

Decision 99-05-036 May 13, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Richard Minetto,

Complainant,

vs.

Sierra Pacific Power Company,
Sierra Pacific Energy Company,

Defendants.

ORIGINAL

Case 98-05-055
(Filed May 29, 1998)

Richard Minetto, for himself, complainant.
David M. Norris, Attorney at Law, for Sierra Pacific
Power Company and Sierra Pacific Energy
Company, defendants.

O P I N I O N

Richard J. Minetto, (complainant) is an engineer and a former employee of Sierra Pacific Power Company (SPP or defendant). Complainant alleges that beginning in October 1997 and continuing through January 1998, defendant violated the affiliate transaction rules of this Commission. Complainant requests that appropriate penalties be imposed upon defendant. SPP denies the allegations. Public hearing was held October 22, 1998 before Administrative Law Judge (ALJ) Robert Barnett.

Complainant's Evidence

Complainant testified that he is an engineer who worked for SPP for almost 20 years before he was terminated in January 1998. Among his assignments at SPP was supervisor of transmission planning, district engineer for the Tahoe district of SPP, and district engineer for the Carson district of SPP. Beginning in October 1997 he was instructed to become involved in the marketing effort of SPP for the California market. At that time, he said he was not aware of the proposed affiliate transaction rules, but understood that the regulated utility could provide marketing efforts in California. He was told by Mr. Randy Harris, a company vice-president, to look into the existing rules, the proposed affiliate rules, and provide management with an assessment of what SPP could and could not do. He made that investigation and reported to management that the proposed affiliate rules required that marketing activity be performed by an affiliate. He was assigned to perform direct access marketing activities in California. He was the contact point for marketing efforts within SPP's California territory and outside that territory but within California. Employees of SPP were instructed that any inquiries from California customers outside the SPP service territory asking to purchase power should be referred to complainant for response.

He testified that SPP incorporated Sierra Pacific Energy Company (SPE) on September 26, 1997 in the state of Nevada. SPE applied to this Commission for registration as an electric service provider (ESP No. 1159) which was granted October 21, 1997. On November 11, 1997, he was called to a meeting of Vice-President Harris along with Mr. Bengochea, his immediate supervisor. At that time Mr. Harris instructed him to contact marketing customers and to represent himself as an employee of SPE. Mr. Harris stated "its probably better

from now on to say you're with Sierra Pacific Energy than risk being in violation."

He said that on at least 55 occasions, he represented his employment to prospective customers as being with SPE. Those prospects were located in California, some within SPP's service territory and some outside. At least 38 of those contacts occurred after the date of CPUC adoption of the affiliate transaction rules on December 16, 1997 (D.97-12-088 in R.97-04-011). He discussed service with customers both commercial and residential who were looking for an energy service provider. He had meetings to provide energy services to a group of propane customers in the Auburn area in California. He answered his phone "Sierra Pacific Energy Company." He had contacts with aggregators and marketers who wanted to use SPE as an ESP. He discussed various types of marketing activity with persons who were representatives of telecommunications companies that were representing major industrial and commercial customers and were interested in ESP service for their customers. He ceased his work for SPE when he was terminated as an employee of SPP on January 16, 1998. At all times he was an employee of SPP; at no time did he bill his work time to SPE.

In support of his testimony, he presented a number of documents. He provided a copy of SPP's employee publication known as "This Week." For the week of October 13, 1997, that document had an article stating that inquiries from persons in California outside the company's service territory seeking to purchase power should be directed to Mr. Minetto. He provided a number of letters from potential customers outside of the California service territory of SPP but within California, which requested information to switch electric suppliers to an ESP such as SPE. The letters were addressed to SPE. Replies to some of those letters

were written on SPE letterhead which he had created. At least one of those replies was signed by Mr. Harris. (See Appendix A).

Sierra Pacific Power's Evidence

SPP is regulated by this Commission and the Public Utilities Commission of Nevada. Approximately 90% of its utility operations are in Nevada. Sierra Pacific serves approximately 42,000 customers in California out of a total of about 322,000 customers. Its revenues from California operations amount to approximately 8% of its total revenues. Its service territory in California extends from Porterville in the north down to Markleeville in the south. At no point does it go further west into California than approximately 30 miles. It has an intertie with PG&E at Donner Summit. In California, it provides power only, but in Nevada it also provides some water and gas utility service within the Reno/Sparks metropolitan area.

