ALJ/BAR/wav *

Mailed

APR 10 1997

Decision 97-04-041 April 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	Rulemaking 94-04-031 (Filed April 20, 1994)
Order Instituting Investigation on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation.	Investigation 94-04-032 (Filed April 20, 1994)

ORIGINAL

ORDER GRANTING MOTION FOR RULEMAKING TO ESTABLISH UTILITY/AFFILIATE STANDARDS OF CONDUCT

On December 9, 1996, Enron Capital and Trade Resources, New Energy Ventures, Inc., the School Project for Utility Rate Reduction and the Regional Energy Management Coalition (together, SPURR/REMAC), The Utility Reform Network (TURN), Utility Consumers' Action Network (UCAN), and XENERGY, Inc. (collectively, Petitioners) filed a "Petition for Order Instituting Rulemaking" which for procedural reasons was accepted as a motion in the electric restructuring docket. In their motion, the Petitioners request the Commission issue an order instituting a rulemaking to establish standards of conduct governing relationships between California's natural gas local distribution companies and electric utilities and their affiliated, unregulated marketing entities. They also request that the utilities be required to have their nonregulated activities conducted by their affiliate companies, rather than the utility itself, subject to the affiliate standards.

By this decision, we grant the motion for a rulemaking. Interested persons are directed to Rulemaking (R.) 97-04-011, adopted today, for the particulars of our rulemaking. In that docket, we will establish standards of conduct governing relationships between energy utilities and their affiliated, unregulated entities

providing energy and energy-related services, and determine whether the utilities should be required to have their nonregulated activities conducted by their affiliated companies.

The Motion and Responses

With their arguments for an order instituting a rulemaking to establish rules governing relationships between California's natural gas local distribution companies and electric utilities and their affiliated, unregulated marketing entities, Petitioners propose specific rules. By ruling, Petitioners were directed to also provide a summary of the orders or decisions the proposed rulemaking would change, and a deadline for filing responses was set.[1] Most respondents do not specifically address the proposed rules, but they do address the broader issues of whether a rulemaking is appropriate, how new rules would interact with existing rules, and what the Petitioners call "minimum, generic standards." These generic standards are: nondiscrimination standards, disclosure and information standards, separation standards, and complaint and penalty procedures.

We will take up these broader issues and then the generic standards. We will then address the Petitioners' request that utilities be required to have their nonregulated activities conducted by their affiliate companies and we will consider how to best coordinate utility-affiliate rules under consideration in a number of dockets with the proposed rulemaking.

Should the Commission Initiate a Rulemaking?

The Petitioners request a rulemaking to establish standards of conduct governing relationships between California's natural gas local distribution companies and electric

---

[1] Responses were filed by the California Energy Commission (CEC); California Department of General Services, University of California, and California State University (DGS/UC/CSU); Coastal Gas Marketing Company (Coastal); Indicated Producers; National Association of Energy Service Companies (NAESCO); Office of Ratepayer Advocates; Pacific Gas and Electric Company (PG&E); San Diego Gas & Electric Company (SDG&E); Southern California Edison

Footnote continued on next page

utilities and their affiliated, unregulated marketing entities. They argue that existing rules do not provide a sufficient safeguard from affiliate abuses, which they assert are already occurring. They also argue that significant changes in the California marketplace create the need for enforceable, standardized rules. The Petitioners state that the purpose of such rules is "to facilitate healthy and fair market competition with all players on equal footing." (Motion, p. 4.)

The Petitioners request the Commission act quickly to establish these rules. They see a serious threat to competition in the creation of numerous affiliated marketing entities at a time when swift change is occurring in the market.

Most of the responding parties support the establishment of a rulemaking, but differ on some of the particulars of scope and timing. PG&E, for example, argues that the Commission already has a substantial workload associated with implementing direct access on January 1, 1998, which must take precedence over the requested rulemaking. With respect to scope, SCG and Edison are among a number of parties who assert that the rulemaking should be limited to developing standards of conduct only for gas and electric power marketing affiliates, and not all (nonenergy) affiliated marketing entities. PG&E, in contrast, suggests that consolidating all existing standards for affiliate transactions in one order through a rulemaking process may be useful. Edison argues that the Commission should concurrently institute a rulemaking *and* investigation to clearly preserve the opportunity for hearings if needed or requested.

The CEC and Vantus do not agree that a separate rulemaking is warranted. Rather, Vantus argues that the Commission currently has in place effective rules and policies governing the relationship between energy utilities and their affiliated marketers operating in unregulated markets. The CEC advocates the Commission direct a stakeholder working group to develop utility-affiliate rules. These rules could result in regulations, or voluntary industry guidelines and other forms of self-regulation.

