MAIL DATE
8/10/98

Decision 98-08-040 August 6, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the operations and practices of affiliated companies Future Net, Inc. and Future Net Online, Inc., dba Future Electric Network, and individuals in control of operations: Alan Setlin and Larry Huff, Respondents.

ORIGINAL

I.98-04-033
(Filed April, 23 1998)

ORDER DENYING REHEARING OF I.98-04-033

I. SUMMARY

In this order we deny the application for rehearing of Order Instituting Investigation 98-04-033 (OII Order) filed by Alan J. Setlin, FutureNet, Inc. and FutureNet Online, Inc. As we explain below, there is no legal impediment to our commencing these proceedings. The statutory scheme includes unregistered entities within the scope of our authority. Moreover, the allegation that we may not decide registration questions, even if true, does not demonstrate that it was error to commence this proceeding. In accordance with well-established legal principles, that claim will be taken up in our ultimate decision, following the completion of administrative proceedings.

II. BACKGROUND

Recent legislation and regulatory efforts have dramatically changed the way electricity is generated and sold in California. (Cf., AB 1890, stats. 1996 ch. 854; SB 477, stats. 1997 ch. 275.) Instead of an industry composed only of

traditionally-regulated, monopoly public utilities, California now has a system of generation competition. In this new market, ordinary consumers[1] can choose to buy electricity from a variety of different sellers. (Pub. Util. Code, § 365 subd. (b).) These sellers include both public utilities and new entrants into the electricity market called "electrical service providers" or "ESPs." This Commission continues to regulate public utilities under the established framework, and it regulates new entrants under a "system of registration and consumer protection" enacted in SB 477. (Cf., Pub. Util. Code, § 391, subd. (f).)

The staff of our Consumer Services Division (CSD) began seeking information about the operations of The Future Electronic Network, FutureNet Online, Inc. and FutureNet, Inc. (collectively, FutureNet) after receiving a number of telephone calls from consumers asking if FutureNet was a "registered" ESP. Public Utilities Code section 394,[2] part of SB 477's system of registration and consumer protection, requires "each entity offering electrical service to residential and small commercial customers [to] register with the commission." It is undisputed that FutureNet has not registered with this Commission.

The FutureNet family of companies engages in a number of different businesses. Relevant here, FutureNet was offering consumers the opportunity to buy electricity from an ESP with which it had a contractual relationship. It also offered consumers the ability to sell the ESP's electricity services. For ninety-nine dollars a consumer could become a "power representative." For one thousand dollars a consumer could become an "executive director." Both power representatives and executive directors were to be paid based on a system that took into account not only how much electricity their customers bought from the ESP, but also their position in a "matrix" relationship with other sales representatives. In

[1] These consumers fall into the residential and small commercial customer classes and are referred to as such in electric restructuring legislation and in many of our decisions.

[2] All section references are to the Public Utilities Code unless otherwise specified.

addition, executive directors' pay was to be based on how many new executive directors they recruited.

In February, 1998, the Federal Trade Commission (FTC) began an investigation into FutureNet. The FTC believed FutureNet operated as an illegal pyramid scheme. The FTC obtained a temporary restraining order (TRO) against FutureNet in the United States District Court for the Central District of California, Western Division in Civil No. 98-1113 GHK (AJx) on February 23, 1998. This TRO was modified at FutureNet's request on March 6, 1998.

After reviewing the circumstances surrounding FutureNet, CSD asked the Commission to begin a formal investigation into the activities of FutureNet and various individual respondents. On April 23, 1998 we began this proceeding, I.98-04-033, by issuing the OII Order challenged by the application for rehearing. The application for rehearing alleges jurisdictional grounds of error. Setlin and FutureNet raised similar issues in the context of the ongoing administrative proceedings, in a pleading entitled "Statement of Jurisdictional Objections," filed May 27, 1998. CSD responded to this pleading on June 8, 1998.

An Assigned Commissioner's and Assigned Administrative Law Judge's Ruling, issued June 11, 1998, determined not to impose interim restrictions on FutureNet's operations until it was clear we had authority to do so. Thus the ruling indicated we would resolve jurisdictional issues before we ordered interim relief. On June 22, CSD and FutureNet settled the interim relief issues. The settlement does not concede legal or factual issues, but provides for significant interim limitations on FutureNet's operations during the pendency of these proceedings. A Presiding Officer's Decision approving the proposed settlement was mailed on July 6, 1998. Now that interim relief has been agreed to by the parties, the matter before us is an investigation into the merits of CSD's allegations in which permanent, prospective relief as well as sanctions for past conduct, if found to have been illegal, will be considered.

