

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298**FILED**11-20-12
11:55 AM

November 20, 2012

Agenda ID #11751
Adjudicatory

TO PARTIES OF RECORD IN CASE 12-05-021

This is the proposed decision of Administrative Law Judge (ALJ) Anne E. Simon. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Simon at aes@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ MARYAM EBKE for
Karen V. Clopton, Chief
Administrative Law Judge

KVC:rs6

Attachment

Decision **PROPOSED DECISION OF ALJ SIMON** (Mailed 11/20/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Western Water and Power Production
Limited, LLC, A New Mexico Limited
Liability Corporation,

Complainant,

vs.

Southern California Edison Company
(U338E),

Defendant.

Case 12-05-021
(Filed May 21, 2012)

DECISION DISMISSING COMPLAINT

1. Summary

The complaint of Western Water and Power Production Limited is dismissed because it fails to state a claim that Southern California Edison Company violated any provision of law or any order or rule of the Commission. The request of Western Water and Power Production Limited to open an investigation is denied. This proceeding is closed.

2. Procedural History

Western Water and Power Production Limited (WWPP) filed its Complaint and Petition for Investigation (Complaint) on May 21, 2012. Southern

California Edison Company (SCE) filed its Answer on July 13, 2012.¹ On July 23, 2012, SCE filed its Motion to Dismiss Complaint. WWPP filed its Response of Complainant to Defendant's Motion to Dismiss on August 7, 2012. With permission of the Administrative Law Judge (ALJ), SCE filed a reply to the response to the motion to dismiss on August 16, 2012.

Because this proceeding is resolved on the motion to dismiss, no evidentiary hearings are necessary and none were held.

3. Discussion

3.1. Complaint to the Commission

The Commission's jurisdiction to receive and adjudicate complaints is set by Pub. Util. Code § 1702.² The key element of a complaint for most purposes,

¹ Both the Complaint and the Answer were accompanied by motions for leave to file portions of each document under seal. The requests to file under seal were granted by the Administrative Law Judge's Ruling Granting Leave to File Material Under Seal (October 30, 2012). This decision is based on allegations, information, and assertions made in the public versions of the Complaint and Answer. All other pleadings were filed in public versions only.

² Section 1702 provides:

Complaint may be made by the commission of its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission. No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electrical, water, or telephone corporation, unless it is signed by the mayor or the

Footnote continued on next page

including this complaint, is “an act. . . done or omitted to be done by any public utility. . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.”

3.2. Standards for Motion to Dismiss

As the Commission recently explained in Decision (D.) 12-07-005 (at 5-8), it has employed two standards for evaluating a motion to dismiss a complaint. One is akin to the standard for a motion to dismiss in a civil court; the other is akin to the standard for a motion for summary judgment in court. The first asks “whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law.” (D.99-11-023 3 CPUC 3d 300, 301. *See also* D.12-03-037.) The second requires “that the moving party must prevail based solely on undisputed facts and matters of law.” (D.04-05-006 at 8.)

On either standard, the result in this case is the same.

3.3. Factual Background

Since disposition of this complaint does not require resolution of any contested factual matters, the relevant factual background is taken from uncontested or agreed to statements and descriptions in the parties’ publicly available pleadings and submissions on the motion to dismiss.

president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the city or city and county within which the alleged violation occurred, or by not less than 25 actual or prospective consumers or purchasers of such gas, electricity, water, or telephone service.

All further references to sections are to the Public Utilities Code unless otherwise specified.

3.3.1. The Contract

This dispute arises from the activities of WWPP and SCE with respect to a contract for SCE to buy electricity to be used for compliance with the Renewables Portfolio Standard (RPS) from a biomass generation project to be developed by WWPP near Estancia, New Mexico. The power purchase and sale agreement (PPA) was signed by WWPP and SCE December 19, 2009. SCE submitted the PPA for Commission approval in advice letter (AL) 2442-E, filed on February 17, 2010.

SCE and WWPP had discussions about amendments to the PPA over several months, both before and after SCE submitted a revised advise letter, AL 2442-E-A, on May 19, 2011. AL 2442-E-A included, among other things, new standard terms and conditions required by D.10-03-021, as modified by D.11-01-025, and additional information required by the Commission in implementing those decisions.

