

Decision 00-06-005 June 8, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SOUTHERN CALIFORNIA GAS COMPANY for Authority Pursuant to Public Utilities Code Section 851 to Sell Certain Intellectual Property Known as Energy Marketplace.

Application 99-10-036
(Filed October 27, 1999)

OPINION**1. Summary**

We grant the Application of Southern California Gas Company (SoCalGas), pursuant to Pub. Util. Code § 851,¹ to sell an Internet website known as Energy Marketplace to Excelergy Corporation (Excelergy). We also approve, on an interim basis, a Settlement Agreement between SoCalGas and the sole protestant, the Office of Ratepayer Advocates (ORA), in which the parties agree to allocate any gain on sale equally between SoCalGas ratepayers and shareholders. SoCalGas' shareholders alone will bear the risk of any loss on the website's sale. We set a second phase of this proceeding to determine whether SoCalGas violated our Affiliate Transaction rules, and, if so, whether we should penalize SoCalGas for such violation.

2. Background

In Application (A.) 99-10-036, filed on October 27, 1999, SoCalGas asked the Commission to grant it permission to sell to an unregulated third party,

¹ All statutory references are to the Pub. Util Code, unless otherwise noted.

Excelergy, the Energy Marketplace website, as well as the related Uniform Resource Locator (URL) and software, pursuant to § 851. SoCalGas characterized Energy Marketplace as a "Web site that was originally developed by SoCalGas as a public service to facilitate gas and electric choice programs in California and other states by providing energy users with an easy, efficient means of access to natural gas suppliers, natural gas commodity prices, and other energy-related information."²

SoCalGas initially proposed to allocate all gain (or loss) on the sale of the website to its shareholders, contending that shareholders alone had funded the website's development. However, after negotiation with ORA, SoCalGas agreed to allocate half of the gain to ratepayers, but to leave any risk of loss on the sale entirely with shareholders. On March 22, 2000, SoCalGas and ORA filed a joint motion for approval of the Settlement Agreement.

ORA takes no position on the appropriateness of the sale itself. At a March 24, 2000 prehearing conference (PHC), the Assigned Commissioner directed SoCalGas and asked ORA to file briefs addressing four issues germane to the appropriateness of § 851 approval.³ Based on SoCalGas' and ORA's comments on the issues, and on our finding that sale of the website is in the public interest, we grant the Application. In addition, we approve the proposed Settlement Agreement on the grounds that it is reasonable in light of the whole record, consistent with law, and in the public interest.

² A.99-10-036 at 2. Notice of the Application appeared in the Commission's Daily Calendar on November 9, 1999.

³ SoCalGas and ORA complied on March 22, 2000.

3. Discussion

A. Requirements of § 851

Section 851 requires Commission authorization before a utility may “sell, lease, assign, mortgage, or otherwise dispose of or encumber” utility property. The purpose of the section is to enable the Commission, before any transfer of public utility property is consummated, to review the situation and to take such action, as a condition of the transfer, as the public interest may require. The four questions we address below are all germane to the question whether the transaction is in the public interest.

(1) Nature of SoCalGas’ Interest in Excelergy

The Assigned Commissioner raised the following issue about the nature of SoCalGas’ interest in Excelergy after the sale:

SoCalGas plans to sell Energy Marketplace to Excelergy. According to the application, Excelergy will pay SoCalGas in stock warrants. Counsel for SoCalGas indicated at the PHC that stock warrants are the same as stock options. Therefore, after the sale, SoCalGas will own (or have the potential to own) a large number of shares of Excelergy stock, making SoCalGas an owner of Excelergy. As such, SoCalGas will remain affiliated with Excelergy and thus with the Energy Marketplace website. This raises the question of whether SoCalGas is actually selling the website, whether the transaction is truly arm’s length, and whether the post-sale affiliation between SoCalGas and Excelergy is appropriate. The parties should address each of these issues.

SoCalGas responded that it planned to acquire less than 5% of the total stock of Excelergy in the sale. It pointed out that the Commission’s Affiliate Transaction rules do not deem a company an “affiliate” unless the owner holds 5% or more of the outstanding stock of the company. SoCalGas also stated that it would not have substantial control over the operation of Excelergy through a

common director or officer or any other means. Thus, SoCalGas concluded, the transaction is truly at arm's length. ORA feels ratepayers are adequately protected since they do not bear any risk of loss on the transaction.

Based on SoCalGas' and ORA's comments, we agree that SoCalGas is not acquiring a prohibited ownership interest in Excelergy, or otherwise controlling Excelergy through interlocking directorates or other means. As SoCalGas states, our Affiliate Transaction rules define an "affiliate" as an entity 5% or more of whose outstanding securities are owned, controlled, or held with power to vote by a utility.⁴ Were Excelergy to become an affiliate of SoCalGas upon the Energy Marketplace sale, SoCalGas would be bound to a series of Affiliate Transaction rules it does not contend it meets. However, because Excelergy will not become a SoCalGas affiliate upon the sale, this issue does not militate against § 851 approval.

(2) Risk to Ratepayers of All-Stock Transaction

The Assigned Commissioner also asked SoCalGas to explain whether its ratepayers would be put at undue risk by the sale:

SoCalGas' only proceeds from the sale of the website will be stock warrants/options. As the parties have agreed to allocate half of the gain on sale to the SoCalGas ratepayers, the proposed sale appears to leave the ratepayers only with stock or stock options. This may be too risky for ratepayers, especially in the volatile "dot.com" stock market.

