

FILED

NOT FOR PUBLICATION

MAR 06 2015

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOLUTIONS FOR UTILITIES, INC., a
California Corporation,

Plaintiff,

and

CALIFORNIANS FOR RENEWABLE
ENERGY, INC., a California Non-Profit
Corporation; MICHAEL E. BOYD;
ROBERT SARVEY,

Plaintiffs - Appellants,

v.

CALIFORNIA PUBLIC UTILITIES
COMMISSION, an Independent California
State Agency; MICHAEL R. PEEVEY;
TIMOTHY ALAN SIMON; MICHAEL R.
FLORIO; CATHERINE J.K.
SANDOVAL; MARK J. FERRON, in
their official and individual capacities as
current Public Utilities Commission of
California Members,

Defendants - Appellees,

No. 13-55206

D.C. No. 2:11-cv-04975-SJO-
JCG

MEMORANDUM*

*This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

and

SOUTHERN CALIFORNIA EDISON
CO., a California Corporation; RACHEL
CHONG; JOHN A. BOHN; DIAN M.
GRUENICH; NANCY E. RYAN, in their
individual capacities as former Public
Utilities Commission of California
Members,

Defendants.

Appeal from the United States District Court
for the Central District of California
S. James Otero, District Judge, Presiding

Argued and Submitted February 10, 2015
Pasadena, California

Before: GRABER and WARDLAW, Circuit Judges, and MAHAN,** District
Judge.

Plaintiffs Californians for Renewable Energy, Inc., a California-based non-
profit energy company, and its members Michael Boyd and Robert Sarvey
(collectively “CARE”) appeal the dismissal of their claims against defendants
California Public Utilities Commission, the state agency responsible for California
energy policymaking, and its past and present commissioners in both their official

** The Honorable James C. Mahan, District Judge for the U.S. District Court
for the District of Nevada, sitting by designation.

and individual capacities (collectively “CPUC”).¹ We review de novo a district court’s grant of a motion to dismiss. Gompper v. VISX, Inc., 298 F.3d 893, 895 (9th Cir. 2002); Vestron, Inc. v. Home Box Office Inc., 839 F.2d 1380, 1381 (9th Cir. 1988). We review the denial of leave to amend for abuse of discretion. Gompper, 298 F.3d at 898. We reverse and remand on claim one but affirm the dismissal of all other claims.

1. We need not decide whether the administrative exhaustion requirement under the Public Utility Regulatory Policies Act of 1978 (“PURPA”) is jurisdictional. CARE fulfilled the requirement to exhaust administrative remedies. It petitioned for enforcement, and the Federal Energy Regulatory Commission did not initiate an enforcement action within 60 days. The statute does not forbid “activating” a premature complaint when there is a proper petition and no action within 60 days. See 16 U.S.C. § 824a-3(h)(2)(B). Therefore, the district court erred. This claim is remanded for further proceedings.

2. The district court correctly dismissed CARE’s 42 U.S.C. § 1983 claim for First Amendment violations. CARE did not sufficiently plead that CPUC had a retaliatory motive that was the but-for cause of seeking to have CARE declared a

¹The underlying complaint also included as parties co-plaintiff Solutions for Utilities, Inc., and co-defendant Southern California Edison Co. Neither is a party to this appeal.

vexatious litigant. See Skoog v. Cnty. of Clackamas, 469 F.3d 1221, 1231-32 (9th Cir. 2006). Though the district court's rationale for dismissal was arguably different, "we may affirm based on any ground supported by the record." Johnson v. Riverside Healthcare Sys., LP, 534 F.3d 1116, 1121 (9th Cir. 2008).

3. The district court correctly dismissed CARE's claim for intervenor fees. The Johnson Act applies because the award of intervenor fees has a dollar-for-dollar effect on utility rates. See Cal. Pub. Util. Code § 1807(a). All four prongs of the Johnson Act were satisfied. See US West, Inc. v. Nelson, 146 F.3d 718, 722 (9th Cir. 1998). First, jurisdiction over the claim rests on the alleged First Amendment violation. Second, CARE did not satisfy its burden to explain how CPUC's actions were directly burdensome to or discriminatory against interstate commerce. See id. at 724. Third, there are extensive notice, hearing, and review procedures in place for CPUC proceedings. See Cal. Pub. Util. Code §§ 1701-1736, 1756-1758. Finally, procedures in place allow intervenors to have an administrative law judge address their request for compensation for their contributions in CPUC proceedings. See Cal. Pub. Util. Code § 1804. Because the Johnson Act withdraws state utility rate cases from federal jurisdiction when all four prongs of the Act are satisfied, we affirm the district court's dismissal of CARE's intervenor fees claim for lack of jurisdiction.

4. The district court correctly dismissed CARE's § 1983 claim for PURPA violations. PURPA provides a mechanism for parties to seek an administrative or judicial remedy. See 16 U.S.C. § 824a-3(h)(2)(B). That PURPA provides fewer remedies than § 1983 is evidence that Congress did not intend to permit a PURPA claim to be brought under § 1983. See City of Rancho Palos Verdes v. Abrams, 544 U.S. 113, 121 (2005). Because PURPA has a comprehensive remedial scheme, CARE is precluded from alleging a PURPA violation through § 1983.

5. The district court properly dismissed CARE's takings claim. Under California law, CARE has no protected property interest in the profits that it anticipated earning with a PURPA-compliant contract. See Yee v. Mobilehome Park Rental Review Bd., 73 Cal. Rptr. 2d 227, 235 (Ct. App. 1998). Though CARE tries to recharacterize its claim as one for complete loss of the use of its property, CARE's claim does not amount to the forfeiture of all economically beneficial uses. See id. at 1421-22; cf. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

AFFIRMED in part, REVERSED in part, and REMANDED. Parties to bear their own costs.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

Form fields for case name, v., and 9th Cir. No.

The Clerk is requested to tax the following costs against:

Table with columns for Cost Taxable, REQUESTED (No. of Docs, Pages per Doc, Cost per Page, TOTAL COST), and ALLOWED (No. of Docs, Pages per Doc, Cost per Page, TOTAL COST). Rows include Excerpt of Record, Opening Brief, Answering Brief, Reply Brief, Other, and a TOTAL row.

* Costs per page: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees cannot be requested on this form.

Continue to next page

Form 10. Bill of Costs - Continued

I, , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature

("s/" plus attorney's name if submitted electronically)

Date

Name of Counsel:

Attorney for:

(To Be Completed by the Clerk)

Date

Costs are taxed in the amount of \$

Clerk of Court

By: , Deputy Clerk