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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WINDING CREEK SOLAR LLC,
Plaintiff,
v.
MICHAEL PEEVEY, et al.,
Defendants.

Case No. [13-cv-04934-JD](#)

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT WITH LEAVE TO
AMEND**

Re: Dkt. No. 45

INTRODUCTION

Plaintiff Winding Creek LLC (“Winding Creek”) is a developer of solar projects. It seeks a declaration that certain ratemaking actions and decisions by the California Public Utilities Commission (“CPUC”) went beyond what is permitted by federal law. The Court previously dismissed Winding Creek’s initial complaint with leave to amend. Currently before the Court is the defendants CPUC Commissioners’ motion to dismiss Winding Creek’s first amended complaint. The Court grants the motion and dismisses the complaint, again with leave to amend.

BACKGROUND

I. STATUTORY FRAMEWORK

The statutory context of this action is complex. As a preliminary matter, under the Federal Power Act (“FPA”), 16 U.S.C. § 791a *et seq.*, the interstate commerce of electric energy at wholesale is subject to regulation by the Federal Energy Regulatory Commission (“FERC”).

In 1978, Congress enacted the Public Utility Regulatory Policies Act (“PURPA”), which amended the FPA. PURPA was enacted to encourage the development of renewable sources of energy, and “thus to reduce American dependence on fossil fuels by promoting increased energy efficiency.” *Indep. Energy Producers Ass’n, Inc. v. Cal. Pub. Util. Comm’n*, 36 F.3d 848, 850 (9th Cir. 1994).

1 To that end, PURPA directs FERC to prescribe “such rules as it determines necessary to
2 encourage cogeneration and small power production,” including rules that “require electric utilities
3 to offer to . . . purchase electric energy from [qualifying cogeneration facilities and qualifying
4 small power production facilities].” 16 U.S.C. § 824a-3(a). PURPA further requires State
5 regulatory authorities such as CPUC to implement the rules prescribed by FERC. *Id.* at § 824a-
6 3(f)(1).

7 PURPA provides qualifying facilities with the right to file suit in the United States district
8 courts if State agencies like the CPUC fail to properly implement FERC’s rules. *Id.* at § 824a-
9 3(h)(2)(B). But this right to file suit arises only after the “electric utility, qualifying cogenerator or
10 qualifying small power producer” has first “petition[ed] the Commission [*i.e.*, FERC] to enforce
11 the requirements of subsection (f)” and FERC has not initiated an enforcement action itself within
12 60 days of the petition. *Id.*

13 The crux of Winding Creek’s claim in this case is that the rate-setting program established
14 by the CPUC violates PURPA itself and FERC’s PURPA regulations.

15 **II. THE ORIGINAL COMPLAINT AND PRIOR MOTION TO DISMISS ORDER**

16 Winding Creek filed this action in this Court on October 24, 2013. The original complaint
17 alleged two claims against defendant CPUC. Both claims related to a 1.0 megawatt solar project
18 that Winding Creek had on the drawing board to build in Lodi, California (“1.0MW facility” or
19 “Lodi facility”). Dkt. No. 1. Winding Creek took issue with a series of CPUC decisions that it
20 calls the “Re-MAT Decisions,” which “create[d] an adjusting auction rate mechanism” to
21 determine the rate at which utilities must purchase electricity from qualifying cogeneration or
22 small power production facilities under PURPA. *Id.* at ¶ 44. Winding Creek’s main complaint
23 was that CPUC had eliminated its “entitlement” under the law to a “long-run rate,” *i.e.*, a rate
24 “which equals the project’s avoided costs calculated at the time the obligation is incurred over a
25 specified longer term,” as opposed to “a rate based upon the utility’s avoided costs calculated at the
26 time of delivery.” *Id.* at ¶¶ 57-58. Winding Creek alleged that CPUC’s policy violated PURPA and
27 FERC’s regulations, and that the Re-MAT program is preempted by the FPA because it is an improper
28 implementation of PURPA. *See id.* at ¶¶ 49-118.

1 CPUC moved to dismiss the complaint, and on February 10, 2014, the Court granted
2 CPUC’s motion, dismissing the complaint with leave to amend. Dkt. Nos. 27, 39. The Court held
3 that “the complaint as alleged triggers the CPUC’s Eleventh Amendment immunity.” Dkt. No. 39
4 at 14. The Court also held that Winding Creek had failed to establish either constitutional or
5 statutory standing. With respect to constitutional standing, the Court held that Plaintiff had not
6 satisfied its burden to show actual or imminent injury under Article III because it had not, for
7 example, made any averments that it could not secure financing for its planned Lodi facility due to
8 CPUC’s alleged violations of PURPA. *See id.* at 6. With respect to statutory standing, the Court
9 held that enforcement rights under PURPA attach only to “entities which ‘produce[] electric
10 energy.’” *Id.* at 10 (citing 16 U.S.C. § 17(A), 824a-3(h)(B)). Because the Lodi facility was not
11 yet producing electricity, the Court reasoned that it was not a “qualifying small power producer”
12 under the relevant statutory scheme, and Winding Creek therefore lacked statutory standing under
13 PURPA to pursue this action. *See id.* at 9-11. Although the Court expressed concern that certain
14 complaint averments “suggest amendment may not be available to rectify the standing defect,”
15 given the early stage of the case, the Court granted Winding Creek leave to amend. *Id.* at 7, 14.