3.3.2. Withdrawal of AL 2442-E-A

On August 29, 2011, SCE withdrew AL 2442-E and AL 2442-E-A, asserting that the PPA with WWPP had been terminated. At the time the ALs were withdrawn, the Commission's Energy Division staff had not yet issued a draft resolution on the ALs.

3.4. Analysis of Claims

3.4.1. WWPP's claims

WWPP's Complaint includes a wide range of discursive statements, speculative assertions, and unsupported legal conclusions.³ In order to decide the motion to dismiss, it is necessary to determine what claims WWPP is actually making. The most succinct and focused presentation of WWPP's claims is found in the section headed Relief Requested, where WWPP states that it is seeking a Commission order:

- a. Rejecting SCE's unilateral withdrawal of Advice Letter 2242-E pending the Commission's consideration and final decision addressing the issues and facts set forth in this Complaint and Exhibits in order to prevent WWPP and SCE's ratepayers from experiencing irreparable harm;

³ These include but are not limited to:

- The claim that "[t]he unilateral withdraw action of the PPA by SCE without Commission review and oversight will undermine the public policy goals of California because it will signal to the renewable energy developers and investors that California has an unreliable and non-transparent third world type business climate and governance thereby hampering the achievement of California's energy public policy." (Complaint, ¶ 22);
- Allegations about the purported behavior of an unregulated affiliate of SCE in another state. (Complaint, ¶ 34);
- The allegation that, "[o]n information and belief, numerous newspaper articles in the Western United States have appeared that report the potential cancellation of renewable energy generation and transmission projects due to alleged state discriminatory policies by California governmental entities based on economic protectionism in California." (Complaint, ¶ 56.)

- b. Finding that SCE's actions were a violation of the Commerce Clause of the U.S. Constitution and Commission policies;
- c. Requiring the parties to modify the PPA in order to effectuate the policies of the State of California.

3.4.2. SCE's Response to WWPP's Claims

In its Answer, SCE avers that the Commission does not have jurisdiction to adjudicate contract disputes about RPS procurement PPAs. (e.g., Answer, ¶¶ 10, 12, 14, 15.) In its motion to dismiss, SCE asserts that the sole basis of WWPP's claims is a contract dispute between SCE and WWPP about SCE's termination of the PPA. SCE argues that the "Complaint is simply WWPP's attempt to revive the [PPA] (or get a new contract) and to avoid the terms of the agreed upon contract." (Motion to Dismiss, at 2; *see also id.* at 3-4.) SCE claims that its termination of the PPA was proper according to the terms of the contract, and that its withdrawal of the advice letters was authorized by the Commission's advice letter rules in General Order (GO) 96-B. (Motion to Dismiss at 5.)

3.4.3. Termination of PPA

The Complaint contains numerous assertions that SCE engaged in unfair tactics and actions during the course of the parties' dealings about the PPA. (e.g., Complaint, ¶¶ 39, 47, 53.) WWPP properly states that "the Commission has no jurisdiction to enforce contracts between the parties. . ." (Complaint, ¶ 13.)⁴ The question then is, has WWPP stated a claim in relation to SCE's termination of the PPA on which the Commission can make a determination?

⁴ *See* D.01-03-050 at 5 ("As a general rule, this Commission does not adjudicate contract disputes merely because one party is a public utility.")

The Commission has made clear that, while it is interested in fairness and disclosure in the RPS procurement contract bidding and negotiation process, it:

...will not. . . be drawn into negotiations and the taking of sides. We expect disclosures [of bidding information to Commission staff] to focus on process (i.e., bidding and negotiating process), not individual bids. We instruct staff to strenuously avoid being drawn into negotiations or the taking of sides in the bargaining between an IOU buyer and an RPS bidder/seller.

D.11-04-030 at 38.

Although the Commission does not supervise contract negotiations, it requires each investor-owned utility (IOU) to employ an Independent Evaluator (IE) to monitor and report on RPS contract negotiations conducted by that IOU.

