

Decision PROPOSED DECISION OF ALJ YACKNIN (Mailed on 5/21/2014)**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Ecos Energy LLC,

Complainant,

vs.

Southern California Edison Company
(U338E),

Defendant.

Case 14-01-025
(Filed January 24, 2014)**DECISION DISMISSING COMPLAINT****1. Summary**

The complaint of Ecos Energy LLC 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 California Public Utilities Commission. This proceeding is closed.

2. Procedural History

Ecos Energy LLC (Ecos) filed its complaint on January 24, 2014. Southern California Edison Company (SCE) filed its answer on March 13, 2014, and a motion to dismiss the complaint on March 17, 2014. The assigned Administrative Law Judge (ALJ) held a Prehearing Conference (PHC) on March 18, 2014, at which the parties discussed the potential issues and schedule of the proceeding in the event that SCE's motion to dismiss was denied. Ecos filed its response in opposition to the motion on April 1, 2014, and, with permission of the ALJ, SCE

filed its reply on April 11, 2014. Because this proceeding is resolved on the motion to dismiss, no scoping memo has been issued, and no evidentiary hearings are necessary and none were held.

3. Discussion

3.1 Complaint to the Commission

The California Public Utilities Commission's (Commission) jurisdiction to receive and adjudicate complaints is set by Pub. Util. Code § 1702.¹ The key element of a complaint for most purposes, 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."

¹ 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 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.

3.2. 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.

D.07-07-027 ordered electric corporations to submit tariffs and standard contracts for public water and wastewater agency customers to implement Assembly Bill 969, and also adopted tariff/standard contracts for customers other than public water and wastewater agencies. In compliance with D.07-07-027, SCE filed Advice Letter 2244-E on May 23, 2008 to propose Schedule WATER – Water Agency Tariff for Eligible Renewables, Schedule CREST – California Renewable Energy Small Tariff, and associated pro forma contracts. The Commission approved the Advice Letter on June 18, 2008. (Resolution E-4593.)

On November 20, 2012, Ecos and SCE entered into a Power Purchase Agreement (PPA) for Ecos’s 1.5 Megawatt (MW) San Jacinto solar generating

facility, utilizing the pro forma contract associated with Schedule CREST.² Schedule CREST was closed to new customers on July 24, 2013, pursuant to D.13-05-034.

By letter dated December 5, 2013, Ecos Energy asked SCE to amend the PPA, stating as follows:

We request that Southern California Edison Company (SCE) agree to amend the Power Purchase Agreement (the PPA) dated November 20, 2012, between Ecos Energy, LLC and SCE with respect to the San Jacinto Solar Project. We have encountered permitting difficulties from Riverside County with respect to the original location for the Project, and have been urged by the County to move the location. As a result, and consistent with our obligations under the PPA, we would like to move the physical location of the Generating Facility.

[...]

We believe that two amendments to the PPA would be required. First, the attached site plan would be substituted for the preliminary site plan included as part of Appendix A. Second, the street address of the Premises in Section 2.2 of the PPA would be 30850 Lakeview Ave., Nuevo, CA 92567.

SCE refuses to grant Ecos's request.

² The parties dispute whether Schedule CREST applies to the San Jacinto PPA. SCE asserts that, having met its CREST cap of 123.8 MW on July 20, 2012, SCE had no obligation under the tariff to enter into the PPA but did so voluntarily, and, therefore, has no obligation to amend the PPA that might otherwise arise under the tariff. Ecos disputes SCE's characterization of its obligation (or lack thereof) to enter into the PPA and resulting obligation under the tariff.

3.4. Discussion

Ecos's complaint claims six causes of action, all of which are overlapping and many of which merely state unsupported legal conclusions. We take them up individually.

Ecos's first claim is that "SCE's refusal to agree to the immaterial change to the location of the generating facility is an improper repudiation of its obligations under the tariff and the PPA and is contrary to law." Ecos does not identify any provision of the CREST tariff or the PPA, or articulate any rule of law, that might oblige SCE to amend the PPA to change the location of the generating facility (whether or not such amendment is material or immaterial), and none is apparent to us.

Ecos's second claim is that "SCE's refusal to agree to the immaterial change to the location of the generating facility is a breach of its obligation to administer the tariff in good faith and to engage in fair dealing and is contrary to law." Ecos does not identify any tariff provision or any rule of law that establishes a requirement that SCE amend the PPA to change the location of the generating facility (whether or not such amendment is material or immaterial) or allege any fact that shows lack of good faith and fair dealing, a matter of good faith or fair dealing, and none is apparent to us.

