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Decision 99-02-059 February 18, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Enron Corporation, Complainant, vs. Southern California Gas Company, Pacific Gas & Electric Company, and San Diego Gas & Electric Company, Defendants.	Case 98-03-005 (Filed March 3, 1998)

OPINION

Summary

In this complaint, Enron Corporation (Enron) asks the Commission to direct Southern California Gas Company (SoCalGas), in conjunction with Pacific Gas and Electric Company (PG&E) and San Diego Gas & Electric Company (SDG&E), to cease operation of the Energy Marketplace website. This website offers an opportunity for potential core aggregation customers to determine which entities offer core aggregation services in their areas and to begin transactions with certain such providers. Enron argues that it is unlawful for the defendant utilities to operate this website without prior Commission approval and that its operation is an inappropriate activity for a regulated natural gas utility. In this decision, we dismiss the complaint with prejudice. This decision only addresses the use of this website to support the core aggregation program. If SoCalGas seeks to provide other service on the website, it must first file an advice letter purusant to Rule VII.E. of the affiliate transaction rules.

Procedural History

Enron filed this complaint on March 3, 1998. The Commission's Docket Office mailed Instructions to Answer to each of the defendants on March 17, 1998. All three defendants filed answers on April 16, 1998. Commissioner Jessie J. Knight, Jr. and Administrative Law Judge (ALJ) Steven Weissman held a prehearing conference on July 28, 1998, at which time parties argued the merits of granting SDG&E's motion to dismiss the proceeding. Pursuant to ruling from the bench, the complainant and each defendant filed briefs on August 14, 1998. Enron and SoCalGas filed reply briefs on August 28, 1998, at which time the case was to be submitted. Through a joint motion filed on September 25, 1998, Enron and SoCalGas asked the ALJ to set aside submission until October 23, 1998 to enable parties to continue negotiations in pursuit of a settlement. That motion is hereby granted. In a telephone message to the ALJ on October 23, 1998, counsel for Enron and SoCalGas reported that they had failed to reach a settlement and that there would be no need for further extensions. Thus, the matter stands submitted as of October 23, 1998.

In its initial filing, the complainant had expressed the opinion that no evidentiary hearings would be required in this matter. Nonetheless, the Commission made a preliminary determination that hearings would be required and that the procedural requirements of Senate Bill (SB) 960 would apply. At the prehearing conference, the assigned commissioner and ALJ determined that there would not be a need for evidentiary hearings in this matter. We confirm the assigned Commissioner's change of the preliminary hearing determination. Thus, this proceeding is not subject to the requirements of SB 960, specified in Public Utilities (Pub. Util.) Code § 1701.1 et seq.

Background

The Energy Marketplace is a web-based information service provided by SoCalGas with the joint nominal sponsorship of PG&E and SDG&E. SoCalGas began offering this service on November 20, 1997. It enables customers to identify core aggregation service providers in their areas and to interact with some of those suppliers on-line. Customers can use the program offered at the site to identify their gas needs and request bids from participating suppliers. Customers pay nothing to use this service. Each participating core aggregation provider must pay a $500 monthly fee to SoCalGas if it provides service in the SoCalGas territory, a $500 monthly fee if it provides service in PG&E's territory, and a $200 monthly fee if it serves the San Diego area. Initially, SoCalGas listed only fee-paying aggregators on this website, in a manner that could leave the impression that these were the only firms offering such service. Now, the site provides separate links to presumably complete lists of aggregators doing business in each of the service territories. However, only fee-paying aggregators can interact with potential customers through the Energy Marketplace website.

Enron supports the concept of providing a service such as this, but contests the current offering for two reasons. First, Enron argues that it is unlawful for the complainants to offer this service without prior approval by the Commission. Second, Enron believes that such a service should be provided by a utility affiliate or a third party, but not by the utility. The defendants disagree with each of these contentions. We discuss them below.

The Need for Prior Approval

There are three prongs to Enron's contention that it is unlawful for the defendants to offer this service without prior Commission approval. First, such approval is required by statute. Second, at the time when the Energy Marketplace was introduced, SoCalGas was required by Decision (D.) 97-07-054

to file an application or advice letter for approval of new products or services. Third, the Commission's affiliate transaction rules (first issued in D.97-12-088) require that new products and services first be reviewed through the advice letter process.

Public Utilities (Pub. Util.) Code § 454 (a) states:

> "No public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon showing before the commission and a finding by the commission that the new rate is justified."

Pub. Util. Code § 489 requires that a utility keep open to public inspection tariff schedules and contracts "showing all rates, tolls, rental, charges and classifications collected or enforced." Pub. Util. Code § 451 states, in part:

> "All charges demanded or received by any public utility or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable."

Enron argues that under these provisions, the defendants were obligated to make a filing with the Commission to establish the service being offered, justify the new rate being charged and demonstrate that the rate is just and reasonable. In making this argument, Enron does not specify if it is focusing on the service provided to core customers, the service provided to core aggregators, or both. In addition, when it refers to rates, Enron does not specify whether it is focusing on the charges imposed on participating core aggregators, the lack of a charge to customers, or both.