16 **III. THE FIRST AMENDED COMPLAINT AND DEFENDANTS’ MOTION TO**
17 **DISMISS**

18 On March 11, 2014, Winding Creek filed a first amended complaint (“FAC”).
19 Dkt. No. 41. The FAC and the original complaint differ in two key ways. First, Winding Creek
20 now names as defendants five CPUC commissioners in their official capacity (“CPUC
21 Commissioners” or “Defendants”), and CPUC itself is no longer a defendant in this action.
22 Second, the FAC brings into the action two new solar facilities. In addition to the 1.0MW Lodi
23 facility, Winding Creek asserts that it is “also the owner and developer of a 3.0MW project in
24 Templeton, California” (“3.0MW facility” or “Templeton facility”), and that it is “also the
25 operator of an existing and fully constructed 1.5MW solar generating facility . . . in Lodi,
26 California” (“1.5MW facility,” “new Lodi facility” or “Bear Creek facility”).¹ *Id.* at ¶ 28.

27 _____
28 ¹ Plaintiff’s pleadings use different names for the same facilities. In the event Plaintiff chooses to
amend, it is advised to pick one name per facility and stick with that.

1 Winding Creek states that the 1.5MW facility “is in commercial operation and delivering and
2 selling electricity and capacity to Pacific Gas and Electric Company (‘PG&E’) under a 20-year
3 power purchase agreement.” *Id.* The FAC alleges that the “1.5MW solar electric generating
4 facility” -- but not any other facility -- “constitutes a ‘small power production facility’ within the
5 meaning of Section 210(l) of PURPA.” *Id.* (citing Section 3(17) of the FPA, 16 U.S.C. 796(17)).

6 The CPUC Commissioners have moved to dismiss the FAC. Dkt. No. 45. In their motion,
7 Defendants assert that statutory standing and constitutional standing are both still lacking and ask
8 that the FAC be dismissed without leave to amend. Winding Creek engaged new counsel after the
9 motion to dismiss briefing had closed, and requested permission to file a supplemental opposition
10 brief so that it could “revisit” the Court’s prior reasoning that the initial Lodi facility “could not be
11 a ‘qualifying small power producer’ until it was actually producing electricity.” Dkt. No. 52 at 2-
12 3. The Court granted the requested leave to file, and also permitted Defendants to file a
13 supplemental memorandum in reply. *See* Dkt. Nos. 56, 58. On May 21, 2014, the Court held a
14 hearing on Defendants’ motion to dismiss.

15 DISCUSSION

16 I. GOVERNING STANDARD

17 Defendants have moved to dismiss for lack of subject matter jurisdiction under Federal
18 Rule of Civil Procedure 12(b)(1). “A jurisdictional challenge under Rule 12(b)(1) may be made
19 either on the face of the pleadings or by presenting extrinsic evidence.” *Warren v. Fox Family*
20 *Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citing *White v. Lee*, 227 F.3d 1214, 1242
21 (9th Cir.2000)). At the motion to dismiss stage, plaintiff “need only show that the facts alleged, if
22 proved, would confer standing upon him.” *Id.* at 1140 (citing *Steel Co. v. Citizens for a Better*
23 *Environment*, 523 U.S. 83, 104 (1998)).

24 “[T]o satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered
25 an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural
26 or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and
27 (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable
28 decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81

1 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). “The existence of
2 federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*”
3 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 571 (1992) (citing *Newman-Green, Inc. v. Alfonzo-*
4 *Larrain*, 490 U.S. 826, 830 (1989)) (emphasis in *Lujan*).