The corporate structure of SPP is as follows:

There is a holding company Sierra Pacific Resources which has as subsidiaries SPP, SPE, and Sierra Energy Company. Sierra Energy Company primarily provides demand-side management services. SPE is an ESP registered in California as of October 23, 1997.

A vice-president of SPP testified that SPP engages in direct marketing to wholesale customers for Federal Energy Regulatory Commission (FERC) related activities. In regard to SPE, he testified that it was formed as a shell company so that if SPP elected at some point to enter the California market it would have the corporate structure in place. He said that SPP would not want to compete with itself within its California service territory, but in any case it is very difficult for customers to purchase electricity from the California power exchange because of transmission constraints. This will continue until additional transmission in California is constructed. At this time, there are no California customers of SPP

that have elected to take service from any ESP. There are no customers of SPE. There is not a single customer of SPP that has taken service from an ESP. As far as the witness knows there are no ESPs with agreements with SPP to serve California customers in SPP's service area.

He said that at the time SPE was formed, SPP was exploring the possibility of marketing outside the company's service territory. At that time SPP was dealing with issues of direct access and had a direct access work group, a team that was formed to look at competitive issues in California that made sense and how that might be done through an affiliate. It was SPP's intention in creating SPE to have the corporate entity in place if the power company elected to enter a competitive market whether it be in a form of selling energy or other products and services. It was not formed to sell energy inside its service area because of transmission constraints. He said that in mid-December 1997 the power company elected not to pursue marketing activities through SPE. He said that SPP with its small capital structure was not prepared to enter a market and compete with companies such as Enron.

He said that he never told Mr. Minetto to represent himself to potential customers outside of the service territory as an employee of SPE. He testified that Mr. Minetto was never offered a contract with SPE and that SPE never had any employees. He instructed Mr. Minetto to be part of the direct access group to deal with customers that were calling; specifically the larger retail customers that were calling in with direct access questions. He asked Mr. Minetto to investigate the possibility of market potential for SPP outside the service territory. It was clear that there was no market potential inside the service territory. He did not tell Mr. Minetto to devise a logo for SPE. He said that Mr. Minetto developed the logo on his own for his use in communicating with persons to determine whether

or not SPP should be in California doing affiliate transaction work outside of its service area.

He said that the chief executive officer of SPP is responsible for the unregulated and regulated activities of the holding company and its affiliates. He admitted that he signed at least one letter that had the name and logo of SPE.

Discussion

In our recent investigation of proposed policies governing restructuring in California's electric service industry we required all investor-owned utilities which have affiliates offering direct access to adhere to defined guidelines. (D.97-05-040 dated May 6, 1997, at pp. 67-68, in R.94-04-031 and I.94-04-032).

We said:

"In adopting holding company structures for the investor-owned electrical corporations in the past, we have relied upon the corporate separation of the regulated and unregulated entities to protect against anticompetitive behavior within the new markets....Our responsibility of overseeing utility/affiliate transactions takes on added significance with the full implementation of direct access. We are concerned that the utilities' market power in their own service territories should not foreclose the entrance of electric service providers who are not affiliates of the utilities."

The affiliate transaction guidelines were:

- "1. There shall be no shared employees, expenses or assets between these two structurally separated entities other than costs billed back by the holding company in compliance with existing affiliate transaction requirements.
- "2. Transactions between the regulated UDC and the unregulated affiliated provider shall be limited to the purchase of tariffed items generally available to other similarly situated electric service providers.

- "3. The regulated UDC shall not discriminate in the treatment of the affiliated and the non-affiliated electric service providers in the processing of direct access requests or other transactions.
- "4. Customer information held by the regulated UDC shall be made available to the affiliated energy service provider only with customer consent and using the same procedures for disseminating such information as is made available to unaffiliated energy service providers.
- "5. The affiliated entity offering electric service shall operate independently of the investor-owned utility.
- "6. If a customer requests information about direct access providers, the UDC shall provide a list of all energy service providers providing direct access services in its service territory, including its affiliate. The UDC shall not promote its affiliate.
- "7. The affiliated entity shall maintain its own books of accounts, have separate offices and utilize separate personnel, separate computer systems, and other equipment.
- "8. The UDC shall track the transfer of employees between the UDC and the affiliated entity.
- "9. The UDC shall have no transactions with an affiliated entity offering direct access transactions that also engages in FERC regulated wholesale transactions unless that entity has been authorized by the FERC to engage in wholesale transactions within the service territory of the UDC. Nothing in this rule would prohibit a UDC from engaging in transactions with an affiliate that provides only retail services and hence would not be subject to regulation by the FERC.
- "10. Joint marketing of electrical services shall be prohibited.
- "11. The UDC shall not require as a condition of any offer to, or agreement with, a customer, that the customer agree to engage an affiliated entity of the UDC or give preference to an affiliated entity's business proposal."