⁴ *Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates; Order Instituting Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, Decision (D.) 98-08-035, 1998 Cal. PUC LEXIS 594, Appendix B, Rule I.A.

The parties should address how long SoCalGas must hold the Excelergy stock/stock options after acquiring them, and the past performance of Excelergy in the stock market, if publicly traded. If Excelergy is not publicly traded, the parties should explain how SoCalGas will dispose of its shares of Excelergy and recoup the sale proceeds. If Excelergy will go public in the future, the parties should indicate when and state the performance of other similar initial public offerings. Finally, the parties should address whether a stock-only transaction is appropriate at all given that it exposes SoCalGas' ratepayers to stock market risk.

SoCalGas responded that while it would have preferred a cash transaction, the nature of Web-based business makes such transactions rare:

[A]s SoCalGas discovered when it sought potential buyers, there is very limited demand for an energy website for a small user base. Start-up Internet companies, such as Excelergy, do not have substantial cash flow and frequently use stock warrants as a form of consideration. *Had SoCalGas insisted on cash, it would not have been able to recoup the investment in the website. Thus, SoCalGas felt that the only viable form of payment was through the agreed-upon stock warrant from Excelergy, which offered the potential for net gain.*⁵

SoCalGas explained the process by which ratepayers (and shareholders) would be able to cash out the stock warrant. According to SoCalGas, on March 10, 2000, Excelergy filed a Form S-1 Registration Statement with the U.S. Securities and Exchange Commission (SEC). SoCalGas stated that

⁵ SoCalGas Brief filed March 22, 2000, at 2-3 (emphasis added).

"[t]his filing would indicate, but is no assurance, that Excelergy is contemplating an IPO [Initial Public Offering of stock] within the next few months."⁶

If Excelergy holds an IPO and its stock begins to be publicly traded, SoCalGas will then exercise its warrant and hold the shares of stock for the holding period required by the SEC. At the conclusion of the holding period, the parties will determine the market value of the stock, although SoCalGas is not required to sell the stock at this point. This valuation process will occur in order to determine whether the Energy Marketplace sale has resulted in a net gain to be shared with ratepayers. If the valuation is higher than the basis amount of \$903,139 (SoCalGas' cost of developing the website), the transaction will have produced a gain. In no event will ratepayers "share" in any loss.

ORA finds solace in the fact that valuation of the Excelergy stock will occur as soon as the stock is publicly traded. ORA does not generally believe that ratepayer funds should be exposed to stock market risk. However, it acknowledges that in this case "the speculative nature of Energy Marketplace as a successful business would make cash compensation less likely or small."⁷

SoCalGas' assertion that ratepayers bear *no* risk is not entirely accurate. Given the volatility of the "dot.com" stock market, there appears to be no way to predict how much SoCalGas' Excelergy stock will be worth at valuation. Nor is there any predictability in dot.com IPOs generally. As SoCalGas concedes, "it cannot be said with any certainty how Excelergy's IPO stock price will compare to that of other Internet companies."⁸ If the sale were a

⁶ *Id.* at 4-5.

⁷ ORA Brief filed March 22, 2000, at 2.

⁸ *Id.*

cash transaction rather than one based solely on unproven stock, we would now know precisely how much the ratepayers would stand to gain. With stock warrants, there is no way to know if the sale will generate any proceeds – it all depends on whether Excelergy goes public and whether the stock has value at the point of valuation more than a year from now.

On balance, however, it appears there is no other option. SoCalGas has represented to us under oath that there was very little demand for the website, and that it would not have been able to recoup its investment, let alone show a gain, if it had insisted on cash. We agree with SoCalGas that we should allow it to accept payment in this case in the form of stock warrants or options because of the lack of demand, appraised value or market price for the website. In this case, there is at least a potential for a gain to ratepayers.

Finally, SoCalGas acknowledges that ratepayers will not have to “share” in any losses from the sale should the Excelergy stock be worthless at the time of valuation. Therefore, while this is not a perfect transaction from the standpoint of ratepayers, we find that ratepayers have the potential to see a gain, and in no circumstances will fund a loss.

(3) Consumer Protection

The Assigned Commissioner also asked SoCalGas to explain whether Energy Marketplace users and SoCalGas customers might suffer harm from the sale:

The Energy Marketplace website initially was an offering of a regulated utility, SoCalGas. Under the terms of the sale, an unregulated, out-of-state business, about which the Commission has little information, will continue to provide California customers with a forum to make energy choices. Users of the website may have come to rely on the safety and reliability suggested by SoCalGas' association with Energy Marketplace. Customers may have less protection from fraud or abuse if the website is

run by an entity not accountable to regulators. The parties should address how customers will be protected after the Energy Marketplace sale and whether the Commission will retain any jurisdiction over the website or its operator after the sale.