Company (Edison); Southern California Gas Company (SCG); Southern California Utility Power Pool (SCUPP); and Vantus Energy Corporation and Vantus Power Services (Vantus).

We have already expressed our interest in reviewing our affiliate transaction rules to determine whether they must be modified given potential self-dealing and cross-subsidization issues that may arise as a result of electric utility restructuring.[2] At present, the affiliate transaction rules which apply to the energy utilities vary somewhat. Aside from the Reporting Requirements for Utility-Affiliate Transactions, rules governing utility relations with affiliates have been developed in a number of dockets, largely as a result of corporate restructurings, but also as a result of competition being introduced into market segments like natural gas procurement.[3] Recrafting the rules which apply only to energy utilities and their energy affiliates, where appropriate, to address the market interactions that may occur in the restructured energy market makes sense. To do so, we should extend the scope of the rules to cover affiliates which provide energy-related services as well. Utility entities competing to provide energy services should face uniform rules so that no advantage or disadvantage accrues to a player simply because of differing regulations. Both electric and gas utilities and affiliates may market services and interact in the marketplace in a manner not anticipated under our present gas marketing affiliate rules. Developing new rules or modifying existing rules for both gas and electric transactions should be undertaken.

A rulemaking is the appropriate procedural venue for rules development and revision. With a formal docket open, parties have a ready forum to address the Commission on this issue. We agree with Edison that instituting an investigation concurrent with the rulemaking is appropriate.

---

[2] See, for example, our Updated Roadmap Decision (D.) 96-12-088, slip op. p. 2.

[3] Reporting Requirements for Utility-Affiliate Transactions were adopted in D.93-02-019 (48 CPUC 2d 163, 178). Decisions governing energy company corporate restructurings which address affiliate transactions include our decision on SDG&E's reorganization, D.95-12-018; the Edison holding company decision (D.88-01-063, 27 CPUC 2d 347, 375, 383); the PG&E holding company decision (D.96-11-017). The final rules for utility gas marketing affiliates can be found in D.91-02-022, 39 CPUC 2d 321, 324, 332.

Should the Rules Supplant or Supplement Existing Rules Governing Utility Transactions with their Affiliates?

In their summary of the orders or decisions the proposed rulemaking would change, the Petitioners indicate that existing rules governing utility/affiliate interactions would largely be supplemented by any standards of conduct adopted in the proposed rulemaking. Although they intend a new set of rules to be created, they acknowledge that the new rules would have implications for the Commission's existing rules.

DGS/UC/CSU states its position more clearly. It agrees that new standards of conduct should supplement the Commission's existing rules. DGS/UC/CSU argues that orders approving new corporate structures for particular utilities, however, should remain unchanged since restructuring "does not obviate the need for the detailed commitments made by utilities in exchange for authorization to alter their corporate structure." (DGS/UC/CSU Response, p. 5.) In contrast, the Indicated Producers seems to argue for the new rules completely supplanting existing rules. It argues that the existing rules are outdated, have market participants confused as to their applicability, and contain gaps with respect to the entities covered.

SCUPP cautions the Commission in its comments supporting the Petitioners that rules intended to govern the utility-affiliate relations between the merged Pacific Enterprises/Enova Corporation (PE/Enova) and its affiliates are under consideration in Application (A.) 96-10-038.

As we stated above, we intend these rules to apply to interactions between utilities and their affiliates providing energy and energy-related services. We agree with DGS/UC/CSU that orders approving new corporate structures for particular utilities should remain unchanged since restructuring does not obviate the need for the detailed commitments made by utilities in exchange for authorization to alter their corporate structures. Unlike the guidelines and policies for affiliate transactions adopted in the decisions on corporate restructurings, these rules developed through R.97-04-011, adopted today, will apply only to that subset of utility affiliates which market energy and energy-related services.

However, supplementing existing rules with a uniform set of rules may result in individual utilities being placed in the untenable position of being obligated to comply with competing rules on the same issue (or at least rules subject to different interpretations.) The utility/affiliate standards rulemaking we adopt today should address this issue.

Like other orders approving new corporate structures, the affiliate transactions rules under consideration in the PE/Enova merger application apply to all of the resulting company's affiliate transactions, and not just those with its energy and energy-related affiliates. As SCUPP suggests, we will coordinate our consideration of any affiliate transaction rules in the PE/Enova docket and those rules proposed in R. 97-04-011.

