UNITED STATES OF AMERICA
BEFORETHE
FEDERALENERGYREGULATORYCOMMISSION

CAlifornians for Renewable Energy, Inc., (CARE) Complainant, v. Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission. Respondents.	Docket No. EL010-___-000

COMPLAINT OF CALIFORNIANS FOR RENEWABLE ENERGY

Pursuant to the Federal Power Act ("FPA"), 16 U.S.C. 824d, 824e, 825e, and 825h, (2008) and Rule 206, 16 C.F.R. 385.206 (2008) of the Rules of Practice and Procedure ("Rules") of the Federal Energy Regulatory Commission ("FERC"), CAlifornians for Renewable Energy, Inc. ("CARE") [1] hereby files this Complaint against the utilities Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission ("CPUC"), for their ongoing conspiracy to violate the Federal Power Act ("FPA") by approving contracts for capacity and energy that exceeds the utilities' avoided cost cap and which also usurps FERC's exclusive jurisdiction to determine the wholesale rates for electricity under its jurisdiction within those territories that it exercises regulatory authority.

[1] CARE in behalf of itself and members Robert Sarvey, and Michael Boyd individually whose QFs # 03-80 and QF#03-76 respectively.

Introduction

On May 4, 2010 in Docket No. EL10-64-000, the CPUC submitted a petition for declaratory order in which it requests that the Commission find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price to combined heat and power (CHP) generation facilities of 20 MW or less that meet energy efficiency and environmental compliance requirements.

Electric power industry restructuring has been sustained largely by technological improvements in gas turbines. It is no longer necessary to build a larger generating plant to gain operating efficiencies. Combined-cycle gas turbines reach maximum efficiency at 400 MW, while aero-derivative gas turbines can be efficient at sizes as low as 10 MW. These new gas-fired combined cycle plants can be more energy efficient and less costly than the older oil and gas-fired plants.[2] Because of their smaller footprint and low emissions, gas turbine generators can often be located close to load, avoiding the need for additional transmission. Coupled with greater transmission access as a result of Order No. 888, it became feasible for generating plants hundreds of miles apart to compete with each other, giving customers more choices in electricity suppliers.[3]

The market participation of the vertically integrated investor owned utilities ("IOU")'s like Pacific Gas and Electric Company ("PG&E") [4] and other non-IOU generation suppliers

[2] *EIA 2000 Update* at ix. The size of the cost improvements depends on the underlying fuel prices.

[3] *Id.*

[4] We also want incorporate administrative Testimony and Exhibits of CARE before FERC in *State of California, ex rel. Bill Lockyer, Attorney General of the State of California v. British Columbia Power Exchange Corporation et al.* under Docket EL02-71 et al.

began changing in response to increases in energy costs in the 1970-1990s and the passage of Public Utility Regulatory Policies Act ("PURPA"), which facilitated entry of non-IOU QFs as energy-efficient, environmentally-friendly, alternative sources of electric power. The change continued through Order No. 888, which opened up the transmission grid to competing wholesale electricity suppliers.[5] Until the early 1980s, electric IOUs' share of electric power production increased steadily, reaching 97 percent in 1979.[6] By 1991, however, the trend had reversed itself, and the IOUs' share declined to 91 percent.[7] By 2004, regulated electric utilities' share of total generation continued to decline (63.1 percent in 2004 versus 63.4 percent in 2003) as non-IOUs' share increased (28.2 percent versus 27.4 percent in 2003).[8] While most of the existing capacity and most of the additions to capacity through the late 1980s were built by IOUs, their share of capacity additions declined in the 1990s. Between 1996 and 2004, roughly 74 percent of electricity capacity additions were made by non-IOU power producers.

Since "the CPUC submitted a petition for declaratory order in which it requests that the Commission find that sections 205 and 206 of the Federal Power Act (FPA), section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA) and Commission regulations do not preempt the CPUC's decision to require California utilities to offer a certain price " and the Commission determined its regulations do in fact preempt the CPUC's decisions therefore CPUC

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This is relevant because CARE's testimony shows PG&E overcharged its customers $6,739,610,453 during the energy crisis of 2000-1.

[5] *Id. at 23*.

[6] EIA 1970-1991 at vii.