SoCalGas responded that the website is a nontariffed service, and that SoCalGas was never required to operate it. Thus, SoCalGas asserts, it was free to shut the site down at any time. Moreover, SoCalGas points out that several other energy-related websites operate completely free of regulation.⁹

SoCalGas' response misses the point. The Assigned Commissioner's inquiry focused on whether customers would be harmed from the website's transition from one operated by a regulated utility to one operated by a pure Internet company. We agree that competitors to Energy Marketplace (now eChoice.net) exist, and that Excelergy could have developed the site on its own in the first instance. However, that is not the issue at hand. The question is whether customers may have come to rely on the security of knowing that a regulated utility operated the site. As SoCalGas acknowledges, the site contains information of sufficient sensitivity to require "considerable measures and firewalls to prevent . . . misuse [of information on the site]."¹⁰

One way in which the assigned Administrative Law Judge (ALJ) sought to ensure notice to users was to have SoCalGas serve its Application on any energy suppliers or marketers whose names were listed on the Energy

⁹ *Id.* at 6 (referring to Energy.com, Nexusenergy.com, GreenMountain.com, Utility.com and Essential.com). ORA finds reassuring the fact that the website was not a tariffed service, but rather a site offered to the public at large.

¹⁰ *Id.*

Marketplace website between December 7, 1999 and the date of service.¹¹ No party other than ORA protested or responded to the Application.

In keeping with this theme, we will order, as a condition of approval, that SoCalGas arrange with Excelergy to have a notice placed on the website for a period of no less than four months explaining to site users that ownership of the site has changed. Within ten days of the effective date of this decision, SoCalGas shall file an Advice Letter proposing the text of such notice for the Commission's approval, and shall also make a compliance filing at the end of the four-month period indicating that such notice appeared on the website for the required period. SoCalGas shall report with this latter filing any feedback it received from the website notice.

(4) Affiliate Transaction Rules

The Assigned Commissioner directed SoCalGas to address one final issue, related to whether it had complied with the Commission's Affiliate Transaction rules, in briefing the appropriateness of the Energy Marketplace sale:

SoCalGas did not obtain Commission authorization to operate the website for services other than core aggregation services despite being ordered to do so in D.99-02-059. The parties should discuss whether it is good policy to allow SoCalGas to avoid the requirements of D.99-02-059 and the Commission's Affiliate Transaction rules simply by selling the asset at issue. In addition, it may not be appropriate for SoCalGas' shareholders to recover *any* gain on sale if SoCalGas did not obtain Commission approval to expand the website beyond core aggregation services.

¹¹ December 7, 1999 was the date of the ALJ's ruling requiring broader service of the Application. SoCalGas complied with the ruling on December 14, 1999.

The Affiliate Transaction rules provide safeguards against cross-subsidy by a regulated utility offering unregulated, nontariffed products and services.

According to Rule VII of the Affiliate Transaction rules, if a utility develops a nontariffed service—such as the Energy Marketplace website—it must offer that service through an affiliate unless it meets the conditions set forth in Rule VII.C. SoCalGas does not appear to contend that it offered Energy Marketplace through an affiliate. Thus, it should address whether the Rule VII.C conditions apply.

* * *

Rule VII.E requires that a utility file an Advice Letter demonstrating compliance with the foregoing provisions whenever it desires to offer a new category of nontariffed product or service. As noted above, in D.99-02-059, the Commission directed SoCalGas to file an Advice Letter in accordance with Rule VII.E *before* expanding the website beyond core aggregation services.

SoCalGas filed an Advice Letter, but the Commission's Energy Division rejected the Advice Letter on the ground that the expanded portion of the website, the electricity platform, had not been discontinued so that the conditions precedent to approval of the required Advice Letter could be met. In other words, SoCalGas had filed the Advice Letter *after*, rather than *before*, expanding the website. SoCalGas did not pursue its Advice Letter thereafter. Nonetheless, SoCalGas should now demonstrate compliance with Rule VII.E. While SoCalGas cannot now demonstrate it met the Advice Letter requirement, it should still address the substantive requirements of the rule.

SoCalGas shall document its compliance with the foregoing provisions in expanding the Energy Marketplace website to products and services beyond core aggregation.

Instead of complying with the Assigned Commissioner's requirement that SoCalGas document its compliance with the Affiliate Transaction rules, SoCalGas argued that the rules were not applicable to its website. Once again, SoCalGas missed the point.

There is no question that SoCalGas should have complied with the Affiliate Transaction rules in expanding the website beyond core gas aggregation services. In D.99-02-059, we stated that,

This decision only addresses the use of this website to support the core aggregation program. If SoCalGas seeks to provide other services on the website, it must first file an advice letter pursuant to Rule VII.E. of the affiliate transaction rules.¹²

While SoCalGas sought modification of this portion of D.99-02-059,¹³ we ruled that it abandoned that motion when it filed this Application to sell the site.¹⁴ Likewise, while it attempted to comply with D.99-02-059 by filing the ordered Advice Letter, the Commission rejected the Advice Letter because SoCalGas had not met D.99-02-059's requirement that SoCalGas file the letter before it modified the website, rather than after the fact.

Thus, while it may be true that SoCalGas attempted to comply with our rules, it does not appear to have accomplished compliance. This raises the issue of whether it is appropriate to allow SoCalGas' shareholders potential gains from the Energy Marketplace sale, or whether penalties would be appropriate.

¹² D.99-02-059, *mimeo.*, at 1.

¹³ SoCalGas filed a Petition for Clarification and/or Modification of D.99-02-059 on March 5, 1999.

¹⁴ D.00-03-004, *mimeo.*, at 3.