III. DISCUSSION

As its name states, the OII Order is an order that institutes an investigation. The OII Order commences proceedings, sets a hearing date, and requires the named respondents (Respondents) to preserve and produce documents. Thus the OII Order merely began this investigation; it did not dispose of any issues. The application for rehearing alleges the OII Order is in error because our authority does not cover unregistered entities. The application also claims that we do not have authority to determine whether or not Setlin or FutureNet should have registered as an ESP.

Because the OII Order is not a decision that resolves issues, the question presented is whether it was error to commence these proceedings. The application's jurisdictional claims do not show this kind of error for two reasons. First, contrary to the application's assertions, SB 477 explicitly grants us authority to institute an investigation naming parties like Setlin and FutureNet as respondents. Second, general principles of administrative law do not allow parties to terminate administrative proceedings prematurely by alleging jurisdictional uncertainty. In such a situation, an agency may lawfully commence proceedings and address jurisdictional questions in its final decision, which is the only decision an aggrieved party may challenge.

We read California's electric restructuring legislation to grant us clear authority to commence an OII naming unregistered entities as respondents. Traditionally, this Commission has had jurisdiction over "every corporation or person" involved in or facilitating the "production, generation, transmission, delivery, or furnishing of electricity." (Pub. Util. Code, §§ 216, 217, 218.) This public-utilities related jurisdiction is pervasive, covering every aspect of an electrical corporation's operations. In the words of the California Supreme Court, this "jurisdiction is extensive, and the commission is obliged to exercise it." (Richfield Oil Corp. v. Public Utilities Com. (1960) 54 Cal.2d 419, 431.)

As part of California's deregulation effort, AB 1890 has exempted certain of the anticipated new participants in the restructured electricity market from such pervasive regulation. (Pub. Util. Code, § 216, subd. (i).) Instead, we regulate these new market participants under SB 477's system of registration and consumer protection.[3] This system provides us with licensing-like authority over some of these non-utilities. (Cf., Pub. Util. Code, § 394 subd. (e).) In addition, we have consumer protection authority over all market participants, including entities that have not registered. We are to issue "public alerts" about companies attempting to provide service in manner that is "unauthorized or fraudulent."[4] Section 394.2, subdivision (a), also provides: "Where the commission reasonably suspects a pattern of customer abuses, the commission may, on its own motion, initiate investigations into the activities of entities offering electrical service."

Section 394.2 does not limit the Commission to investigations only of registered ESPs. The phrase "entities offering electrical service" is entirely unqualified and must be read to refer to anyone who makes such an offer of service.[5] In Proposed Policies Governing Electric Restructuring, etc. (Consumer Protection) [D.98-03-072] (1998) __ Cal.P.U.C 2d. __, we considered these issues and established that our authority extended to non-registered entities and entities offering service to large commercial and industrial customers. We also considered the mechanics of such an investigation, noting that our subpoena power under section 311 and 312 gave us authority to require even non-registered entities to provide access to documents when an investigation was opened.

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[3] SB 477, a clean-up bill, revised and expanded several provisions of AB 1890.

[4] Section 392 contains this mandate and defines "unauthorized or fraudulent."

[5] If the application means to suggest that we have no authority because FutureNet was not offering electrical services it certainly does not demonstrate error in the OII Order. As discussed below, the principle of exhaustion of administrative remedies indicates that determination must be made in the course of this proceeding, based on the facts presented. This claim provides no basis to prevent the proceeding from starting.

As this discussion indicates, the application's claim that we have no authority over those exempt from pervasive regulation as public utilities until they register has no merit. The application bases its claim on the proposition that "no provision of Article 12 [i.e., sections 394-396] authorizes the Commission to exercise any jurisdiction over a non-public utility unless that entity is a 'registered entity.'" (Application, p. 5 (emphasis in original).) However, both sections 392 and 394.2 grant such authority. We specifically have authority to issue orders such as the OII Order, i.e., to initiate investigations on our own motion.

Since the Legislature has granted us authority to investigate those exempt from regulation as public utilities by virtue of section 216(i), even if they are unregistered, we may make Setlin and FutureNet respondents in an OII proceeding. Notwithstanding the application's discussion of the constitutional and statutory bases of our jurisdiction, this grant of authority is proper. The Legislature may confer upon us authority in addition to the regulation of designated public utilities as long as the authority conferred is cognate and germane to utilities regulation. (Cal. Const., art. XII, § 5; People v. Western Airlines (1954) 42 Cal.2d 621, 634; Morel v. Railroad Com. (1938) 11 Cal.2d 488.)