...

"A violation of these prescribed affiliate transaction rules will be interpreted by this Commission as an attempt by the regulated utility to unfairly advantage its affiliate with the intent of leveraging its market power to monopolize the emerging direct access marketplace." (Id. p. 69.)

In our order in D.97-05-040, we ordered:

"5. The following rules are adopted, and shall apply to all investor-owned electrical corporations."

"m. The eleven affiliate transaction guidelines listed in this decision shall be adhered to by the investor-owned electrical corporations in any transactions with their affiliates."

In D.97-12-088 dated December 16, 1997, in R.97-04-011 and I.97-04-012, we elaborated on the conditions set out in D.97-05-040. We said "In D.97-05-040...we adopted 11 interim affiliate transaction guidelines that required much greater separation of utility and affiliate operations than had occurred in the past, to address our market power concerns." (D.97-12-088 at p. 17.) We went on to deny the request of SPP to be exempted from the affiliate rules. (Id. Conclusion of Law 6, p. 96.) We adopted more detailed rules. (Appendix A of D.97-12-088.) Those rules specifically provided, among other things, that utilities and their affiliates may not share marketing services (Rule E); shall not participate in joint activities including "communications and correspondence with any existing or potential customer" (Rule F 4(b)); shall not jointly employ the same employees (Rule G); the list goes on.

Turning to the record in this complaint, we observe that a vice president of SPP testified that SPE never had employees; that SPP had a direct access group to deal with customers, specifically the larger retail customers; that Mr. Minetto was

to investigate whether there was a possibility that there was a market potential for SPP outside the service territory.

Without considering complainant's testimony the evidence from SPP's own witnesses shows a violation of our affiliate rules. When considering complainant's testimony, the violation is all the more obvious. We are persuaded by the evidence that complainant's version of his instructions from his superiors is correct. He was told to represent himself as an employee of SPE. (TR. 58-59.) The evidence is overwhelming that SPP used SPP employees to contact prospective customers to determine if it was feasible to energize its direct access affiliate SPE. (TR. 58-60, 95, 104, Ex 1.) At no time did SPE have any employees (TR. p. 84, 98, 107); all costs were borne by the ratepayers of SPP. Although SPE never had a customer in California and SPP decided that an ESP in California was not economically feasible, the evidence is persuasive that SPP used the employees and equipment of SPP to make the investigation that resulted in the conclusion of economic infeasibility. That investigation took at least three months (mid-October 1997 through mid-January 1998) and was conducted under the aegis of SPE.

Given the number of SPP employees associated in one way or another with SPE and the high rank of some of those employees, we find that at least \$50,000 of SPP employee time was spent on SPE activities between October 1997 and January 1998. This money should be returned to the ratepayers. SPP will be ordered to file an advice letter to be approved by our Energy Division setting forth a proposed refund method. The method shall include a cash refund or bill credit and shall be completed within 120 days from the effective date of this order.

Comments

This decision was first issued as a Presiding Officer's Decision (POD; Pub. Util. Code § 1701.2, Commission Rule 8.2) to which the parties and a Commissioner responded. The Commissioner requested review to consider further sanctions against defendants. Defendants appealed the POD on grounds discussed below, and also responded to the Commissioner's request for review. Complainant responded to both the Commissioner's request for review (in support) and defendants' appeal and response (in opposition).

We have reviewed the Commissioner's request for review, defendants' appeal and response, and complainant's comments. We affirm the Presiding Officer's Decision and adopt it.

1. *The Commissioner's Request for Review*

One Commissioner, agreeing that SPP violated our affiliate transaction rules, believes it is appropriate to impose a monetary fine consistent with Pub. Util. Code §§ 2107 and 2108. Complainant supports the Commissioner's request, arguing that SPP's ratepayers were harmed because they, through rates, subsidized all market entrant costs of SPP. Defendant opposes any penalty, whether a fine or a refund, arguing that "no one was harmed by the activity found to be in violation of the affiliate transaction rules." (SPP Response, p. 2.)