Ecos's third claim is that it "is still entitled to service under the CREST tariff and SCE's refusal to agree to the change (whether immaterial or not) violates its obligations under the tariff and is contrary to law." Ecos does not identify any tariff provision or rule of law that requires SCE to amend the PPA to change the location of the generating facility (whether or not such amendment is material or immaterial). Ecos points out that "the PPA itself does not preclude the change in location of the Generating Facility," but neither does it require it.

Ecos points out that, pursuant to the PPA, SCE may terminate the PPA for only certain specified reasons, and that SCE may not terminate the PPA because none of those reasons applies here; however, SCE's refusal to amend the PPA does not constitute termination of the PPA. Ecos suggests that, because the PPA sets forth the conditions under which SCE may terminate the PPA without reference to any specifically located generating facility,³ the PPA is not dependent upon a specifically located generating facility. However, it is undisputed that the change would require amendments to the PPA, as conceded in Ecos' December 5, 2013, letter requesting the amendment. Furthermore, Recitals Section 1.1 of the PPA (attached to the complaint) states:

This Agreement requires the Producer to be a retail customer and to obtain retail electrical service from SCE to serve all the electrical loads, net of the Renewable Generating Facility, *at the Premises identified in Appendix A. (Emphasis added.)*

Other sections of the PPA also describe the generating facility by incorporating Appendix A, which specifically includes the facility address, latitude and longitude.

Ecos's fourth claim is that "SCE's decision to deny complainant's change violates the provisions of Section 399.20(N) [sic] that were incorporated into the [feed-in tariff (FIT)]" to the effect that SCE may reject a tariff request only under certain circumstances not applicable here. However, SCE's refusal to amend the

³ As examples, Ecos cites to Section 4 of the PPA which provides the right of termination if Ecos "has not installed any of the equipment or devices necessary for *any Generating Facility* to satisfy the Gross Power Rating of such Generating Facility," and if Ecos "fails to interconnect and operate *a Generating Facility*, in accordance with the terms of" the PPA within 120 days after SCE delivers electric energy to such Generating Facility for station use. *(Emphasis added.)*

existing PPA is not a rejection of a tariff request. Although the CREST tariff was closed to new customers on July 24, 2013, Ecos may request a new PPA pursuant to the currently-available Renewable Market Adjusting (Re-MAT) tariff and does not suggest that SCE would refuse such request.

Ecos's fifth claim is that "SCE's refusal to agree to the change to the location of the generating facility violates Section 451" because SCE's refusal to agree to the amendment is unreasonable. Ecos misstates the statute as "provid[ing] that all rules made by SCE affecting or pertaining to as service shall be just and reasonable." More accurately, Section 451 provides that "[a]ll rules ... affecting or pertaining to *its charges or services to the public* shall be just and reasonable." (*Emphasis added.*) The PPA and the tariff concern the relationship between SCE as buyer and Ecos as the seller of electricity, and do not affect or pertain to charges imposed or services provided by SCE to Ecos. Section 451 does not apply.

Ecos's sixth claim is that "the Commission has the authority and obligation [under Section 761]⁴ to revise SCE's conduct to allow for the change in the location of the generating facility" because the rule or practice that resulted in SCE's refusal to amend the PPA is unjust and unreasonable. Here the "rule or practice" under which SCE is acting is the PPA approved by the Commission in Resolution E-4593, D.07-07-027 which implements Section 399.20, and (according

⁴ Section 761 provides, "Whenever the commission, after a hearing, finds that the rules, practices, ... or service of any public utility ... are unjust [or] unreasonable ..., the commission shall determine and, by order or rule, fix the rules, practices, ... service or methods to be observed, ... enforced, or employed."

to Ecos) the CREST tariff.⁵ To the extent that Ecos seeks to challenge any of those rules, its remedy was to appeal the Commission's decision, not bring an action against SCE. In its motion to dismiss, in addition to asserting that Ecos has failed to state a cause of action against it, SCE asserts that the Commission lacks jurisdiction to adjudicate this contract dispute. Because we find that Ecos has failed to state a cause of action and dismiss the complaint on that basis, we do not reach the jurisdictional issue.

4. Categorization and Need for Hearing

This proceeding was initially categorized as adjudicatory. The categorization as adjudicatory is hereby confirmed. 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 Hallie Yacknin 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. SCE filed comments on June 10, 2014, supporting the proposed decision. No other comments were filed. The Commission hereby adopts the ALJ's proposed decision.

6. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge for this proceeding.

⁵ SCE asserts that the CREST tariff does not govern here. Because this complaint is dismissed for failure to state a cause of action, we do not reach that issue.

Findings of Fact

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

Conclusions of Law

1. Ecos 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.
2. 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.
3. This complaint should be dismissed.
4. This order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed.
2. No evidentiary hearings are necessary.
3. Case 14-01-025 is closed.

This order is effective today.

Dated _____, at San Francisco, California.