[7] *Id.*

[8] U.S. Department of Energy, Energy Information Administration, *Electric Power Annual 2004*, at 2 (November 2005), *available at* http://www.eia.doe.gov/cneaf/electricity/epa/epa.pdf [hereinafter *EIA Electric Power Annual 2004*].

has waived any claims of sovereign immunity from the Commission's authority to hear and decide this Complaint against any of those contracts that CPUC has approved outside of the Commission's FPA authority or in excess of the utilities' avoided cost cap as determined by the Commission.

Complaint

In 132 FERC ¶ 61,047 the FERC found[9] regarding the California Public Utilities Commission (CPUC) petition for declaratory order:

> The *Commission's authority under the FPA includes the exclusive jurisdiction to regulate the rates, terms and conditions of sales for resale of electric energy in interstate commerce by public utilities*.[10] While Congress has authorized a role for States in setting wholesale rates under PURPA, Congress has not authorized other opportunities for States to set rates for wholesale sales in interstate commerce by public utilities, or indicated that the Commission's actions or inactions can give States this authority. We disagree with the characterization of the CPUC's AB 1613 Decisions as merely establishing an "offering price" by the purchaser of power. Rather, we agree with the Joint Utilities that *the CPUC's AB 1613 Decisions constitute impermissible wholesale rate-setting by the CPUC. Because the CPUC's AB 1613 Decisions are setting rates for wholesale sales in interstate commerce by public utilities, we find that they are preempted by the FPA.*
>
> As noted above, however, a *state commission may, pursuant to PURPA, determine avoided cost rates for QFs*.[11] Although the CPUC has not argued that its AB 1613 program is an implementation of PURPA, we find that, to the extent the CHP generators that can take part in the AB 1613 program obtain QF status, the CPUC's AB 1613 feed-in tariff is *not* preempted by the FPA, PURPA or Commission regulations,[12] subject to certain requirements,... [*Emphasis* added]

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation sources that the CPUC approved contracts for, that where not QFs, both conventional fossil fuel powered generation and renewable generation sources

[9] At paragraphs 64 and 65 of 132 FERC ¶ 61,047.

[10] 16 U.S.C. §§ 824, 824d, 824e (2006); *e.g.*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988).

[11] See 16 U.S.C. § 824a-3 (2006); 18 C.F.R. § 292.304 (2010).

[12] 18 C.F.R. § 292.101 *et seq*. (2010).

covered under California's AB 32[13] renewable portfolio standard ("RPS") including both in state and out-of-state firming capacity and renewable capacity and energy; all these contracts are unlawful and should be abrogated pursuant to the FPA therefore.

CPUC Decision 10-07-042 July 29, 2010[14]

In Application (A.) 09-10-022 and A.09-10-034, Pacific Gas and Electric Company (PG&E) requested CPUC approval of three transactions. The purported purpose of the transactions is to novate existing power purchase agreements (PPAs) from the CDWR to PG&E, and then replace the novated agreements with new long-term PPAs. The new PPAs would procure 1,090 megawatts (MW) of fossil-fuel capacity, including 254 MW of new capacity.

This decision approves the Peakers Transaction under which PG&E will procure 502 MW of capacity, energy, and ancillary services from existing facilities through 2017, and 325 MW through 2021. This decision grants conditional authority for PG&E to proceed with the Tracy Transaction and the Los Esteros Critical Energy Facility (LECEF) Transaction, which together provide 588 MW of capacity, including 254 MW of new capacity. Specifically, today's decision requires PG&E to proceed immediately with both of these transactions if PG&E's request for approval of the proposed Marsh Landing Project and/or Oakley Project is denied in A.09-09-021. If other events occur that create an unfilled need for the new capacity authorized by Decision 07-12-052 or subsequent decisions, PG&E may resubmit one or both of these transactions for Commission approval via a Tier 3 advice letter. Construction was not restarted until years later when Mirant transferred ownership of the facility.

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[13] *See* http://www.leginfo.ca.gov/pub/05-06/bill/asm/ab_0001-0050/ab_32_bill_20060927_chaptered.pdf

[14] CARE Exhibit 2 attached in Adobe format.

See http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/121596.htm

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation projects that the CPUC approved contracts for, that where not QFs, these contracts are unlawful and should be abrogated pursuant to the FPA therefore.

