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Decision 99-03-064 March 18, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Gas Company approval of a Long-term Gas Transmission Service Contract with Distribuidora de Gas Natural de Mexicali, S.de R.L. de C.V.	Application 97-03-015 (Filed March 10, 1997)

ORDER DENYING REHEARING OF DECISION 98-12-024

I. SUMMARY

On January 8, 1999, the City of Long Beach (Long Beach) filed an application for rehearing in Application (A.) 97-03-015. Long Beach argues therein that Southern California Gas Company's (SoCalGas) natural gas service contract with its affiliate, Distribuidora de Gas Natural de Mexicali (DGN), contained terms that are materially more favorable than the terms SoCalGas offered in its original published offer for service to other non-affiliated competitors. Long Beach further claims that, because DGN is affiliated with SoCalGas, we were required, in Decision (D.) 98-12-024, to order SoCalGas to serve DGN based on the terms contained in the original public offer for service. Long Beach also proposes that the Commission adopt an affiliate transaction rule which would require SoCalGas to bound by the its original public offer when negotiating a service agreement that involves an affiliate. Long Beach fails to provide any legal authority and support for its claim. In fact, no such legal requirement existed at the time the DGN contract was signed in January, 1997.

II. BACKGROUND

Prior to November, 1995, the northern area of Mexico bordering on California had never had natural gas provided through gas pipelines. In November, 1995, the Mexican government issued regulations that allowed for the licensure of private companies to construct and operate natural gas transmission and distribution pipelines along the California-Mexican border. On April 12, 1996, Mexico's Comision Reguladora de Energia (CRE) issued the terms and conditions for an international public bid to grant the first license for distribution of natural gas in Mexicali. After completion of the competitive bidding process, CRE announced a list of six companies, including DGN, which qualified for the distribution license. Before CRE had completed its process of determining which of the six qualifying companies would be granted the license, SoCalGas, on May 10, 1996, sent its offer for service to Mexicali to all six companies. On August 12, 1996, the Mexican government awarded the license for gas distribution in the Mexicali area to DGN.[1] Once CRE granted the license to DGN, thereby eliminating the other five qualifying companies, SoCalGas began its negotiations with DGN for an agreement to service the Mexicali region. SoCalGas agreed to be responsible for providing gas transportation service across its system to a border point in Mexicali. DGN agreed to be responsible for providing gas supplies and transportation south of the California border (upstream from SoCalGas' system).

On January 29, 1997, DGN and SoCalGas entered into the service agreement addressed in Application 97-03-015. This natural gas service agreement is the first contract between a California regulated entity and a foreign country. The service agreement provides for firm service as defined by SoCalGas' tariffs. The terms of the agreement are as follows: (1) the contract provides for firm service for 15,150 decatherms per day, subject to an increase up to 25,200 decatherms per day on 18 months notice; (2) the term of the contract is twelve years, subject to a rate readjustment clause that may be triggered by either party after five years; (3)

[1] DGN is a Mexican Corporation owned as follows: 30% by subsidiaries of Pacific Enterprises (other than SoCalGas or its subsidiaries); 30% by subsidiaries of Enova Corporation; and 40% by Proxima, a Mexican corporation.

SoCalGas is required to file with the Commission by the end of the eleventh year of the service agreement a tariff for default service to be applicable after the twelfth year of the contract; (4) the initial volumetric rate is 3.5 cents per therm with annual escalation equal to an inflation index less one percentage point; (5) the service agreement provides for a minimum monthly charge of 75% of the daily minimum quantity multiplied by the number of days in the month multiplied by the volumetric rate; (6) DGN is subject to a minimum annual charge of $600,000 with interest for the first five years of the agreement (this charge is payable at the end of the fifth year of service); (7) DGN is subject to an exit fee if it selects another transmission service provider within the twelve year term of the agreement; (8) DGN is subject to an operational flow order; (9) DGN is subject to fees for imbalances beyond the allowed quantities; and (10) the contract includes a provision for dispute resolution that includes binding arbitration. SoCalGas' forecast of the average throughput over the life of the contract is 16 million cubic feet per day (mmcf/d). The contract provides for a maximum of 25 mmcf/d for firm service.