Defendants' argument is without merit. Actual harm is not a part of an affiliate transaction violation. It is sufficient that an affiliate transaction rule is violated.¹ But in this case, actual harm occurred. Ratepayers funded an

¹ "...disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity." (D.98-12-075, p. 36.)

ESP where a non-utility ESP would have to finance itself. This harms SPP's ratepayers, discourages non-utility ESPs in SPP's territory, and has the potential to deny to ESP customers the services of non-utility ESPs.

Our review of the record shows that a violation of the affiliate rule occurred. We have considered the sanction and agree that since ratepayers funded the affiliate that money should be returned to ratepayers.² We have also considered adding a penalty under Pub. Util. Code §§ 2107 and 2108, but will not do so in this case. The \$50,000 refund to ratepayers rectifies the harm done. Given that the affiliate transaction rules are of recent vintage and this is SPP's first transgression we are of the opinion that under the facts of this case the \$50,000 refund is a "high level of severity" and an adequate sanction.

2. Defendants' Appeal

Defendants argue that the presiding officer did not consider the substantial evidence of the complainant's bias against the defendants. Defendants point out that complainant was a former disgruntled employee of SPP who had a continuing severance pay claim and had threatened litigation.

We have reviewed the record, which shows that the presiding officer was very familiar with complainant's status. At page 2 of the Reporter's Transcript the presiding officer said: "And, Mr. Minetto, I want you to clearly understand that should there be a judgment in your favor from the Commission, it would not give any personal relief to you; that is, there is no question of damages to the complainant. There's no question of reinstatement, if that's what you want. Those are civil matters;" and p. 141 "But the problem of the

² "Utilities may not receive in rates or charges costs that are unrelated to any product or commodity furnished or service rendered by a public utility." (Conclusion of Law 16, D.97-05-088 in A.96-03-054, p. 83.)

whistleblower is exactly the situation you find yourself in." The record is replete with evidence of the pay claim and possible civil litigation. It is quite clear from the record that the presiding officer knew he was dealing with a situation caused by an employment problem with overtones of civil litigation. The status of the whistleblower is of great concern to the Commission. We considered it in D.98-12-075, pp. 18-19, and included a specific section on whistleblower complaints in our Affiliate Transaction Rules (& VIII.B.2). In this case, the testimony of SPP's own officers, set forth on pages 5 and 6 of this opinion, shows the violation. Complainant's testimony merely confirms it. The appeal is denied.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section (311(g)) and Rule 77.1 of the Rules of Practice and Procedure.

Findings of Fact

1. Sierra Pacific Energy Company is an affiliate of Sierra Pacific Power Company.
2. Sierra Pacific Energy Company registered as an electric service provider (ESP No. 1159), with this Commission on October 21, 1997.
3. On November 11, 1997, complainant, Richard J. Minetto, was an engineer employed by SPP. On that date, he attended a meeting with a vice president of SPP and with his immediate supervisor. At that time, he was told to contact potential marketing customers for direct access. He was told to represent himself as an employee of SPE.
4. On at least 55 occasions during November 1997 through January 1998, he represented his employment to prospective customers as being with SPE.
5. The prospective customers were located in California, some within SPP service territory and some outside of the service territory.

6. As part of his duties he discusses direct access service with customers, both commercial and residential, who are looking for an energy service provider. He contacted aggregators and marketers who wanted to use SPE as their energy service provider.

7. At all times during this period he was an employee of Sierra Pacific Power Company and at no time did he bill his time to Sierra Pacific Energy Company.

8. He prepared a letterhead for SPE and used that letterhead stationery to reply to inquiries from persons in California regarding SPE's ability to be an electric service provider in California.

9. On at least one occasion, the vice president of SPP used the SPE letterhead to respond to inquiries from prospective customers in California.

10. At all times during the period, October 1997 through January 1998, SPE was considered by SPP as a shell company with no employees. All expenses of SPE were paid by SPP.

11. During this period of time, SPP had a website for Sierra Pacific Energy Company as an electric service provider. On that website, the person to contact for ESP service was William E. Peterson, designated as Secretary/Resident Agent. Mr. Peterson is the general counsel of SPP. Also, on that website the corporate officers of SPE are listed as Randy G. Harris, vice president; Walter M. Higgins, president; and Mark A. Ruelle, treasurer. All of these persons at the time were employees of SPP.

