commission set for hearing in that proceeding the qualifications of CARE's representative to appear and practice before the Commission.

20. The CPUC contends that according to previous Commission decisions, any person appearing before the Commission, not just attorneys, must conform his or her conduct to the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules).³⁴ The CPUC asserts that Rule 3.1(f) of the ABA Model Rules does not allow filing of continuous frivolous complaints.³⁵ The CPUC argues that "it is time to stop Mr. Boyd and CARE from wasting the CPUC's, FERC's, CAISO's and the other parties' limited resources with his frivolous complaints."³⁶

21. In response to the CPUC's Motion, CARE alleges that the motion is in retaliation for the fact that on August 10, 2009, CARE filed a criminal complaint with the U.S. Department of Justice Civil Rights Division Criminal Section, alleging that the CPUC wrongfully denied compensation to CARE's attorneys in several past CPUC proceedings.³⁷

Commission Decision

22. The general standard that we apply in considering matters of disqualification is set forth in Rule 385.2102(a). This rule states: "After a hearing the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing

³³ *Id.*

³⁴ *Id.* at 27, citing *Enron Power Mktg Inc.*, 119 FERC ¶ 61,036, at P18, n.21 (2007).

³⁵ Rule 3.1 of the ABA Model Rules provides that "a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

³⁶ CPUC Answer at 28.

³⁷ CARE Answer at 14.

before it in any way to a person who is found . . . [t]o have engaged in unethical or improper professional conduct”³⁸ We note that the language of the rule gives the Commission discretion in deciding whether to grant a motion to disqualify even if the Commission finds that the practitioner engaged in unethical or improper professional conduct.

23. While we have often referred such matters to an Administrative Law Judge for an evidentiary hearing, in this case we exercise our discretion to make a summary determination based on the record before us.³⁹

24. In this instance we will exercise our discretion and deny the Motion. While we have repeatedly informed CARE that the Commission is not the appropriate forum in which to challenge the actions of non-jurisdictional entities⁴⁰ and we have also repeatedly informed CARE of the necessity to follow our procedural rules, at this time we do not find that the severe sanction of disqualification is warranted.

The Commission orders:

(A) CARE’s complaint is hereby dismissed, as discussed in the body of this order.

³⁸ 18 C.F.R. § 385.2102(a) (2009).

³⁹ The Commission generally has discretion whether or not to require trial-type hearings. *See, e.g., Env’tl. Action and Consumer Fed. of Amer. v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) (“FERC . . . is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions.”); *see also Nevada Power Co., et al. v. Enron Power Mktg, Inc., et al.*, 125 FERC ¶ 61,312, at P 29 and n.67 (2008) (“while the FPA and case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, i.e., where the written submissions do not provide an adequate basis for resolving disputes about material facts.”).

⁴⁰ *See, e.g., Californians for Renewable Energy v. Cal. Pub. Utils. Comm’n*, 119 FERC ¶ 61,058, at n.48; *Californians for Renewable Energy v. Cal. Pub. Utils. Comm’n*, 120 FERC ¶ 61,272, at P 1.

(B) The CPUC's Motion to Disqualify is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.