CPUC Decision 10-07-045 July 29, 2010[15]

This CPUC decision grants, in part, the application of Pacific Gas and Electric Company for approval of its 2008 Long-Term Request for Offer results and adopts a cost recovery and ratemaking mechanism related thereto. In particular, it approves Pacific Gas and Electric Company's power purchase agreements ("PPA")s the Mirant's Marsh Landing, Contra Costa 6 & 7, and Midway Sunset procurement agreements.

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation projects that the CPUC approved contracts for, that where not QFs, these contracts are unlawful and should be abrogated pursuant to the FPA therefore.

Power Purchase Agreements

A Power Purchase Agreement (PPA) is a contract between an electricity generator and a purchaser of electricity or capacity. In the Complaint herein we include only those PPAs which the FERC exercises wholesale jurisdictional authority over in the listed CPUC approved utility owned PPA's.[16]

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[15] [15] CARE Exhibit 3 attached in Adobe format.

See http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/121605.htm

[16] It is not clear that FERC has authority over utility contracts with governmental agencies that exceed the avoided cost cap? Please review the spreadsheet of utility owned PPA's (CARE Exhibit 4A and 4B attached in both Excel and Adobe formats) at http://www.cpuc.ca.gov/NR/rdonlyres/CFFCA82E-8E1C-4B5F-9158-FDF45D4243F3/0/UpdatedPPAPUBLIC5709.xls

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those energy generation projects that the CPUC approved contracts for, that where not QFs, these contracts are unlawful and should be abrogated pursuant to the FPA therefore.

RPS contracts

In 2006, the Legislature passed and California Governor Schwarzenegger signed AB 32, the Global Warming Solutions Act of 2006, which set the 2020 greenhouse gas emissions reduction goal into law. It directed the California Air Resources Board ("ARB" or "Board") to begin developing discrete early actions to reduce greenhouse gases while also preparing a scoping plan to identify how best to reach the 2020 limit. The reduction measures to meet the 2020 target are to be adopted by the start of 2011.

CARE considers that greenhouse gas ("GHG") offsets[17] in the form of a renewable energy credits ("REC")s to be a type of energy ancillary service that CPUC maintains authority over in regard to the price that is paid wholesale Sellers and therefore CPUC controls what the Sellers will be compensated for RECs. The implied REC price is the difference between the costs of the standard contract and the value of a comparable market brown energy product. The REC's purpose therefore is to offset greenhouse gas emissions by avoidance. Unfortunately under the current scheme being implemented greenhouse gas emissions are being displaced, not avoided.

In *American Ref-Fuel Co., et al.* 107 FERC ¶ 61,016 at PP 2-3 (2004) in which FERC considered state programs that require the procurement and use of renewable energy credits

[17] Offsets are defined by AB 32 Section 38505 (k)(2) at page 4 "Greenhouse gas emissions exchanges, banking, *credits*, and other transactions, governed by rules and protocols established by the state board, that result in the same greenhouse gas emission reduction, over the same time period, as direct compliance with a greenhouse gas emission limit or emission reduction measure adopted by the state board pursuant to this division."

(RECs) that are premised on promoting goals, such as improved air and water quality and reduction of GHG emissions, the FERC held that its avoided cost regulations for QFs under PURPA did not contemplate the existence of RECs, and, therefore, the determinations concerning state-created RECs must be based upon state law. The FERC stated that under its avoided costs regulations, the rates are not required to compensate the QF for more than capacity and energy, and therefore, States violate the avoided cost regulations of FERC by recognizing under State law, utilities can be required to pay additional compensation for the environmental attributes of the QF outside of PURPA and the FPA.

The CPUC approved RPS projects that are already online, under development with project names and CPUC website links to Commission resolutions approving or rejecting the project should be reviewed by FERC for compliance to the FPA.[18]

Because the FERC found the CPUC lacked authority to set the wholesale rate, except for QFs, therefore those RPS contracts the CPUC approved for, capacity, energy, and or ancillary services, that where not QFs, these contracts are unlawful and should be abrogated pursuant to the FPA therefore.

Additional Requirements of Rule 206

18 C.F.R. § 383.206(b)(1)-(2)

The price and non-price terms and conditions of the contracts approved by CPUC above the avoided cost cap challenged herein are unjust and unreasonable and in violation of § 206 of the FPA, and to the extent applicable, are not in the public interest pursuant to § 206.