SoCalGas responds that Pub. Util. Code §§ 451 and 454 focus on rates for services provided across broad customer groups, not on subscription fees charged to marketers. SoCalGas also argues that Pub. Util. Code § 489 is inapplicable, since it merely requires the utility to keep all rates and tariffs open

for inspection. PG&E and SDG&E point out that if the Energy Marketplace is a service at all, it is not their service, since SoCalGas operates the website and retains all revenues collected from aggregators. This position is reinforced by a disclaimer carried on the web site, announcing that it is a "service of Southern California Gas Company." However, the defendants argue that the Energy Marketplace is not a "service" in the traditional sense. It is, in SDG&E's words, an "ancillary utility compliance effort in support of the Commission's core aggregation program"-- more akin to a support function such as a telephone center or published consumer guides than to a service such as providing a commodity or installing safety devices.

The fact that customers are not charged to use the Energy Marketplace tends to support the defendants' characterization of the nature of the service. In addition, the Energy Marketplace appears to support and promote the core aggregation transportation program because it encourages customers to seek out and interact with core providers. Enron agrees with this last point. This website allows a potential customer-participant in the core aggregation transportation program to find out who provides these services in the customer's area and to interact electronically with those providers who pay fees to support the website.

The danger, however, is that the utility's interest as a core gas provider or as an affiliate of a competitive core gas provider may conflict with its interest in encouraging customers to seek other providers. Enron suggests that the defendants or their affiliates may be able to gain competitive advantage from the role they have taken on through the Energy Marketplace as market facilitators — by collecting customer information or controlling access by customers to competing providers. These are concerns that we take seriously and will discuss below. However, these concerns do not lift the Energy Marketplace from the status of ancillary activity to that of a new service offering.

The Energy Marketplace has a clear relationship to the defendants' core aggregation programs and does not directly provide a source of revenue from a broad customer base. Focusing solely on the relationship of the defendants and the end-use customers who may rely on the Energy Marketplace, the website does not rise to the status of new service offering. The only exchange of funds occurs between those core aggregation providers who wish to take advantage of the website's interactive capabilities, and SoCalGas. SoCalGas is providing a service to those core aggregation providers, since it is helping them to connect with potential customers. In that it is a service for which they are charged, the core aggregation providers are customers. The question is whether the service becomes one which is subject to the requirements of Pub. Util. Code §§ 451 and 454 when viewed from this perspective.

We do not view the offering of this web service to core aggregation providers as the type of service for which prospective rate regulation was envisioned by the Legislature. The service provided to end-users is ancillary to the utilities' core aggregation programs. The involvement of at least some core aggregation providers is essential to the process, since without their involvement, the ability to encourage additional transactions is minimized. The imposition of a fee for participation by core aggregation providers appears reasonable in an effort to defray program costs. Since the number of core aggregation providers is small, it appears unlikely that the utilities are offering this service because of its potential to generate revenues. So long as the fees are not so high as to create a barrier to participation, there is no apparent purpose for this Commission to determine their reasonableness. Enron has not asserted here that the fees are unreasonably high.

The only apparent service resulting from the Energy Marketplace is an opportunity for potential customers and aggregators to find each other.

SoCalGas is not offering itself as an agent for any resulting transactions and does not stand to profit if the service is used. Rather than being viewed as the offering of a product or service, the Energy Marketplace appears more analogous to the sponsorship of a trade show. SoCalGas might sponsor a trade show at which core aggregators would set up booths and potential customers could walk the aisles. Some potential customers might just gather information, while others might make decisions to purchase products. The apparent differences between the Energy Marketplace and such a trade show are that Energy Marketplace attendees browse electronically, rather than walking the aisles, and the "exhibit floor" is open 24 hours a day. Such a trade show would not become a product or service subject to our regulation simply because SoCalGas might charge a fee to an aggregator that chooses to set up a booth.

Because we do not find that the Energy Marketplace is a new product or service, Enron's arguments about SoCalGas' obligation to file an application or advice letter for approval of new products or services are moot.

Although the Energy Marketplace is not a new service offering, we retain an interest in assuring that it is not used a part of an effort to gain anti-competitive advantage. Enron raises concerns about the potential for abuse, and that expression of concern draws our interest.[1] However, in light of the potential benefits of the program, we are not persuaded that the existence of the potential

[1] We note, for instance, that the website initially listed only those core aggregators who were fee-paying participants in the Energy Marketplace and did so in a manner that could lead potential customers to believe that only the listed entities provided such services. By conveying such misinformation, the website could impair competition. The defendants have each taken steps to correct this problem by directing users of the website to a complete list of core aggregation service providers. This is the type of problem that should be brought to our attention in the form of a complaint, whether or not the Energy Marketplace is considered to be a product or service for other purposes.

abuses alone should cause us to interfere with these efforts. If the rates for entry were to become prohibitive, or a utility were to have improper access to competitive information, or were to operate the program in such a way as to create advantage for itself or an affiliate, then we will be prepared to take corrective action. We note that this service is subject to our affiliate transaction rules to the extent that it provides any advantage to an affiliate.