5 **II. DISMISSAL UNDER FRCP 8**

6 As a preliminary matter, the Court finds it appropriate to dismiss the FAC sua sponte with
7 leave to amend pursuant to Federal Rule of Civil Procedure 8(a)(2). That rule requires “a short
8 and plain statement of the claim showing that the pleader is entitled to relief,” which “give[s] the
9 defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Bell Atlantic*
10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

11 The FAC violates this rule in a number of respects, due mainly to Winding Creek’s flip-
12 flopping on key allegations and inclusion of confusing and wholly irrelevant factual averments.
13 The most striking example of the FAC’s flaws involves the important question of statutory
14 standing. Of the three facilities referenced in the FAC, it is only the new Lodi facility that is
15 alleged in the FAC to be a “small power production facility” with statutory standing to sue under
16 PURPA. *See, e.g.*, Dkt. No. 41 at ¶ 28. In its opposition brief, Winding Creek conceded that the
17 original Lodi facility did not have PURPA standing. It argued that it had “cured th[is]
18 jurisdictional defect” by amending the complaint and adding the allegation that it is now the
19 operator of “a qualifying small power production facility,” by which Winding Creek was referring
20 only to the “Bear Creek Solar facility.” Dkt. No. 46 at 3, 5, 6.

21 But in a supplemental opposition brief and at the hearing (both of which happened after the
22 addition of new counsel), Winding Creek changed positions to argue that there never was any
23 jurisdictional defect, because the original Lodi facility did, in fact, have PURPA standing despite
24 its non-operational status. Dkt. No. 56. These new arguments are at odds with what the FAC
25 actually pleads, and the Court finds that the FAC no longer gives Defendants “fair notice” of what
26 Winding Creek’s claims are. This defect alone mandates dismissal of Winding Creek’s amended
27 complaint.

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1 Other problems in the FAC compound its deficiency under Rule 8. For example, at the
2 hearing, Winding Creek’s counsel acknowledged that the 3.0MW facility in Templeton, California
3 has no role in this litigation and may be disregarded. Counsel further acknowledged that Count II
4 of the FAC, which alleges that the “Re-MAT is preempted by the Federal Power Act and is an
5 improper implementation of PURPA,” is analytically identical to Count I, which alleges that the
6 Re-MAT program “violates PURPA.” See Dkt. No. 41. That the two claims are “legally
7 indistinguishable” from one another was previously noted in this Court’s prior motion to dismiss
8 order. Dkt. No. 39 at 13. These admittedly extraneous allegations in the FAC further violate the
9 “short and plain” and “fair notice” mandates of Rule 8, and they are to be removed in any
10 subsequent pleadings.

11 **III. DISMISSAL UNDER FRCP 12(B)(1)**

12 The Court also dismisses the FAC under FRCP 12(b)(1) because the FAC fails to establish
13 the Court’s jurisdiction over the case. Defendants submitted with their motion to dismiss a request
14 for judicial notice, attaching three documents which were filed with the FERC. Dkt. No. 45-1.
15 The Court grants the request and takes judicial notice of these documents under Federal Rule of
16 Evidence 201. “Judicial notice is appropriate for records and ‘reports of administrative bodies.’”
17 *U.S. v. 14.02 Acres of Land More or Less in Fresno Cnty.*, 547 F.3d 943, 955 (9th Cir. 2008)
18 (citation omitted).

19 The first two documents are two versions of “Form 556,” which is a document that small
20 power production or cogeneration facilities may file with the FERC to “self-certify” as a
21 “qualifying small power production facility” or a “qualifying cogeneration facility.” The two
22 versions of the form were filed on behalf of the new Lodi facility on March 21, 2013 and February
23 17, 2014, respectively. Dkt. No. 45-1, Exs. A & B. As Defendants point out, these documents
24 show that Bear Creek Solar LLC was previously the operator of the new Lodi facility, and it was
25 not until February 17, 2014 -- seven days after this Court’s first motion to dismiss order -- that
26 Winding Creek notified FERC that it was now the operator of the new Lodi facility. The third
27 document is a Petition for Enforcement under the Public Utilities Regulatory Policies Act of 1978,
28 filed by Winding Creek Solar LLC on June 13, 2013. *Id.*, Ex. C. The Petition mentions only “a

1 1.0 megawatt solar project in Lodi, California,” and asserts that the facility “has been self-
2 certified.” *Id.* at 4-5.

3 The addition of the new Lodi facility -- and the fact that Winding Creek is now registered
4 with the FERC as its operator -- does not give Winding Creek statutory standing under PURPA or
5 constitutional standing under Article III. Under PURPA, a “qualifying small power producer” has
6 the right to initiate an action in U.S. district court only if it has first petitioned FERC to enforce its
7 rules and FERC has not done so within 60 days. 16 U.S.C. § 824a-3(h)(2)(B). Here, it is not
8 disputed that Winding Creek has filed only one petition with the FERC, namely the petition filed
9 on June 13, 2013, eight months before Winding Creek became the operator of the new Lodi
10 facility. Understandably, the petition makes no mention of the new Lodi facility, and instead
11 mentions only the original Lodi facility. Dkt. No. 45-1, Ex. C. The fact that Winding Creek is
12 now the operator of the new Lodi facility does not give it standing under PURPA when Winding
13 Creek has never filed with the FERC any petition as the operator of the new Lodi facility.