The Reporting Requirements for Utility-Affiliate Transactions present a unique circumstance. These rules apply to all electric, gas and telephone utilities substantially uniform reporting requirements for transactions with their affiliates. They govern the *reporting* of allowed transactions between utilities and their affiliates whereas the existing affiliate rules referred to above go more to which transactions are allowed or how allowed transactions may occur. At this juncture, we do not anticipate the Reporting Requirements for Utility-Affiliate Transactions to change with the adoption of new standards of conduct governing utility transactions with affiliates which market energy and energy-related services.

Should the Rulemaking Include Nondiscrimination Standards?

The Petitioners argue that standards of conduct should include, at a minimum, provisions which ensure that preference is not given to customers of affiliates, or requests for service from affiliates, relative to nonaffiliated suppliers and their customers. Also, the Petitioners argue that preferential access for affiliates to utility assets should be prohibited. Petitioners argue that the rules should state that discounts, rebates or fee waivers offered by the utility to its affiliate must be contemporaneously offered to all similarly situated nonaffiliated suppliers or customers; and that service requests made to the utility must be processed by the utility without regard to the

supplier identity. NAESCO agrees, specifying that a nondiscrimination standard should apply to the terms, conditions and services related to all monopoly functions undertaken by the distribution company. It includes distribution service, default electric service, demand-side management programs, and metering and billing among the distribution companies' monopoly functions. SCG also generally agrees with the Petitioners regarding the inclusion of nondiscrimination standards in proposed rules.

We have included nondiscrimination standards in other of our affiliate transactions rules.[4] It is appropriate to include nondiscrimination standards in utility-affiliate standards of conduct.

Should the Rulemaking Include Disclosure and Information Standards?

The Petitioners state that a utility must not be permitted to disclose to its affiliate any information which the utility receives from a nonaffiliated customer; a potential customer, supplier or their agent; or a marketer or other entity. The Petitioners also state that if a utility provides any transportation/transmission or sales/marketing information to the marketing affiliate it should be contemporaneously provided to all potential users, affiliated and nonaffiliated, on its system. The Petitioners suggest a number of disclosure methods and reporting requirements related to this proposed rule.

SCG generally agrees with the Petitioners. DGS/UC/CSU and NAESCO both agree that the rules should provide for nonpreferential access to information.

---

[4] In our Rules for Gas Utility Procurement (D.91-02-022), for example, we state that "[e]mployees of the gas utilities shall not perform any functions for utility affiliates except those services which they offer to others on an equal basis..." (39 CPUC 2d at 332.) Similarly, in our Guidelines for Transactions Between Pacific and a Category III Below-the-Line Affiliate, we require the sale of tariffed goods and services from Pacific Telesis to the affiliate to be at rates governed by the tariffs. (Guidelines for Transactions Between Pacific and a Category III Below-the-Line Affiliate, p. 1.)

Vantus points out that adopting Petitioners' prohibition on disclosure is too broad for it would prohibit the sharing of customer-specific information with an affiliate when the customer has expressly consented to the sharing of information.

Among the more controversial of the Petitioners' proposals is that the Commission should prohibit the utility from providing leads to marketing affiliates. The proposed rules should also, Petitioners continue, direct the utility to refrain from giving the appearance that the utility speaks on behalf of its affiliate, and the affiliate should be prohibited from trading upon, promoting or advertising its affiliation with the utility. The Petitioners also want the affiliate to be directed to refrain from suggesting it receives preferential treatment due to its affiliation.

SDG&E believes this proposal goes too far. It argues that in a competitive market, customers should receive as much accurate information about gas and electricity suppliers as possible. It points out that for some customers, a marketers' affiliation with a utility would be a plus, for others it would be a minus. SDG&E further states that the Commission has previously determined that the name and reputation of a utility is not an asset to which ratepayers have a claim.[5] SDG&E argues that these assets should not be devalued in an attempt to promote competition by artificially fettering utility marketing affiliates. Vantus makes similar arguments, and adds that there should be no prohibition against utility promotion of an affiliate so long as it is not funded by ratepayers and the utility makes it clear that the affiliate is competing with others. Vantus also points out that the Commission has approved joint marketing in the telecommunications market, subject to certain conditions.

Disclosure to affiliates of market information not provided to other market players would unfairly advantage affiliates in marketing their services. Again, our existing rules governing transactions with affiliates include rules governing the disclosure of utility and utility customer information. The proposed rules in R.97-04-011

---

[5] SDG&E cites D.95-12-018, slip op. at 24 (citing 27 CPUC 2d at 369).

should prohibit disclosure of utility and utility customer information with the exception of customer-specific information where the customer has consented to disclosure.