12. On Sierra Pacific Resources home page on the internet, there is a listing for Sierra Pacific Energy Company with a contact Bob Balzar. Mr. Balzar is a supervisor employed by SPP.

13. SPP and SPE have shared employees, expenses, and other assets in violation of the affiliate transaction guidelines. (D.97-05-040, pp. 67-68,

Guidelines 1, 7, and 8.) SPE did not operate independently of SPP, in violation of the affiliate transaction guidelines. (Id. Guideline 5.)

14. SPP used SPP employees to solicit customers in California for SPE. (Id. Guidelines 1 and 5.)

15. SPE did not maintain its own books of accounts; did not have separate offices; did not utilize separate personnel; did not have a separate computer system or other equipment, all in violation of the affiliate transaction guidelines. (Id. Guideline 7.)

16. A reasonable estimate of the cost of the time spent by SPP employees on SPE projects in California is \$50,000.

Conclusions of Law

1. SPP has violated the affiliate transaction guidelines 1, 5, 7, and 8 of D.97-05-040.

2. SPP should be directed to refund \$50,000 to its customers.

O R D E R

IT IS ORDERED that:

1. Sierra Pacific Power Company shall refund \$50,000 to its customers.
2. Within 120 days from the effective date of this order, Sierra Pacific Power Company shall file an advice letter to be approved by this Commission's Energy Division setting forth a proposed refund method. The method shall include a cash refund or bill credit.

C.98-05-055 ALJ/RAB-MOD-POD/mrj

3. This case is closed.

This order is effective today.

Dated May 13, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

Appendix A

Yukio Yamaoka
7050 Hedgewood Drive, Rancho Palos Verdes, CA 90275-2966
Tel: (310) 544-5123; Fax: (310) 544-5633
-- E-mail: Yukio.Yamaoka@att.net --

December 22, 1997

Sierra Pacific Energy Company
6100 NEIL ROAD, RENO, NV 89511
(702) 689-5900

Re: Request of Information:

Dear Madam/Sirs:

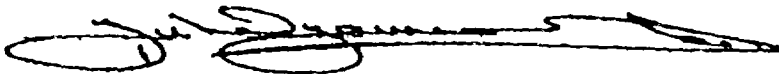
Due to the deregulation and open-up the market, I would like to switch over my electric suppliers to one of the energy service providers.

Currently, I am a residential customer of Southern California Edison, and my monthly consumption rate is about 500 kWh.

Would you kindly send me the information as to how to switch over to you and explain to me the characteristics of your company's service, and advantage and disadvantage to do so. (i.e. "Green power" or "environmentally friendly" etc.)

Thanking in advance for your kind information, I am

Sincerely,



Yukio Yamaoka

p.s. As my close friend is also considering to switch, I would appreciate it if you would send me two copies. Thank you!



Sierra Pacific Energy Co.

6100 Nell Road
Reno, NV 89511

December 30, 1997

Yukio Yamaoka
7050 Hedgewood Dr.
Rancho Palos Verdes, CA 90275-2966

Dear Mr. Yamaoka,

Thank you for contacting Sierra Pacific Energy Company with regard to providing electrical energy service for your home in Southern California. Sierra Pacific Energy Company is an affiliate company of Sierra Pacific Power Company, which is the utility serving most of Northern Nevada. At this time Sierra Pacific Energy Company is not marketing energy to the residential market in California. If we decide to expand our energy marketing effort to your area, we will contact you at that time.

Sincerely,

Mr. Richard Minetto
Sierra Pacific Energy Company



Sierra Pacific Energy Co.

6100 Nell Road
Reno, NV 89611

December 12, 1997

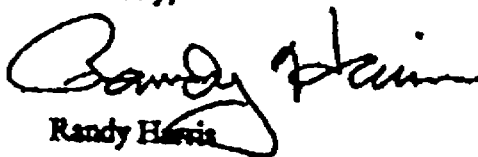
Ms. Wanda Jowers
48354 Old Woman Springs Road
Johnson Valley, CA 92235-2324

Dear Ms. Jowers,

Thank you for your letter of December 1, 1997. Sierra Pacific Energy Company is an affiliate company of Sierra Pacific Power Company, which is the utility serving most of Northern Nevada.

At this time Sierra Pacific Energy Company is not marketing energy to the residential market in California. If we decide to expand our energy marketing effort to your area, we will contact you at that time. Again, thank you for your interest in Sierra Pacific Energy Company.

Sincerely,


Randy Harris

(END OF APPENDIX A)