14 In the FAC and in its opposition, Winding Creek does not attempt to argue that it was a
15 “qualifying power producer” at the time it filed its only FERC petition. Rather, Winding Creek
16 claims that it has met “the essential jurisdictional elements,” which are “(1) that Winding Creek is
17 a QSPP at the time of filing the FAC, which it is, and (2) that Winding Creek first presented the
18 issues for the enforcement action to the FERC, which it did.” Dkt. No. 46 at 7. But these are not
19 mix-and-match pre-conditions that can be met at different times. Rather, the statute states that
20 “[a]ny . . . qualifying small power producer may petition the Commission,” 16 U.S.C.
21 § 824a-3(h)(2)(B), and so Winding Creek must have been a “qualifying small power producer” at
22 the time it petitioned FERC. Although Winding Creek shifted its position on this issue at the
23 hearing, the FAC and Winding Creek’s opposition to the motion to dismiss base the contention
24 that Winding Creek was a “qualifying small power producer” on the fact that it is now the operator
25 of the new Lodi facility, a status that it did not acquire until after the prior motion to dismiss order.
26 For example, in its opposition, Winding Creek explained that ““qualifying small power producer’
27 means the owner or operator of a qualifying small power production facility,” and argued that
28 “Winding Creek is the operator of a qualifying small power production facility (‘QSPPF’),”

1 making reference to the Bear Creek facility only. Dkt. No. 3 and n.2. As alleged by the FAC,
2 then, Winding Creek did not petition the Commission as a “qualifying small power producer,” it
3 lacks statutory standing under PURPA on that basis, and the FAC is dismissed on that ground.

4 Winding Creek’s acquired status as operator of the new Lodi facility also does not bestow
5 upon it a constitutionally cognizable injury under Article III. The FAC itself alleges that the
6 1.5MW project is “delivering and selling electricity and capacity to [PG&E] under a 20-year
7 power purchase agreement.” Dkt. No. 41 at ¶ 28. Moreover, at the motion to dismiss hearing,
8 Winding Creek acknowledged that the new Lodi facility is “happy with” its power purchase
9 agreement, and that no claims were being made -- and no relief was being sought -- on behalf of
10 that facility. Winding Creek’s effort to base Article III injury arguments on the unbuilt 1.0MW
11 and 3.0MW facilities, while resting its PURPA statutory standing arguments solely on the 1.5MW
12 facility, is misguided and hints at an opportunistic approach to pleading that is wholly improper.

13 For all of these reasons, the FAC as currently pled fails to cure the statutory and
14 constitutional standing deficiencies identified in this Court’s prior motion to dismiss order, and it
15 is therefore dismissed.

16 **IV. LEAVE TO AMEND**

17 Defendants urge the Court to dismiss the FAC without leave to amend. Dkt. Nos. 45, 48.
18 But this Court is to “freely give leave when justice so requires.” FRCP 15(a)(2). Especially in
19 light of the Court’s sua sponte dismissal under FRCP 8, the Court finds that dismissal with
20 prejudice is not appropriate at this juncture. But as Winding Creek’s next attempt will be its third,
21 the Court offers this guidance.

22 The Court is concerned that the original Lodi facility -- which Winding Creek claimed at
23 the hearing was the only facility for which it seeks relief -- may be unable to provide the
24 constitutional standing necessary for Winding Creek to proceed. Specifically, the Court questions
25 whether the facility’s inability to get the specific contract terms it desires is a cognizable injury
26 under Article III. That might in the end be the case, but the Court will examine that issue closely
27 should there be a further complaint and motion to dismiss.

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In addition, as discussed at the hearing, the Court also questions whether a small power production facility that is not yet producing any electric energy can be deemed a “qualifying small power production facility” under PURPA. As Winding Creek acknowledged at the oral argument, the relevant statutory definitional framework resembles nested eggs. A “qualifying small power producer” (which can have standing to sue under certain circumstances) is an owner or operator of a “qualifying small power production facility,” and a “small power production facility” is a “facility which . . . produces electric energy” 16 U.S.C. § 796 (emphasis added). Although Winding Creek argues that FERC has, through its regulations, expanded this definition to include “proposed” facilities, such an expansion would appear to exceed the scope of the agency’s authority. *See, e.g., Banko v. Apple Inc.*, No. CV-13-02977-RS, 2013 WL 7394596 (N.D. Cal. Sept. 27, 2013) (conducting a similar analysis in a different context, and concluding that the statute and not the agency’s regulation must control where the statute is not ambiguous). The Court will also closely analyze this issue should it arise again in Winding Creek’s second amended complaint.

CONCLUSION

For all of the reasons above, the motion to dismiss is granted with leave to amend. Any amendment must be filed within 14 days of this order.

IT IS SO ORDERED.

Dated: June 11, 2014



JAMES DONATO
United States District Judge