Provision of the Energy Marketplace by a Third Party, Instead of SoCalGas

Enron argues that it is inappropriate for SoCalGas to provide this service, because it has the capability of monitoring information about customer needs and competitive negotiations. Enron emphasizes that it does not want SoCalGas or the other defendants to know anything about its interactions with potential customers. The premise is that the service should be provided by another entity, even an "appropriate" utility affiliate, in order to alleviate this concern. SoCalGas asserts that the website uses secured areas and passwords to ensure that no data being exchanged between a supplier and potential customer can be intercepted by SoCalGas. The parties have waived the opportunity to develop the facts that underlie these assertions. Thus, we are left without a basis for concluding that SoCalGas or any of the other defendants can or does use the website to intercept information about transactions between core aggregation service providers and potential customers. Nor does the record suggest how moving the service from the utility to an affiliate would alleviate these concerns.

Nonetheless, Enron and other competitors have a strong interest in ensuring that the defendants, as core service providers, do not use the website to gain access to competitively sensitive information. Because Enron and others may determine that they need to participate in the Energy Marketplace in order to preserve all competitive options, core providers should have the right to ensure that the security provisions related to the website are sufficient. SoCalGas

should provide to enquiring core providers enough information to ensure them of the adequacy of the security measures. If Enron or others are not satisfied, SoCalGas should make a good faith effort to improve its security in a manner that meets competitors' reasonable concerns. We have an ongoing interest in seeing that this effort serves only to enhance competition, not to interfere with it. Thus, if Enron or others can demonstrate that the security provisions are insufficient, or that any of the defendants have been uncooperative in addressing security concerns, they may bring this issue before us in a subsequent complaint.

Enron also raises concerns about ways in which the Energy Marketplace could be used to the advantage of a utility affiliate, if an affiliate providing core aggregation service were to become a fee-paying participant. We note that there is no such utility-affiliate involvement at this point. Enron suggests that it would be appropriate to prohibit prospectively any such affiliate involvement. In the absence of compelling circumstances, such a prohibition would be inconsistent with the approach we are taking to our oversight of the interface between regulated and affiliated entities. Rather than banning such transactions, we are requiring that they be undertaken in a manner that complies with our affiliate transaction rules. Actual problems related to affiliate involvement with the Energy Marketplace should be raised through the enforcement mechanisms included in the affiliate transaction rules.

In its comments on the Draft Decision, Enron states that SoCalGas is now offering the energy marketplace not just to support gas core aggregation efforts, but as a resource for electricity markets in California and elsewhere. Although we have not taken evidence on this point, SoCalGas acknowledges this new use of the energy marketplace in its reply comments. We emphasize that our findings in this complaint relate solely to the use of the website to support gas core aggregation providers in California. As SoCalGas begins to provide other

services on its webstie (especially services that are not clearly supportive of its own gas programs), those new services are subject to our affiliate transaction rules. Prior to offering any such new service, SoCalGas must file an advice letter pursuant to Rule VII.E.

Conclusions

Enron has not met its burden of demonstrating that the defendants are offering or operating the Energy Marketplace in a manner that is in violation of any provision of law or any order or rule of the Commission. Thus, we will dismiss this complaint, with prejudice. However, we have an ongoing interest in the fair and secure operation of the Energy Marketplace. Should the defendants operate the website in an anticompetitive manner, or in a manner that violates any law, order or rule of the Commission, we will entertain future related complaints. Regardless, we expect the defendants to make a good faith effort to work with competing core providers to ensure that the website operates in manner that is both fair and secure. In addition, if SoCalGas expands its use of the energy marketplace website beyond the function of supporting the gas core aggregation, it must first file an advice letter under Rule VII.E. of the affiliate transaction rules.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed on February 3, 1999, and reply comments were filed on February 8, 1999.

Findings of Fact

1. Enron has not demonstrated that the defendants are offering or operating the Energy Marketplace in a manner that is in violation of any provision of law or of any order or rule of the Commission.

2. The Commission has an ongoing interest in ensuring that the Energy Marketplace operates in a manner that is not anticompetitive and is both fair and secure.

Conclusions of Law

1. The complaint should be dismissed with prejudice.

2. The defendants should make a good faith effort to work with competing core service providers to ensure that the Energy Marketplace website operates in a manner that is not anticompetitive, and is both fair and secure.

O R D E R

IT IS ORDERED that:

1. This complaint is dismissed with prejudice.

2. Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Gas Company shall make a good faith effort to work with competing core service providers to ensure that the Energy Marketplace website operates in a manner that is not anticompetitive, and is both fair and secure.

3. Case 98-03-005 is closed.

This order is effective today.

Dated February 18, 1999, at San Francisco, California.

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