SoCalGas received general approval from the Federal Energy Regulatory Commission (FERC) for construction of border crossing facilities, as well as approval to deliver gas to Mexicali pursuant to Section 3 of the Federal Natural Gas Act. On May 5, 1997, SoCalGas obtained FERC's approval of the exact location of the border crossing. The FERC also issued a declaratory order disclaiming jurisdiction to approve or regulate rates or facilities of SoCalGas that would be used to transport gas to Mexicali pursuant to the service agreement.

SoCalGas proceeded to construct a 14.4 mile pipeline extension (designated Line 6903) from the terminus of its service on lines 6000 and 6001, to the border crossing. The utility also began to construct the actual border crossing facilities approved by the FERC. On July 31, 1997, SoCalGas began interim service to DGN at the Mexicali border crossing. DGN's average daily volumes have since reached the level of 5 to 6 mmcf/d.

On December 3, 1998, we issued D.98-12-024 and mailed it on December 9, 1998, to all the parties in A.97-03-015. Our decision granted approval of the DGN transmission service contract, denied SoCalGas' request for special treatment of the cost of exclusions, and granted SoCalGas' request for exemption from Section X of General Order 96-A. The City of Long Beach filed its application for rehearing of D. 98-12-024 on January 8, 1999. On January 25, 1999, SoCalGas filed its response to the City of Long Beach's rehearing application.

III. DISCUSSION

Long Beach's application for rehearing fails to specify why our decision is unlawful. Long Beach's objections to our decision discuss policy and factual arguments rather than demonstrating legal error. Such objections are not grounds for granting rehearing under Section 1732 of the Public Utilities Code and Rule 86.1 of the Commission's Rules of Practice and Procedure.

A. Long Beach has failed to show that the terms offered by SoCalGas are unfairly favorable to DGN and considerably different from the terms in the original public offer.

Long Beach asserts that the terms offered to DGN are substantially different from the terms contained in the initial offer. The evidentiary record demonstrates that SoCalGas provided a detailed analysis, Exhibit 1, which explains the differences between the initial offer and the service agreement that was subsequently entered into by DGN. Exhibit 1 illustrates two major differences between the initial offer and the service agreement; the rate structure and the imbalances requirement. Long Beach's rehearing application focuses on the rate structure differences.

The initial offer contained a two-part rate structure based on the demand volume levels. However, the service agreement approved by us contains a one-part rate structure. This rate structure is based on the volumetric rate, subject to a minimum monthly charge for the first five years, and a minimum annual charge of $600,000. Long Beach focused on the disparity of the terms between the two service agreements, while the other the parties who protested SoCalGas' application to serve DGN focused on the reasonableness of the rate and the exclusion of Interstate Transition Cost Surcharges (ITCS) cost.

As previously stated, Long Beach asserts that DGN should be required to pay the rate that was originally offered to it in the May, 1996 contract. The original rate was based on a 10 mmcf/d volumetric rate and would have been 5.5 cents per therm. The current contract volumetric rate is 16 mmcf/d with a 3.5 cent per therm rate.

In D.98-12-024, we rejected Long Beach's arguments that (1) DGN had no credible gas transmission service alternatives; (2) the terms of the contract eliminated the possibility of a competitive alternative; and (3) the negotiated rate of 3.5 cents per therm is unreasonable. We approved the 3.5 cents per therm rate based on the following factors. First, we took into consideration that DGN could agree to service the Mexicali area by bypassing SoCalGas' pipeline and using the Yuma, Arizona pipeline. We also considered that at the time the contract was signed DGN had alternative fuel options. These fuel alternatives would have allowed DGN to receive a 3.5 cents per therm rate.

We also considered the estimated level of throughput in the service agreement. The agreement called for 16 mmcf/d throughput as opposed to the 10 mmcf/d originally proposed in the May 10, 1996, contract. This higher throughput is beneficial in that it reduces the rate per therm to DGN.[2] Long Beach cross-examined

[2] The contract between SoCalGas and DGN currently allows for a pipeline capacity of 25 mmcf/d.

SoCalGas' witness Borkovich extensively on the issue in an attempt to establish that the 16 mmcf/d was unreasonable. However, the D.98-12-024 found the rate to be reasonable in light of the circumstances and this finding is fully supported by the record evidence.