Nevertheless, the application also claims that the OII Order is in error because we cannot consider issues related to registration. The application interprets section 394's registration requirement in a way that establishes the Superior Court as the venue for all registration disputes. This interpretation places great emphasis on the fact that the language creating the registration requirement is not accompanied by a statement indicating where the law is to be enforced. The application reads into this absence of accompanying language a requirement that all registration claims be litigated in a court of general jurisdiction.

This claim goes too far. Section 394 does not contain any explicit requirement that the registration requirement be judicially administered. Rather, it establishes the registration requirement as one aspect of the Commission-

administered system of registration and consumer protection. This suggests that we should have responsibility for determining such matters. In addition, electricity services are within our area of expertise and many companies in the electricity industry are designated as public utilities. Commission administration of the registration requirement will ensure uniform application of the law. We also have authority to investigate customer abuse by any market participant. Given the Legislature's insistence that those who sell to ordinary consumers must register, the failure to register provides reasonable grounds for us to investigate whether this failure constitutes abuse. (Cf., Pub. Util. Code, §394.1, subd. (e)(1).) Thus, certain registration questions will come before us in any event.[6]

As a result, the application's assertions show only that the statute requires interpretation. Such a lack of clarity does not mean the OII Order is in error. When jurisdictional objections are raised because an agency's statutory authority is unclear, principles of administrative law favor the agency's addressing such jurisdictional questions in the course of administrative proceedings. "The party aggrieved by an administrative action ... is entitled to review only of [the agency's] final or ultimate decision." (9 Witkin California Procedure (4th ed. 1997), §108, p. 1153.)

In United States v. Superior Court (1941) 19 Cal.2d 189, 184, the California Supreme Court held that, "it lies within the power of an administrative agency to determine in the first instance, and before judicial relief may be obtained, whether a given controversy falls within the statutory grant of jurisdiction." In Abelleira v. Dist. Court of Appeal (1941) 17 Cal.2d 290, 293-294, the California Supreme Court clearly indicated that such questions should be

[6] Also, the application's interpretation leads to an absurd treatment of registered entities that have engaged in wrongdoing. The Commission has authority to revoke those entities registrations. Under the application's interpretation, entities that engaged in this osrt of wrongdoing would then will be placed beyond the Commission's oversight. Having the penalty for misconduct be a lessening of regulatory oversight is absurd, especially considering the statute's strong bias towards consumer protection.

resolved in the course of administrative proceedings. There, the Court described a party's obligation to exhaust its administrative remedies:

> [T]he long-settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter. The . . . rule is one of judicial administration — not merely a rule governing the exercise of discretion.

By claiming that the OII Order is in error, the application for rehearing alleges that we may not even commence the administrative proceedings in which Setlin's and FutureNet's jurisdictional claims could be decided. This claim has no merit. Respondents have brought these and other issues forward in their Statement of Jurisdictional Objections filed May 27, 1998. All of those issues should be addressed in the course of these proceedings and resolved with the benefit of briefing by the parties and hearings, if required. Resolving all of the issues together in this manner will allow us to consider factual questions about FutureNet's methods of operations. We may need, for example, to consider factual issues to determine if FutureNet was itself "offering electrical service" given that it was offering electrical services on behalf of a registered ESP. We will also have the ability to include in our consideration questions of our authority to fine respondents and to issue injunctive relief. The application for rehearing explicitly excludes these issues from consideration at this point.

In our view, a decision that covers all aspects of our authority made with the benefit of facts determined in the course of administrative proceedings, is the correct vehicle for resolving such questions. The application makes no allegations that Setlin or FutureNet will suffer harm or unusual expense by appearing here. We note they are already subject to the restrictions imposed by the

TRO obtained by the FTC. Since interim relief issues were settled voluntarily, we need not determine whether we have authority to impose such interim relief. Following this procedure supports policies of judicial economy, and will provide a considered decision addressing all aspects of jurisdictional issues in the context of an analysis of the facts presented here and the overall electric restructuring scheme.

IV. CONCLUSION

Thus, the OII Order is not in error. It is proper to commence this proceeding and to resolve the application's claims in our ultimate decision. Even if these claims are viewed in the most favorable light to applicants, they suggest only that we should consider the extent of our authority before reaching a final decision in this proceeding. We will commit to doing this. Any Respondent aggrieved by that decision may file an application for rehearing and, if it deems necessary, obtain judicial review. Such a procedure will allow for the most efficient resolution of these questions and will not cause Setlin or FutureNet undue harm.

THEREFORE, GOOD CAUSE APPEARING, the application for rehearing of I.98-04-033 is denied.

This order is effective today.

Dated August 6, 1998, at San Francisco, California.

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