Therefore, we approve the sale and accounting treatment here, but will conduct a second phase of the proceeding to determine whether SoCalGas violated the Affiliate Transaction rules, and, if so, whether it should suffer penalties.

Moreover, in the future SoCalGas shall not develop websites as stand-alone business opportunities, even if for the purpose of facilitating competitive access to or choice of energy products and services, without securing advance Commission approval for such efforts.¹⁵ SoCalGas is still the dominant provider in its market. As such, its nontariffed offerings pose risks both that ratepayers will subsidize unregulated offerings, and that SoCalGas will have an unfair competitive advantage in offering such services.

We are concerned about the use of web-based communications where any associated development and maintenance activities are funded by ratepayers and are used to promote and provide access to competitive services offered by the utility or by another entity. This issue should be included in the Commission's re-examination of Rule VII which is currently part of the Affiliate Transaction rules.

Indeed, SoCalGas admits that the Commission's pending "Gas Strategy" investigation,¹⁶ "does lend credence to the argument that SoCalGas should not, as an active player in the market, be in the position of possessing market information, even as a passive intermediary."¹⁷ Likewise, in its motion

¹⁵ ORA agrees that SoCalGas "should probably have first received the authority to expand the website . . ." but welcomes the website's sale to a third party as a means of minimizing the problems brought about by SoCalGas' operation of the site. ORA Brief, at 3-4.

¹⁶ I.99-07-003.

¹⁷ SoCalGas Brief at 7.

for approval of the Settlement Agreement discussed in Section B below,¹⁸ SoCalGas stated that "*in light of the pending 'Gas Strategy' investigation, I.99-07-003, where there has been a shift away from the utility functioning as an information intermediary, SoCalGas agreed to sell Energy Marketplace.*"¹⁹

SoCalGas is now on notice that we consider web-based solutions for enhancing competition to be subject to Rule VII of the Affiliate Transaction rules. SoCalGas must comply with these rules in the future before it begins offering nontariffed products and services on the Internet. As to the current proceeding, we will set a separate phase for consideration of whether SoCalGas violated the rules, and, if so, the appropriateness of penalties.

B. SoCalGas/ORA Motion for Approval of Settlement Agreement

(1) The Settlement Agreement

On March 22, 2000, after a duly-noticed settlement conference,²⁰ SoCalGas and ORA filed a joint motion for approval of a Settlement Agreement addressing allocation of the website's gain on sale.

The Settlement Agreement provides that any net after-tax gain on the sale of Energy Marketplace will be allocated equally between SoCalGas' ratepayers and shareholders, including any income tax benefits from the sharing

¹⁸ Joint Motion of Southern California Gas Company and the Office of Ratepayer Advocates for Approval of Settlement Agreement, filed March 22, 2000 (Joint Motion).

¹⁹ *Id.* at 7-8 (emphasis added).

²⁰ Commission Rules of Practice and Procedure, Rule 51.1(b). The settlement conference occurred on March 9, 2000. Only the parties, their counsel, and a representative of the Energy Division attended. No party raised any objection to the proposed Settlement Agreement, which the parties attached to their Notice of Settlement Conference, served on February 28, 2000.

of such gain. The parties agree that the basis for determining whether there is a gain is \$903,139 (SoCalGas' cost of developing the website), plus interest from the date of Commission approval of the sale, until the earlier of the date all stock is valued²¹ or two years after Commission approval. The Final Valuation Date will set the shares' value on a date certain, even if SoCalGas decides to hold the shares after valuation. If, as of the Final Valuation Date, there is no gain, as defined in the Agreement, no gain shall be shared between shareholders and ratepayers.

If Excelergy's stock does not become publicly traded within three years after the Commission approves the Settlement Agreement, the parties shall mutually determine the amount of any gain and jointly petition the Commission to modify the Settlement Agreement accordingly.

Ratepayers will share in the gain even if SoCalGas' overall earnings are below the sharing band under the Performance-Based Ratemaking (PBR) sharing mechanism. Under PBR, a utility's earnings must be at a certain level before the utility is required to share earnings with ratepayers. Here, the parties have agreed to ratepayer sharing even if SoCalGas' earnings are not high enough to require sharing under PBR. Without the Settlement, ratepayers run the risk that if SoCalGas' earnings are below the sharing band, ratepayers will not be able to share the revenues received from the sale of Energy Marketplace.

²¹ The Settlement Agreement terms this date the "Final Valuation Date." This date will occur on the date following the expiration of any contractually imposed trading restrictions on the Excelergy shares (such as restrictions imposed by IPO underwriters). Individual blocks of shares may be assigned a Market Value, as defined in the Settlement Agreement, on different dates. The Final Valuation Date will not occur until all blocks are assigned a Market Value. The entire Settlement Agreement appears as Appendix A to this decision.

Finally, ratepayers will bear no loss from the sale if the Excelergy stock valuation results in a value lower than SoCalGas' cost of developing the website.

(2) Test for Approving Settlement Agreements

We have a strong policy favoring settlement of disputes if the settlement is fair and reasonable in light of the record.²² Rule 5.1 of the Commission's Rules of Practice and Procedure provide that the Commission will approve a settlement if it is (1) reasonable in light of the whole record, (2) consistent with law, and (3) in the public interest. We have already found that the website's sale is in the public interest; the only remaining issue is whether the Settlement Agreement's allocation of gain and loss is appropriate.