Long Beach further raises an allegation that SoCalGas effectively destroyed the competitive bidding process. However, Long Beach has failed to establish how SoCalGas destroyed the competitive bidding process implemented by CRE or explain why this issue is relevant to the instant case. The CRE awarded one license and that license went to DGN. Thus, SoCalGas was limited to negotiating with the licensee chosen by CRE.

B. Long Beach proposes an affiliate transaction rule which is inconsistent with the Commission's Affiliate Transactions Rules adopted in D. 97-12-088.

Long Beach also proposes that we adopt a rule that SoCalGas be bound by the terms of its published offers. It claims that if SoCalGas is allowed to deviate from the original public offer when negotiating with its affiliate, DGN, it will destroy competition, and the published offer will have been illusory. It further complains that this issue was inappropriately ignored in the decision.

Long Beach claims that we should have required SoCalGas to serve its affiliate, DGN, with the terms contained in the original public offer for service, rather than the terms that were negotiated as part of the January 29, 1997 service agreement. However, it fails to provide any authority or support for its claim. In fact, there was no such requirement in law at the time the DGN contract was signed in January, 1997.

Long Beach's application fails to show that any laws or rules have been violated. According to Long Beach, the only time that we can approve a utility contract with terms which differ from the initial public offer is if the contract involves an unaffiliated customer. Long Beach is incorrect. It is not unlawful for affiliates of a utility to negotiate terms differing from an initial public offer for service. In fact, it may be perfectly reasonable to do so. During the course of negotiations the parties may find that some change from the initial offer would better serve the needs of both parties, or would meet the needs of one party better without being disadvantageous to the other party. There is no reason that affiliates should be disadvantaged by not being given the same flexibility as non-affiliates in contractual negotiations. Treating affiliates equally with non-affiliates does not constitute unlawful discrimination under Public Utilities (PU) Code 453 or any other provision of the law.

In D.97-12-088, we adopted the Affiliate Transaction Rules, later modified by D.98-08-035. These rules govern the relationship between California's natural gas local distribution companies and electric utilities and certain of their affiliates. These are the only rules and regulations that might apply to a service contract such as the one in the instant case. However, these rules were not in effect when SoCalGas negotiated its contract with DGN. Therefore, SoCalGas could not have violated them.

Even if the rules had been in existence at the time the service agreement was entered into, Long Beach's argument would still fail. The two affiliated transaction rules that would now apply are Rule III.A.2 and Rule III.B.2. These rules state that the utility shall not provide any preference, including pricing, to any affiliate over a non-affiliated entity, and that if a discount is provided to an affiliate, it shall be offered to all similarly situated market participants. The purpose of these rules is to ensure that a utility offers the same terms and conditions to all similarly situated competitors.

Contrary to Long Beach's allegation, SoCalGas did not violate the purpose of Rule III A.2 and Rule III B. 2. According to the evidentiary record, SoCalGas never discriminated against the other five similarly situated competitors in favor of DGN. The record shows that SoCalGas offered a contract on May 10, 1996, to six competitors, who at the time were similarly situated[3]. On August 12, 1996, the Mexican government issued the license to DGN. It is at this point in time that DGN was no longer similarly situated with the other five competitors. The Mexican government issued only one license for the distribution and transmission of gas in the Mexicali region. The license issued to DGN was for thirty years with an exclusivity period covering the first twelve years of the license term. This exclusivity forbids any other competitor from constructing a distribution system and transmitting gas in the region. Thus, due to Mexico's choice of DGN, SoCalGas was limited to negotiating solely with that company. If SoCalGas had entered into an agreement with one of the other five competitors, the contract would be void due to the fact that the Mexican government would only allow DGN to effectuate service. Therefore, there was no discrimination in favor of the affiliate, DGN.

IV. CONCLUSION

Long Beach has not established any legal error in D.98-12-024. We therefore summarily deny Long Beach's rehearing application of D.98-12-024 for the reasons stated above.

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[3] The Comision Reguladora de Energia (CRE) determined which six companies would be considered for the license to serve the Mexicali region after a competitive bidding process.

THEREFORE, IT IS ORDERED that:

1. The application for rehearing in D.98-12-024 filed by the City of Long Beach is denied.

2. This proceeding is closed.

This order is effective today.

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

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