We are not prepared at this time, however, to rule on whether the utilities should be prohibited from providing leads to marketing affiliates, or to rule on any prohibition of the affiliates trading upon, promoting or advertising their affiliation with utilities. The proposed rules in R.97-04-011 should address these aspects of disclosure and information sharing.

Should the Rulemaking Include Separation Standards?

In their motion, the Petitioners argue that the utility and affiliate operations should be functionally and operationally separate to prevent cross-subsidization of the marketing affiliate by utility ratepayers. They propose that utility and affiliate employees should function independently of each other; be employed by separate corporate entities; reside in separate offices; and utilize separate computer and information systems. They also propose the utility and affiliate maintain separate books of accounts and records. To the extent the affiliate uses utility assets, the Petitioners recommend the utility not be permitted to charge the affiliate less than the embedded cost of service for that use.

Though SCG generally agrees with the Petitioners' proposed separation standards, it argues that employees of affiliates should be allowed access to the computer and other information systems of the utility. SCG states that the Federal Energy Regulatory Commission (FERC) has concluded that so long as adequate security measures are in place to ensure that confidential marketing information is not improperly conveyed from the utility to the marketing affiliate, the sharing of information systems is appropriate. SCG agrees that use by the affiliate of utility assets must be accompanied by reimbursement, but the cost it recommends be assigned is not the embedded cost of service. Rather, SCG recommends the affiliate reimburse the utility at a competitive rate or "fully loaded" cost of service.

Our existing rules governing transactions with affiliates include separations standards. R.97-04-011 should also.

Should the Rulemaking Include Special Complaint Procedures?

The Petitioners argue that in order to make the standards meaningful, utilities need a procedure by which all complaints are referred to the utility's general counsel for informal processing and possible resolution prior to, or if resolved, in lieu of, the filing of a formal complaint with the Commission. DGS/UC/CSU agrees with the Petitioners, and further states that it supports an expedited process to review complaints related to the breach of standards of conduct as a means to minimize barriers to complaints by small players. Coastal urges the Commission to establish a complaint procedure that requires the utility, with Commission oversight, to respond expeditiously and formally to charges of discrimination or violation of the affiliate rules.

PG&E and SDG&E argue that it is unclear why a separate complaint procedure for marketing affiliate issues is warranted. PG&E adds that establishing such a procedure would elevate marketing affiliate issues beyond basic customer concerns such as utility service or billing.

At this juncture, we are not convinced that a separate complaint procedure is needed for purposes of addressing marketing affiliate issues. Our present complaint procedure requires the utility to answer a complaint expeditiously (in 30 days) and formally. With the recent establishment of the Consumer Services Division, however, we emphasize that "[t]he Commission must ...be prepared to address both the new commercial relationships and the fair-dealing issues which are likely to arise with the continued movement toward greater competition in various markets." (1997 Business Plan, pp. XIV-1-2.) Competitor complaints regarding utility-affiliate relations and transactions fall into this area of the Consumer Services Division's responsibilities.

New approaches for addressing informal complaints, outlined in our Business Plan, are available to all complainants. The proposal advanced by Petitioners suggests the complainant and utility attempt to resolve the complaint informally prior to availing themselves of the Consumer Services Division's new approaches to informal resolution and the Commission's formal process. Nothing in our rules prohibits a complainant and utility from attempting to resolve a complaint informally. Absent a

successful conclusion to such an attempt, our new approaches for addressing informal complaints provide sufficient Commission oversight of informal complaints to complainants who wish to take advantage of our resolution services.

Should the Rulemaking Establish Special Penalties for Violations of the Rules?

The Petitioners request the Commission create a penalty for violation of the standards of conduct. They argue that as long as a utility adopts and enforces the standards of conduct, it and its affiliated marketers should be permitted to market energy services in competition with other suppliers in the utility's service territory. If the utility or the affiliate is found by the Commission to have failed to comply with the standards, the Petitioners argue that the penalty should be that the marketing affiliate is thereafter prohibited from marketing in the utility's service territory. DGS/UC/CSU agrees that special penalties for violations of the standards should be established. However, it argues that less severe penalties should also be available to ensure less severe infractions are appropriately addressed.

PG&E argues that the proposed "one strike, you're out" penalty is extreme, inequitable, and arguably beyond the Commission's jurisdiction to impose. While arguing that the specific penalty proposed by Petitioners is not within the power of the Commission, Vantus recognizes that the Commission must have the discretion to remedy noncompliance with its rules and policies. SDG&E points out that the Public Utilities (PU) Code already provides for monetary penalties for violation of Commission orders (§ 2107) and for prohibited transactions with an affiliated company (§ 798).[6]

Since we have penalty authority in place and we want standards of conduct ready for implementation no later than January 1, 1998, we will not include penalty

---

[6] PU Code § 798 applies only to payments to or received from subsidiaries and affiliates.

provisions specific to violations of the standards of conduct in the utility/affiliate standards rulemaking.