We find that the Settlement Agreement meets each of the foregoing criteria. As we discuss in Section 3(A)(2), while it would be preferable for the Energy Marketplace sale to be a cash sale, and the proceeds of the sale not to be subject to stock market risk, there is no evidence that there was any other option.

No party has objected to the Settlement, and the parties' allocation of the gain on sale represents a significant compromise of SoCalGas' initial position that its shareholders should retain all gain. Indeed, ORA never contended that ratepayers should receive the entire gain: "[S]ince Energy Marketplace is a non-tariffed product and service, the proceeds from its sale *should accrue to both ratepayers and shareholders.*"²³ Thus, ORA achieved much, if not all, of what it sought for ratepayers.

²² *Re Pacific Gas and Electric Co.*, 30 CPUC 2d 189, 221-23 (1988); *Re Pacific Gas and Electric Co.*, 40 CPUC 2d 301, 325 (1991); *Re San Diego Gas and Electric Co.*, 46 CPUC 2d 538, 553 (1992).

²³ Protest of ORA, filed November 30, 1999, at 4-5 (emphasis added).

Moreover, while ratepayers bear the risk that the amount of gain will fluctuate in the volatile "dot.com" stock market, they bear no risk of loss should Excelergy not go public or the stock proceeds be less than SoCalGas' investment in Energy Marketplace.

We find the Settlement Agreement to be reasonable, consistent with law, and in the public interest, and hereby approve it on an interim basis. However, if we determine in the next phase of this proceeding that SoCalGas violated our rules, we may impose penalties, including requiring SoCalGas to credit ratepayers all or a portion of the shareholders' half of the gain on sale.

4. Motion for Protective Order

Shortly after filing its Application, SoCalGas sought a protective order prohibiting disclosure, except to Commission employees, of portions of the SoCalGas-Excelergy Web Site License and Asset Purchase Agreement (Asset Purchase Agreement) dated September 1, 1999.²⁴ SoCalGas seeks to maintain as confidential the consideration to be paid by Excelergy, the financial condition of Excelergy and the identity of Excelergy's shareholders. SoCalGas alleges that Excelergy would be placed at a competitive disadvantage if its competitors in the Internet industry were given information on how Excelergy specifically valued Energy Marketplace. Moreover, SoCalGas alleges that as a small, privately-held company, Excelergy could be harmed if its competitors knew its financial strengths and/or weaknesses and the identity of its shareholders.

No party opposed the Motion. Moreover, the Settlement Agreement in the public record contains adequate information for the Commission to determine

²⁴ SoCalGas attached a redacted version of the Asset Purchase Agreement under Tab B to its Application filed October 27, 1999.

the financial nature of the transaction. In view of these facts, and SoCalGas' representations as to the need for confidentiality, the Motion is granted.

5. Category and Need for Hearings

In Resolution ALJ 176-3026, dated November 4, 1999, the Commission preliminarily categorized this proceeding as ratesetting, and preliminarily determined that hearings were necessary. Since the only party protesting the Application has now settled its dispute with SoCalGas, and as we have adequate record information to determine that the Energy Marketplace sale is in the public interest, we conclude that a public hearing is not necessary on the issue of the sale itself. However, we will conduct further proceedings to determine whether SoCalGas violated the Affiliate Transaction rules and whether it should be penalized. Therefore, we uphold the preliminary determinations in ALJ 176-3026.

6. Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Section 311(g) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. SoCalGas and ORA filed comments on May 24, 2000, and SoCalGas filed reply comments on May 30, 2000. We hereby adopt portions of SoCalGas' suggested language relating to its future use of the Internet, and suggest that the Commission consider utilities' use of web-based communications in its upcoming review of the Affiliate Transaction rules. Otherwise, we leave the decision unchanged.

Findings of Fact

1. SoCalGas seeks Commission approval, pursuant to Public Utilities Code Section 851, to sell to an unregulated third party, Excelergy, the Energy Marketplace website, as well as the related URL and software.
2. Notice of this application appeared in the Commission's Daily Calendar on November 9, 1999. This proceeding was categorized as ratesetting by Resolution ALJ-176-3026.
3. SoCalGas will acquire less than 5% of the total stock of Excelergy in the sale of Energy Marketplace.
4. SoCalGas will not have substantial control over the operation of Excelergy through a common director or officer or any other means.
5. The nature of Web-based business makes cash-only transactions rare.
6. SoCalGas discovered when it sought potential buyers for Energy Marketplace that there was very limited demand for an energy website for a small user base. Start-up Internet companies, such as Excelergy, do not have substantial cash flow and frequently use stock warrants as a form of consideration. Had SoCalGas insisted on cash, it would not have been able to recoup the investment in the website.
7. On March 10, 2000 Excelergy filed a Form S-1 Registration Statement with the SEC. This filing would indicate, but is no assurance, that Excelergy is contemplating an IPO within the next few months.
8. If Excelergy holds an IPO and its stock begins to be publicly traded, SoCalGas will then exercise its warrant and hold the shares of stock for the holding period required by the SEC, typically one year.
9. At the conclusion of the holding period, the parties will determine the market value of the stock, although SoCalGas is not required to sell the stock at

this point. This valuation process will occur in order to determine whether the Energy Marketplace sale has resulted in a net gain to be shared with ratepayers.