It is the role of the IE:

...to separately report (a preliminary report with the short list, final report with IOU advice letter to approve contracts) on [the utility's] entire bid, solicitation, evaluation and selection process, with the report submitted to the utility, P[rocurement] R[evision] G[roup] and Commission; served on the service list; and available to the public (subject to confidential treatment of protected information).

D.06-05-039, Conclusion of Law 3(e)(2) at 82. Thus, any issues or problems identified by the IE with respect to the "entire bid, solicitation, evaluation and selection process" will be brought to the Commission's attention when the IE report is filed with the advice letter.

WWPP does not allege that SCE failed to include an IE report with AL 2442-E or AL 2442-E-A. To the contrary, WWPP represents that the PPA "was subject to Independent Evaluator review pursuant to D.06-05-039. . ." (Complaint ¶ 61.) Nor does WWPP claim that the IE identified any problems

with respect to the solicitation in which WWPP participated or with respect to the PPA between SCE and WWPP.

WWPP may desire that the contract negotiation process with SCE had proceeded differently, or had a different conclusion. But the Commission's clearly stated policy places firm limits on the role of staff and the Commission in RPS contracting. WWPP has alleged no facts on the basis of which the Commission could determine that either its policy or process for reviewing the fairness of RPS procurement contracting has been violated.

3.3.5. Withdrawal of Advice Letters

There is no factual dispute that SCE withdrew AL-2442-E and 2442-E-A. Nor is it disputed that the withdrawal occurred before Energy Division staff prepared a draft resolution for the disposition of these advice letters.

SCE states that the withdrawal of the advice letters was the result of SCE's termination of the underlying PPA. SCE argues that the withdrawal is consistent with the Commission's rules on advice letters, as set out in GO 96-B.

WWPP concedes that GO 96-B "may allow a utility to unilaterally withdraw an Advice Letter. . ." (Reply at 6, n.5.) WWPP's concession is correct and necessary. Section 5.3 of GO 96-B provides that:

Before disposition of an advice letter, but no later than the date of issuance, for public review and comment, of a draft resolution (if any) that would grant or reject the advice letter, a utility may withdraw its advice letter without prejudice, except that an advice letter that is effective pending disposition may not be withdrawn on or after the effective date. The withdrawal shall bear the same identifying number as the advice letter and shall be submitted in the same manner and served on the same persons as the advice letter.

The Tier 3 advice letters used to submit RPS contracts for Commission approval are not effective pending disposition. (GO 96-B, Rule 7.3.5 and Energy

Industry Rule 5.3.) There is no dispute that SCE withdrew these Tier 3 advice letters before a draft resolution was issued. SCE's action was therefore consistent with the Commission's rules about advice letters as set forth in GO 96-B.

3.3.6. Commerce Clause of U.S. Constitution

WWPP asserts that, even if SCE complied with GO 96-B in withdrawing the ALs, that compliance "does not shield the utility if its intent was to violate the constitutional rights of others." (Reply at 6, n.5.) WWPP provides no legal authority for its unusual proposition that a utility may possess an intent to violate constitutional rights. In its factual allegations, WWPP's essentially states that SCE made certain statements.⁵ Even assuming, for purposes of deciding the motion to dismiss, that such allegations are true, the most they can demonstrate is that certain individuals employed by SCE made the alleged statements during the course of discussions about the PPA. WWPP provides no authority for construing those statements as having any legal significance, much less the constitutional significance that WWPP attaches to them.

Further, WWPP provides neither factual information nor legal authority to support the claim in its First Cause of Action (Complaint, ¶¶ 57-64) that SCE's withdrawal of AL 2442-E and AL 2442-E-A, which had sought Commission approval of the single PPA between WWPP and SCE, is constitutionally significant. WWPP claims that SCE's withdrawal of the advice letters after SCE

⁵ See, e.g., Complaint ¶ 25 ("SCE has specifically communicated to WWPP that one of the principal pretexts for its withdrawal action was to be responsive to California political opposition to out of state renewable energy resources. . .)

terminated the PPA is suspect under the Commerce Clause of the U.S. Constitution.⁶

WWPP's Complaint suggests that WWPP believes that an RPS contract, once entered into, must be carried out by the contracting utility. This perception is inaccurate, because RPS procurement contracts take a variety of forms and have a variety of negotiating histories and outcomes.⁷ Like other commercial arrangements, RPS procurement contracts do not always come to fruition in their initial form. The technology or commercial on-line date of the generation project may change. The price or other terms of the PPA may be amended, or the PPA may be cancelled. The PPA may be modified or rejected by the Commission.⁸ WWPP provides no basis on which the Commission could conclude that any actions with respect to this PPA were so different from the usual issues that arise with respect to RPS contracts that they should be viewed with constitutionally-based suspicion.⁹

⁶ The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have power to . . . regulate commerce with foreign nations, and among the several states, and with the Indian tribes." (U.S. Const., Art. I, sec. 8, cl. 3.)

⁷ A general overview of the RPS procurement process is provided by the RPS Project Status Table, which is compiled by Commission staff and periodically updated. It may be found at <http://www.cpuc.ca.gov/PUC/energy/Renewables/index.htm>.

⁸ For a recent discussion of several of these types of changes, *see* Resolution E-4522 (October 29, 2011). In that resolution, the Commission addresses five amended PPAs for RPS-eligible generation from solar thermal facilities in various locations in California, rejecting three of the PPAs and approving two with modifications.

⁹ It is difficult to ascertain from the Complaint whether WWPP is claiming that the Commission has violated the Commerce Clause by following its own rules and policies with respect to the PPA (e.g., Complaint ¶ 64), or that the Legislature has violated the Commerce Clause by enacting Senate Bill 2 (1X) (Simitian), Stats. 2011, ch. 1. (*see, e.g.,*

Footnote continued on next page

3.5. Petition for Investigation

The Complaint is captioned “Complaint and Petition for Investigation.” The Complaint provides no elucidation of the request for a Commission investigation beyond a conclusory assertion that the Commission has an independent interest in investigating SCE's behavior with respect to the PPA. (Complaint ¶ 14.) WWPP does not ask for a Commission investigation in its Request for Relief (Complaint at 30). To the extent that WWPP intends to request that the Commission issue an Order Instituting Investigation pursuant to Rule 5.1 of the Commission’s Rules of Practice and Procedure, the request must be denied. There is no procedure set by statute or Commission rule that allows a petition requesting that the Commission open an investigation.¹⁰

Complaint ¶ 62.) To the extent that WWPP is attempting to make either or both of those claims, a complaint filed with the Commission pursuant to its statutory jurisdiction over complaints against utilities is not an allowable way to do so. Section 1702 governs complaints to the Commission. Cal. Const., Art. III, § 3.5 sets the parameters of an agency’s consideration of constitutional questions. It provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
- (b) To declare a statute unconstitutional;
- (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

¹⁰ By contrast, a petition for rulemaking may be filed by any person, so long as it meets certain statutory requisites. See Pub. Util. Code §1708.5 and Rule 6.3.

4. Categorization and Need for Hearing

This proceeding was initially categorized as adjudicatory. The categorization as adjudicatory is hereby confirmed. WWPP requested an evidentiary hearing in its Complaint. However, because this proceeding is resolved on the basis of the motion to dismiss, no evidentiary hearings are necessary and none were held.

5. Comments on Proposed Decision

The proposed decision of ALJ Anne E. Simon in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on ____, and reply comments were filed on ____ by ____.

6. Assignment of Proceeding

Mark J. Ferron is the assigned Commissioner and Anne E. Simon is the assigned ALJ for this proceeding.

Finding of Fact

No evidentiary hearing is necessary in this proceeding and none was held.

Conclusions of Law

1. Because WWPP has failed to allege sufficient facts in its Complaint to support a conclusion that SCE violated any provision of law or any order or rule of the Commission, this complaint should be dismissed.

2. Because the undisputed facts and relevant law support a conclusion that SCE has not violated any provision of law or rule of the Commission with respect to the actions alleged in the Complaint, this complaint should be dismissed.

3. Because there is no authorized procedure for petitioning the Commission to institute an investigation, WWPP's request that an investigation be instituted should be denied.

4. In order to eliminate uncertainty about the status of the transactions at issue in this complaint, this order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed.
2. The request for an investigation is denied.
3. No evidentiary hearings are necessary.
4. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.