[18] It is not clear that FERC has authority over utility contracts with governmental agencies that exceed the avoided cost cap. Please review the spreadsheet of utility owned RPS contracts (CARE Exhibit 5A and 5B attached in both Excel and Adobe formats) at http://www.cpuc.ca.gov/NR/rdonlyres/4D4C8DF8-F762-4099-9D95-93F9F2A31515/0/RPS_Project_Status_Table_Augupdate.XLS

18 C.F.R. § 383.206(b)(3)(5)

Collectively the challenged contracts impose a financial burden on California ratepayers.

18 C.F.R. § 383.206(b)(6)

While some of the facts and legal arguments relevant to the instant Complaint may have been brought to FERC's attention in other pending proceedings, no pending proceeding provides an adequate opportunity for FERC to address the totality of Respondents' misconduct and fully address the injuries complained of herein. CARE has protested at the CPUC said approved by CPUC above the avoided cost cap, identifying some potentially unjust and unreasonable prices, terms, and conditions, and requests that FERC set the matters for hearing in order to make a determination of whether and the extent to which the particular contracts approved by CPUC above the avoided cost cap are just and reasonable, or to the extent applicable, in the public interest. CPUC and the other California state agencies and utilities named herein have not granted permission to file CARE's complaint against them at the FERC.

18 C.F.R. § 383.206(b)(7)

CARE submits that the contracts approved by CPUC above the avoided cost cap challenged herein must be abrogated as they are unjust and unreasonable. In addition to unreasonable pricing, the non-price terms and conditions of the violations are unjust and unreasonable, and warrant abrogation of the discrimination. Abrogation of the violations should be implemented in an orderly fashion which will enable California to obtain such replacement energy supplies as are necessary at reasonable prices.

18 C.F.R. § 383.206(b)(8)

In support of the facts in this Complaint, CARE provides the attached Exhibits

18 C.F.R. § 383.206(b)(9)

CARE has not attempted to use any of FERC's alternative dispute resolution procedures, and does not believe that any such procedures could successfully resolve the Complaint.

18 C.F.R. § 383.206(b)(10)

A Form of Notice suitable for publication in the Federal Register is attached hereto as Exhibit 1.

Service

The following person should be included in the official service list in these proceedings and all notices and communications with respect to these proceedings should be addressed, by electronic service if available, to:

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San Francisco, California 94124
(415) 285-4628
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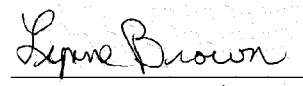
Conclusion

For the foregoing reasons, CARE respectfully requests that FERC grant the relief requested herein.

Respectfully submitted,



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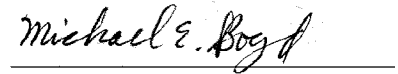

Michael E. Boyd President
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5439 Soquel Drive
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Verification

I am an officer of the complaining corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 1st 2010, at Soquel, California

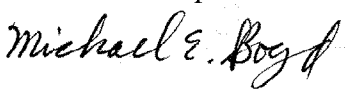

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Exhibit 1

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CAlifornians for Renewable Energy, Inc., (CARE) Complainant, v. Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission. Respondents.	Docket No. EL010-___-000

NOTICE OF SECTION 206 COMPLAINT

(September___, 2010)

Take notice that on September__, 2010, CAlifornians for Renewable Energy, Inc. (CARE) (Complainant) submitted a Complaint against the utilities Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, and the California Public Utilities Commission ("CPUC"), for their ongoing conspiracy to violate the Federal Power Act ("FPA") by approving contracts for capacity and energy that exceeds the utilities' avoided cost cap and which also usurps FERC's exclusive jurisdiction to determine the wholesale rates for electricity under its jurisdiction within those territories that it exercises regulatory authority.

Copies of this filing were served upon Respondents and other interested parties.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests must be filed on or before _____, 2010. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding.

Any person wishing to become a party must file a motion to intervene. Answers to the complaint shall also be due on or before _____, 2010. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at http://www.ferc.gov using the "RIMS" link, select "Docket#" and follow the instructions (call 202-208-2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the "e-Filing" link.

Kimberly D. Bose

Secretary