10. In no event will ratepayers "share" in any loss from the sale should the Excelergy stock be worthless at the time of valuation.

11. Competitors to Energy Marketplace (now eChoice.net) exist on the Internet.

12. The assigned ALJ sought to ensure notice of the sale to users by having SoCalGas serve its Application on any energy suppliers or marketers whose names were listed on the Energy Marketplace website between December 7, 1999 and the date of service. SoCalGas complied with the ruling on December 14, 1999, but no party other than ORA protested or responded to the Application.

13. SoCalGas did not obtain Commission authorization to operate the website for services other than core gas aggregation services despite being ordered to do so in D.99-02-059.

14. In D.99-02-059, the Commission directed SoCalGas to file an Advice Letter in accordance with Rule VII of the Commission's Affiliate Transaction rules before expanding the website beyond core gas aggregation services. SoCalGas filed an Advice Letter, but the Commission's Energy Division rejected the Advice Letter on the ground that the expanded portion of the website, the electricity platform, had not been discontinued so that the conditions precedent to approval of the required Advice Letter could be met.

15. SoCalGas recognizes that it should not possess market information, even as a passive intermediary.

16. The Settlement Agreement between SoCalGas and ORA provides that ratepayers will receive 50% of any gain on sale of Energy Marketplace, and will

not share in any loss on the sale. SoCalGas and ORA filed a joint motion for approval of the Settlement Agreement on March 22, 2000.

17. No party objected to the Settlement Agreement.

18. SoCalGas has sought a protective order prohibiting disclosure, except to Commission employees, of portions of the SoCalGas-Excelergy Web Site License and Asset Purchase Agreement dated September 1, 1999. SoCalGas seeks to maintain as confidential the consideration to be paid by Excelergy, the financial condition of Excelergy and the identity of Excelergy's shareholders.

Conclusions of Law

1. SoCalGas' proposed sale of Energy Marketplace and related intellectual property to Excelergy is in the public interest, because ratepayers have the potential to benefit from a gain on sale, and will in no event bear any risk of loss.

2. The Commission's Affiliate Transaction rules do not deem a company an "affiliate" unless the owner holds 5% or more of the outstanding stock of the company.

3. Because SoCalGas will not hold enough Excelergy stock to make Excelergy its affiliate, and because SoCalGas will not otherwise acquire control over Excelergy, the transaction is at arm's length.

4. In this case, we will not, as a matter of policy, prohibit SoCalGas from accepting payment in the form of stock warrants or options, because there is limited demand for the asset and the asset does not have an appraised value or established market price.

5. Rule VII of the Affiliate Transaction rules provides that if a utility develops a nontariffed service such as the Energy Marketplace website it must offer that service through an affiliate unless it meets the conditions set forth in Rule VII.

6. SoCalGas should have complied with the Affiliate Transaction rules in expanding the website beyond core gas aggregation services.

7. The Commission required SoCalGas to file an Advice Letter before expanding Energy Marketplace into services other than core gas aggregation services.

8. While SoCalGas attempted to comply with Commission rules, it did not accomplish compliance. In the future, SoCalGas should not develop websites as stand-alone business opportunities, even if for the purpose of facilitating competitive access to or choice of energy products and services, without securing advance Commission approval for such efforts, and complying with the Commission's Affiliate Transaction rules.

9. Further proceedings are appropriate to determine whether SoCalGas violated our Affiliate Transaction rules, and if so, whether we should impose penalties. We direct the assigned ALJ to issue a ruling after the effective date of this decision setting forth procedures for the next phase of this proceeding.

10. SoCalGas is still the dominant provider in its market. As such, its nontariffed offerings pose risks both that ratepayers will subsidize unregulated offerings, and that SoCalGas will have an unfair competitive advantage in offering such services.

11. The Settlement Agreement between SoCalGas and ORA meets the requirements of Rule 5.1 of the Commission's Rules of Practice and Procedure requiring that a settlement be (1) reasonable in light of the whole record, (2) consistent with law, and (3) in the public interest.

12. If Excelergy's stock does not become publicly traded within three years after the Commission approves the Settlement Agreement, the parties shall mutually determine the amount of any gain and jointly petition the Commission to modify the Settlement Agreement accordingly.

13. SoCalGas should be authorized to sell the Energy Marketplace website and related URL to Excelergy as set forth in the Application.

14. SoCalGas should be required to notify the Energy Division when the sale has been consummated, and to make the final executed sale documents available for inspection. SoCalGas should also be required to notify the Energy Division and ORA if and when Excelergy conducts an IPO, and provide the Energy Division and ORA information reflecting the value of the stock on the date of valuation (approximately one year from now) for purposes of calculating the gain on sale, with detailed records supporting the valuation.

15. This order should be made effective immediately in order that the sale can be consummated promptly.

O R D E R

IT IS ORDERED that:

1. Southern California Gas Company (SoCalGas) is authorized, pursuant to Pub. Util. Code § 851, to sell to Excelergy Corporation (Excelergy), the Energy Marketplace website, as well as the related Uniform Resource Locator (URL) and software, on the terms and conditions set forth in its Application.

2. SoCalGas shall notify the Director, Energy Division, in writing, when the sale has occurred, and shall make the sale documents available for inspection upon request of the Commission or its staff. SoCalGas shall also (1) notify the Energy Division and Office of Ratepayer Advocates (ORA) if and when Excelergy conducts an initial public offering of stock, and (2) provide the Energy Division and ORA information reflecting the value of the stock on the date of valuation for purposes of calculating the gain on sale, with detailed records supporting the valuation.

3. As a condition of the approval we grant here, SoCalGas shall arrange with Excelergy to have a notice placed on the website for a period of no less than four months explaining to site users that ownership of the site has changed. Within

ten days of the effective date of this decision, SoCalGas shall file an advice letter proposing the text of such notice for the Commission's approval, and shall also make a compliance advice letter filing at the end of the four-month period indicating that such notice appeared on the website for the required period. SoCalGas shall report with this latter filing any feedback it received from the website notice.

4. If Excelergy's stock does not become publicly traded within three years after the Commission approves the Settlement Agreement, the parties shall mutually determine the amount of any gain and jointly petition the Commission to modify the Settlement Agreement accordingly.

5. SoCalGas shall not develop websites as stand-alone business opportunities, even if for the purpose of facilitating competitive access to or choice of energy products or services, without securing advance Commission approval for such efforts.

6. SoCalGas' and ORA's joint motion for approval of their Settlement Agreement is granted on an interim basis, subject to change should we find in the next phase of this proceeding that SoCalGas' conduct warrants penalties.

7. The assigned Administrative Law Judge (ALJ) shall issue a ruling after the effective date of this decision setting forth the procedures for the next phase. We will conduct a second phase of this proceeding to determine whether SoCalGas violated the Commission's Affiliate Transaction rules, and, if so, whether we should penalize SoCalGas for such violations.

8. SoCalGas' Motion for Protective Order (Motion) is granted to the extent set forth below:

- a. The Site License and Asset Purchase Agreement dated September 1, 1999 between SoCalGas and Excelergy Corporation (Asset Purchase Agreement), a redacted version of which SoCalGas appended under Tab B to its Application filed October 27, 1999, and which was filed under seal as an

attachment to the Motion, shall remain under seal for a period of two years from the effective date of this decision. During that period, the Asset Purchase Agreement shall not be made accessible or be disclosed to anyone other than Commission staff except on the further order or ruling of the Commission, the Assigned Commissioner, the assigned ALJ, or the ALJ then designated as Law and Motion Judge.

- b. If SoCalGas believes that further protection of this information is needed after two years, it may file a motion stating the justification for further withholding the material from public inspection, or for such other relief as the Commission rules may then provide. This motion shall be filed no later than 30 days before the expiration of this protective order.

This order is effective today.

Dated June 8, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners

APPENDIX A

APPENDIX A

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into as of the later date of execution below, by and between Southern California Gas Company ("SoCalGas") and the California Public Utilities Commission's ("Commission") Office of Ratepayer Advocates ("ORA"). SoCalGas and ORA are each a "Party" and collectively the "Parties."

This Agreement is made and entered into with reference to the following facts:

FACTUAL BACKGROUND

A. On October 27, 1999, SoCalGas filed Application No. 99-10-036 ("Application" or "A.99-10-036") seeking Commission approval under California Public Utilities Code Section 851, on an expedited, *ex parte* basis, to sell SoCalGas' Internet Web site known as Energy Marketplace ("Energy Marketplace") to Excelergy Corporation ("Excelergy"). In its Application, SoCalGas also requested Commission approval for 100% of the gain or loss on sale of Energy Marketplace to accrue to SoCalGas' shareholders ("Shareholders"). Excelergy's consideration for the purchase of Energy Marketplace is a warrant for SoCalGas to obtain shares of Excelergy's common stock at a stated exercise price ("Warrant"), to be exercised in the event of an initial public offering ("IPO").¹²

B. On November 30, 1999, ORA filed a protest to A.99-10-036. ORA did not object to SoCalGas' request for approval of the sale of Energy Marketplace but did object to SoCalGas' proposal that any gain or loss on the sale accrues to its Shareholders. In its protest, ORA argued

¹² The actual number of shares and exercise price for such shares under the Warrant have been redacted from the Application as information confidential and proprietary to Excelergy and are not relevant to this Agreement.

that any gain on the sale should be allocated to SoCalGas' total company earnings, which would then be subject to possible sharing with SoCalGas' ratepayers ("Ratepayers") under SoCalGas' Performance-Based Ratemaking ("PBR") earnings sharing mechanism.

C. The Parties recognize the need for expedited Commission approval of SoCalGas' Application in order to preserve the pending sale of Energy Marketplace to Excelergy, inasmuch as Excelergy has had the right to terminate the sale since November 30, 1999. Therefore, in consideration of the mutual covenants hereinafter contained, the Parties agree as follows:

AGREEMENT

1. SoCalGas' sale of Energy Marketplace to Excelergy under the terms of their Web Site License and Asset Purchase Agreement dated as of September 1, 1999, pursuant to Paragraph P.1 of the Application, should be approved on an expedited, *ex parte* basis.