Should Utilities be Required to Conduct Unregulated Activities Through Affiliate Companies?

The Petitioners state that they welcome competition from utility affiliates as long as all suppliers are treated equally by a utility. They identify two prerequisites which they argue ensure equal treatment. One is the establishment of clearly articulated and enforceable standards of conduct governing the relationship between the utilities and their marketing affiliates, which we have discussed above. The other prerequisite is that the utility providing services within a monopoly structure limit its actions to those services. The Petitioners ask the Commission to delineate those regulated activities appropriate for the utilities to perform versus the unregulated, competitive activities better performed by a marketing affiliate.

SCUPP points out that this aspect of the Petitioners' motion is opposed to a proposal made by SCG in its Performance-based Ratemaking (PBR) A.95-06-002. SCUPP asks the Commission to coordinate the processing of the motion and the related aspect of SCG's PBR application.

In its application, SCG seeks the ability to offer new products and services, either itself or through an affiliate, without prior Commission approval, assuming these programs are funded with shareholder dollars. It also asks the Commission to agree that the Commission will not regulate the prices, terms and conditions for new products and services; that the profits or losses from new products and services should flow entirely to shareholders; and that existing products and services that are offered on an unbundled basis in the future should be treated in the same manner as new utility-related products and services.

We agree with SCUPP that coordination of the motion and this aspect of SCG's PBR application is appropriate. We are concerned that addressing this aspect of SCG's PBR application could place SCG and its affiliates at an unfair advantage vis a vis the other California energy utilities and their affiliates. The bold step in deregulation of energy services SCG proposes is best accomplished in a manner which applies uniform

rules to the energy utilities and their affiliates. As we foster competition in the energy marketplace, it is our responsibility to ensure that entry by the energy utilities and their affiliates into the unregulated market for energy products and services is on an equal footing. We address coordination further in R.97-04-011.

Findings of Fact

1. On December 9, 1996, Enron Capital and Trade Resources, New Energy Ventures, Inc., the School Project for Utility Rate Reduction and the Regional Energy Management Coalition, The Utility Reform Network, Utility Consumers' Action Network, and XENERGY, Inc. (collectively, Petitioners) filed a motion which was accepted into the electric restructuring docket. The Petitioners request the Commission issue an order instituting a rulemaking to establish standards of conduct governing relationships between California's natural gas local distribution companies and electric utilities and their affiliated, unregulated marketing entities. They also request that the utilities be required to have their nonregulated activities conducted by their affiliate companies, rather than the utility itself, subject to the affiliate standards.

2. The affiliate transaction rules which presently apply to the energy utilities vary somewhat since they were developed in a number of dockets, largely as a result of corporate restructurings, but also as a result of competition being introduced into market segments like natural gas procurement.

3. Utility entities competing to provide energy services should face uniform rules so that no advantage or disadvantage accrues to a player simply because of differing regulations

4. Other California utility-affiliate transaction rules include nondiscrimination standards, disclosure and information standards, and separation standards.

5. Disclosure to affiliates of market information not provided to other market players would unfairly advantage affiliates in marketing their services.

6. Our present complaint procedure requires the utility to answer a complaint expeditiously (in 30 days) and formally.

7. Nothing in our rules prohibits a complainant and utility from attempting to resolve a complaint informally. Absent a successful conclusion to such an attempt, the new approaches our Consumer Services Division employs for addressing informal complaints provide sufficient Commission oversight of informal complaints to complainants who wish to take advantage of our resolution services.

8. The PU Code provides for penalties for violation of Commission orders.

9. As we foster competition in the energy marketplace, it is our responsibility to ensure that entry by the energy utilities and their affiliates into the unregulated market for energy products and services is on an equal footing.

Conclusion of Law

Developing new rules or modifying existing rules for both gas and electric utility-affiliate transactions should be undertaken in a rulemaking and investigation setting. The rules should be developed for implementation on an expedited basis.

O R D E R

IT IS ORDERED that:

The Motion for Order Instituting Rulemaking on Standards of Conduct for Marketing Affiliates, filed by Enron Capital and Trade Resources, New Energy Ventures, Inc., the School Project for Utility Rate Reduction, the Regional Energy Management Coalition, The Utility Reform Network, Utility Consumers' Action Network, and XENERGY, Inc., is granted as contained in Rulemaking 97-04-011.

This order is effective today.

Dated April 9, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners