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MAIL DATE

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Decision 98-11-021

November 5, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationship Between Energy Utilities and Their Affiliates.

Rulemaking 97-04-011
(Filed April 9, 1997)

Order Instituting Investigation to Establish Standards of Conduct Governing Relationship Between Energy Utilities and Their Affiliates.

Investigation 97-04-012
(Filed April 9, 1997)

ORDER GRANTING LIMITED REHEARING OF D.97-12-088, AND DENYING REHEARING OF DECISION (D.) 97-12-088 IN ALL OTHER RESPECT, AS TO MATTERS RELATING TO THE APPLICATIONS FOR REHEARING FILED BY WILD GOOSE STORAGE, INC. AND WASHINGTON WATER POWER COMPANY

I. INTRODUCTION

On April 10, 1997, the Commission opened Rulemaking (R.) 97-04-011 and Investigation (I.) 97-04-012 ("OIR/OII"). The purpose of the OIR/OII was to establish rules governing the interactions between energy utilities and their affiliates. On June 2, 1997, various parties submitted proposals and comments on those proposals pursuant to the OIR/OII. Two parties filing proposals were the Joint Petitioners Coalition¹ ("JPC") and the Joint Utility Respondents²

¹The Joint Petitioners Coalition included Enron Capital and Trade Resources; New Energy Ventures, Inc.; the School Project for Utilities Rate Reduction and the Regional Energy Management Coalition; The Utility Reform Network; Utility Consumers' Action Network; XENERGY, Inc.; Amoco Energy Trading Corporation; the Southern California Utility Power Pool; the Imperial Irrigation District; the Alliance for Fair Energy Competition and Trading; the City of San Diego; Pan-Alberta Gas Ltd.; and the City of Vernon.

²The Joint Utility Respondents included Pacific Gas and Electric Company; San Diego Gas and Electric Company ("SDG&E"); Southern California Edison Company; and Southern California Gas Company ("SoCalGas").

("JUR").² On July 31, 1997, various parties submitted comments to the June 2 proposals. On August 15, 1997, the parties filed replies. (See D.97-12-088, pp. 4-6.)

Based on the record for the OIR/OII, which included the proposals and the comments, we adopted the standards of conduct governing relationships between energy utilities and their affiliates in D.97-12-088. We call these standards the Affiliate Transaction Rules, which can be found in Appendix A of that decision.⁴

In these rules, the Commission determined that the rules would apply to "California Public Utility gas corporations and California public utility corporations, subject to regulation by the California Public Utilities Commission." (Rule II.A., D.97-12-088, Appendix A, p. 2.) This language in Rule II.A. was proposed by JPC. (See D.97-12-088, Appendix B, p. 5; see also, Motion of the JPC for Adoption of Proposed Rules governing Utility-Affiliate Relations ("JPC's Motion"), filed June 2, 1997, p. 9.)

The rules also define "utility" to mean "any public utility subject to the jurisdiction of the Commission as an Electrical Corporation or Gas Corporation, as defined in California Public Utilities Code Sections 218 and 222." (Rule I.G., D.97-12-088, Appendix 2, p. 2.) The language in Rule I.G. was the consensus definition agreed to by the JPC and the JUR. (See D.97-12-088, Appendix B, p. 4; see also, JPC's Motion, filed June 2, 1997, p. 11; Joint Motion of JUR Requesting Adoption of Settlement Agreement, filed June 2, 1997, p. 6; see also, Comments of the JPC on the JUR's Proposed Affiliate Transaction Rules, Appendix A, p. 1.)

² For a list of other parties filing proposals or comments on June 2, 1997, see D.97-12-088, pp. 4-5.

⁴ D.98-08-035 modified some portions of the Affiliate Transaction Rules, but not the rules germane to the instant applications for rehearing.

Applications for Rehearing of D.97-12-088 were filed by Wild Goose Storage, Inc. ("Wild Goose") and Washington Water Power Company ("WWP").⁵ In its application for rehearing, Wild Goose alleges that the Commission erred because: (1) the Commission failed to provide proper notice that the Affiliate Transaction Rules would apply to gas corporations that are not local distribution companies; (2) D.97-12-088 does not contain, separately stated, findings of fact and conclusions of law on this particular issue; (3) the Commission failed to adhere to the policies established in the gas storage decision; and (4) D.97-12-088 does not consider the adverse and disproportionate affect the rules would have on the operation of Wild Goose and all other similarly situated providers. In its application for rehearing, WWP broadly alleges, without much explanation, that the Commission has exceeded its jurisdiction and violated WWP's constitutional and statutory rights.

A response was filed by Western Gas Resources, Inc. ("Western Gas"), in support of Wild Goose's application for rehearing. Western Gas also filed a petition for modification which raises the same issues as Wild Goose. A motion for leave to withdraw this response and the petition for modification was filed recently.⁶

We have reviewed each and every allegation raised by Wild Goose, and conclude that the due process issue raised in its rehearing application warrants the granting of a limited rehearing for the purpose discussed below. We have also carefully and fully considered the application for rehearing filed by WWP, and

⁵ Applications for rehearing were also filed by SoCalGas and SDG&E (jointly) and Edison Electric Institute. We will dispose of these rehearings in another order, and our decision today is not intended to prejudice any issues raised in those rehearing applications. We also recognize that there are outstanding motions, complaints, compliance filings and petitions for modification. This decision does not address or prejudice these filings.

⁶ This decision does not dispose of this particular motion filed by Western Gas.

deny it for failing to comply with the statutory requirements of Public Utilities Code Section 1732.

II. DISCUSSION

A. A Limited Rehearing Is Granted For Purposes Of Determining Whether The Affiliate Transaction Rules Should Apply To Nondistribution Gas Corporations, In Particular Natural Gas Storage Companies.

The focus of Wild Goose's rehearing application is whether the Affiliate Transaction Rules apply only to natural gas local distribution companies ("LDCs") and not to nondistribution gas companies.² We stated in the rules we adopted that "these Rules would apply to California public utility gas corporations and California public utility electric corporations, subject to regulation by the California Public Utilities Commission." (Rule II.A., D.97-12-088, Appendix A, p. 2.) The rules define "utility" to mean "any public utility subject to the jurisdiction of the Commission as an Electrical Corporation or Gas Corporation, as defined in California Public Utilities Code Sections 218 and 222." (Rule I.G., D.97-12-088, Appendix A, p. 2.)

Under the statutes, Wild Goose, which is a independent natural gas storage company and not a LDC, is a gas corporation.³ It received its public utility status as gas corporation upon the Commission's approval of Wild Goose's application for a certificate of public convenience and necessity ("CPCN") in D.97-06-091 (issued on July 2, 1997.) (See Application of Wild Goose Storage

² Although the rules apply also to electrical corporations, this decision focuses on gas corporations because Wild Goose has public utility status as a gas corporation.

³ Public Utilities Code Section 216 defines a "public utility" to include a "gas corporation." (Pub. Util. Code, §216, subd. (a).) Public Utilities Code Section 222 defines "gas corporation" to include every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this state," (Pub. Util. Code, §222.) "Gas plant" includes "underground storage." (Pub. Util. Code, §221.) Wild Goose's CPCN authorizes it to develop, construct, and operate an underground storage facility and to provide firm and interruptible storage services at market-based rates." (Wild Goose's CPCN Decision [D.97-06-091], supra, at pp. 2-3 (slip op).)

Inc. for CPCN to Construct Facilities for Gas Storage Operations [D.97-06-091, pp. 1, 9, 20, & 24-25 (slip op.)) (1997) ___ Cal.P.U.C.2d ___.) Therefore, pursuant to Rules H.A. and I.G., the Affiliate Transaction Rules apply to Wild Goose as a gas corporation. (See D.97-12-088, Appendix A, p. 2.)

However, Wild Goose argues that the Commission erred when it stated that the rules applied to all gas corporations, rather than limiting it to just to gas corporations that are LDCs. Wild Goose cites to language in the OIR/OII and D.98-12-088 which makes references to term "natural gas local distribution companies" in order to support its assertion that the Commission intended that the rules were adopted to govern the affiliate transactions of gas corporations that are LDCs, rather than nondistribution gas corporations. (Application for Rehearing, pp. 1-3.)

Thus, when Wild Goose became subject to the rules, it believed that it had no notice that the rules would apply to gas corporations that are not local distribution companies, since the scope of the OIR/OII appears to be the standards of conduct governing relationships between "California's natural gas local distribution companies" and their affiliates, and Wild Goose had not been named as a Respondent. Accordingly, Wild Goose argues that there is a due process defect in D.97-12-088.

The fact that neither Wild Goose nor any other nondistribution gas company was named as a respondent gives no validity to Wild Goose's due process argument. At the time of issuance of the OIR/OII, there were no other gas corporations and electrical corporations other than those named as Respondents. Further, Wild Goose did not receive its public utility status as a gas corporation until June 1997, which was at least two months after the OIR/OII had been issued in April 1997.

Wild Goose, however, is correct that the scope of the OIR/OII appears to have been defined by the Commission as establishing "standards of conduct

governing relationships between California's natural gas local distribution companies and electric utilities and their affiliated, unregulated entities. . . .” (OIR /OII, pp. 1 & 8 (Ordering Paragraph No. 1.) However, the parties, namely JPC and JUR, proposed rules for applicability (namely, Rules II.A. and I.G.) that would encompass all gas corporations, and thus, the parties themselves enlarged the scope of the OIR/OII. There is no clear explanation as to why the JPC and JUR proposed the broader term “gas corporations” in their proposals. We can only speculate that it might have been because the gas corporations that existed at the time of the issuance of the OIR/OII were only LDCs. This would explain why the issue concerning applicability to non-LDCs was not considered or envisioned in the OIR/OII or during the proceeding. Because there was consensus on these particular rules, we adopted them, and thus, inadvertently created an ambiguity.

This apparent unexplained broadening of the scope of the OIR/OII by the proposals of JPC and JUR may have deprived proper notice to parties who could have reasonably read the OIR/OII to be limited to establishing standards for “natural gas local distribution companies.”² Wild Goose states that this due process problem could be fixed with a modification of the order without the need for reopening the proceeding.

However, since the issue of applicability of the rules to nondistribution gas corporations, in particular natural gas storage companies like Wild Goose, was not raised during the proceeding, and perhaps never envisioned

²Although it is clear that any entity that wishes to become a public utility has an obligation to inform itself not only of those existing Commission decisions that would govern its behavior as a public utility, but also of those pending Commission proceedings that might result in decisions that might govern its behavior as a public utility, such an entity ought to be able to look at the Commission issued decisions set forth the scope of a proceeding that might impact the entity. As discussed above, it was reasonable for Wild Goose to conclude that the purpose for OIR/OII was to establish rules that would apply only to LDCs, and thus Wild Goose arguably might not have received the requisite due process notice to become involved in the proceeding.

by the parties, there was never a record developed on this issue during the OIR/OH, and therefore, a modification without notice and opportunity to heard on this issue would not be appropriate. Accordingly, we will grant a limited rehearing.¹⁰

The limited rehearing will be conducted on the issue of whether the Affiliates Transaction Rules should be modified to exempt nondistribution gas corporations, in particular independent natural gas storage companies, or whether Rules II.A. and I.G. should not be changed. The assigned Administrative Law Judge will be directed to issue a procedural ruling on how the parties will be provided with an opportunity to be heard on the issue.

B. WWP's Application For Rehearing Is Denied Because It Fails to Comply With Public Utilities Code Section 1732.

We deny WWP's application for rehearing for failing to comply with the statutory requirements mandated in Public Utilities Code Section 1732, which provides that an application for rehearing must set forth "specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." (Pub. Util. Code, §1732.) In its rehearing application, WWP merely makes very broad allegations, namely that the Commission has exceeded its jurisdiction and violated its constitutional and statutory rights. The rehearing application is devoid of any legal analysis. WWP merely requests that its Application for Exemption from the rules and its earlier filings in the docket be incorporated as part of its rehearing application, without even attaching a copy of these documents. A review of these pleadings offers no discussion whatsoever as to how the Commission has allegedly exceeded its jurisdiction and violated its constitutional

¹⁰ Since we are granting a limited rehearing on whether the Affiliate Transaction Rules should be modified to exclude nondistribution gas corporations, in particular independent natural gas storage companies, it is unnecessary to reach the merits on the other issues raised by Wild Goose in its application for rehearing. We deny rehearing on these remaining issues.

and statutory rights. Accordingly, we will deny WWP's application for rehearing for failure to comply with Public Utilities Code Section 1732.

THEREFORE, IT IS ORDERED that:

1. A limited rehearing of D.97-12-088 is granted for the purpose of determining whether the Affiliates Transaction Rules should be modified to exempt nondistribution gas corporations, in particular independent natural gas storage companies, or whether Rules II.A. and I.G. should not be changed.
2. The Executive Director shall provide notice of this limited rehearing to all parties in the manner prescribed by Rule 52 of the Commission's Rules of Practice and Procedure. The Executive Director shall provide notice to all parties in R.97-04-011/I.97-04-012. The Executive Director should also provide notice to Wild Goose and any gas corporations that has received its public utility status after the date of the issuance of the OII/OIR.
3. The assigned Administrative Law Judge shall issue a procedural ruling on how the parties will be provided with an opportunity to be heard on the issue.
4. Except to the extent that rehearing has been granted in the manner set forth herein, Wild Goose's application for rehearing of D.97-12-088 is denied.
5. The application for rehearing of D.97-12-088 filed by WWP is denied.

This order is effective today.

Dated November 5, 1998, at San Francisco, California.

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

I dissent.

/s/ P. GREGORY CONLON
Commissioner