2. Notwithstanding Paragraph P.2 of the Application, any net after-tax gain in the value of publicly tradable shares acquired by SoCalGas as a result of the sale of Energy Marketplace ("Gain"),² whether to Excelergy or any other buyer should this particular transaction with Excelergy be terminated, shall be allocated 50% to SoCalGas' Shareholders and 50% to SoCalGas' Ratepayers, as determined below:

² For the avoidance of doubt, SoCalGas' Shareholders shall be entitled to fully recover from the Market Value of such shares the book value of Energy Marketplace in the amount of \$903,139.00 (see SoCalGas' Summary of Costs for Energy Marketplace as of September 30, 1999, in A.99-10-036, Tab D, Attachment A), together with interest from the date of Commission approval of the sale of Energy Marketplace until the Final Valuation Date, as those terms are defined in this Agreement.

- a. On the date following the expiration of any contractually imposed trading restrictions on a given block of shares upon the Warrant's exercise (such as restrictions imposed by IPO underwriters) or on which a given block of shares upon the Warrant's exercise becomes publicly tradable ("Valuation Date"), whether because such shares become registered or because they have become publicly tradable under Rule 144 of the Securities Act of 1933 as amended ("Rule 144") (provided that the amount considered publicly tradable under Rule 144 shall be determined without reference to the four-week average daily volume component of volume restrictions contained therein), the market value of such shares shall be determined ("Market Value"). The Market Value shall be either (i) the actual sales price less brokerage expenses if such shares are sold or (ii) the closing price (4:30 p.m. EST) of the shares if they are not sold. A unique Market Value shall be established for each block of shares that becomes registered or publicly tradable.
- b. Any Gain to be allocated between SoCalGas Ratepayers and Shareholders shall be calculated as of the date the Market Value for the last block of shares to be determined is established ("Final Valuation Date"). Gain, if any, shall be calculated by first determining any net before-tax gain on sale by (i) adding the Market Value of all blocks of shares as of their respective Valuation Dates, plus interest from their Valuation Dates to the Final Valuation Date, and (ii) subtracting therefrom \$903,139.00² plus interest from the date of

² The book value of Energy Marketplace, as further described in footnote 2.

Commission approval of the sale of Energy Marketplace ("Approval") until the earlier of (x) the Final Valuation Date or (y) two years after Approval. All calculations of interest shall be at SoCalGas' weighted average cost of capital during the applicable period(s). The net before-tax gain figure shall then be reduced by the applicable percentage of state and federal taxes[±] to determine the (after-tax) Gain to be shared equally by Ratepayers and Shareholders as set forth below.

- c. Except as set forth in Paragraph 2.e below, no calculation of Gain shall be made until the Final Valuation Date has occurred. The amount of Gain shall not be affected by the actual sales price realized by SoCalGas if SoCalGas sells the shares covered by this Agreement on a date after the Valuation Date for a given block of shares.
- d. SoCalGas shall allocate any Gain equally to its Shareholders and its Ratepayers. If, as of the Final Valuation Date, the number calculated for the Gain is not a positive number, there shall be no Gain to be shared between Shareholders and Ratepayers.
- e. If Final Valuation does not occur (*i.e.*, not all shares become publicly tradable) within three years after Approval, the Parties shall mutually determine the amount of any Gain accrued by the end of the third year following Approval,

[±] For example, given the current applicable federal tax rate of 35% and state tax rate of 8.84%, the current applicable aggregate tax rate would be 40.75% after the deduction of state tax from the federal income tax statement.

to be allocated equally between Shareholders and Ratepayers consistent with the Parties' intent under this Agreement. The Parties shall thereafter jointly petition the Commission to modify this Agreement accordingly.

- f. Any income tax benefits resulting from the sharing of the Gain as calculated in Paragraph 2.b shall be shared equally between Shareholders and Ratepayers. To accomplish this, the Ratepayer share of any Gain shall be grossed up according to the adopted method set forth in SoCalGas' Preliminary Statement, Performance Based Ratemaking, Revised Cal. PUC Sheet No. 30183-G. Thus, the gross-up factor shall be equal to:

$$1/[1 - (50\% * 0.4190)] = 1.2650$$

This gross-up factor includes a component for franchise fees and uncollectibles.

- g. The Shareholder portion of the Gain shall be credited to a non-utility revenue account that shall not be subject to SoCalGas' PBR earnings sharing mechanism.
- h. The Ratepayer portion of the Gain shall be allocated to customer classes using the same methodology established in SoCalGas' PBR earnings sharing mechanism and shall not be subject to sharing with Shareholders.

3. This Agreement shall apply to the disposition of the instant Application only.

Neither Party shall cite to or otherwise use this Agreement as precedent against the other in any other proceeding.

4. The Parties shall jointly file a motion requesting adoption of this Agreement by the Commission on an expedited, *ex parte* basis. Such joint motion shall be filed on March 22, 2000, pursuant to the Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge dated March 3, 2000, as amended.

5. This Agreement sets forth all of the terms and conditions governing the issues raised in the Application and ORA's protest thereto.

6. This Agreement is subject to approval in its entirety by the Commission and with language, terms, and conditions consistent with this Agreement. In the event such approval is not received, or if the Commission does not approve all of this Agreement in its entirety, this Agreement shall be of no further force or effect.

SOUTHERN CALIFORNIA
GAS COMPANY

California Public Utilities Commission
OFFICE OF RATEPAYER ADVOCATES

By: Richard M. Morrow
Richard M. Morrow
Vice President
Customer Services and Marketing

By: Terry R. Mowrey
Terry R. Mowrey
Interim Director

Date: March 20, 2000

Date: March 13, 2000

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(END OF APPENDIX A)