

Decision 99-06-055 June 10, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into the operations and practices of affiliated companies FutureNet, Inc., and FutureNet Online, Inc., dba Future Electric Networks, and individuals in control of operations: Alan Setlin and Larry Huff, Respondents.

Investigation 98-04-033
(Filed April 23, 1998)

Goodin, MacBride, Squeri, Schlotz & Ritchie, by
Thomas J. MacBride, Jr., Attorney at Law, and
Kathryn A. Fugere, for FutureNet, Inc. and Alan
Setlin, respondents.

Maria Oropeza, Attorney at Law, for Consumer
Services Division.

O P I N I O N

Procedural Background

On April 23, 1998, the Commission issued its Order Instituting Investigation and Order to Show Cause (OII) in which it summarized Staff's representations that the respondents:¹

- offered to sell electricity to end-user customers, without having first registered with the Commission pursuant to Public Utilities (Pub. Util.) Code² § 394(a),

¹ FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin are respondents in this proceeding. Larry Huff was also named as a respondent but has not appeared, and CSD has not sought any further action against him.

² Unless otherwise indicated, all citations are to the Pub. Util. Code.

- were under the control of corporate officers that had previous criminal convictions for consumer fraud and endless chain schemes,
- were subject to a temporary restraining order obtained from a federal court by the Federal Trade Commission (FTC) prohibiting respondents from soliciting new distributors due to evidence that the respondents were employing an illegal compensation plan commonly known as a pyramid scheme.

The OII directed respondents to respond to specific data requests and to appear at a hearing to show cause why they should not be ordered to cease and desist from all conduct regarding marketing or soliciting customers to receive electric service.

On June 16, 1998, Commissioner Neeper and Administrative Law Judge Bushey conducted the show cause hearing. At the hearing, the Consumer Services Division (CSD) presented seven witnesses who were solicited by FutureNet to be either sales representatives or customers. CSD also presented its investigator, Curtis Jung, to testify as to his investigation. By the end of the day, CSD had concluded its case and FutureNet presented its first witness.

On June 17, 1998, the hearing resumed and CSD and FutureNet announced that they had reached an agreement which would apply to FutureNet's marketing activities during the pendency of this matter. Further hearings were suspended and the presiding officer's decision approving the interim agreement became the decision of Commission in FutureNet, Inc., Decision 98-08-041.

On December 15, 1998, hearings on sanctions and prospective limitations began, with the record to include the previous hearing record. CSD and FutureNet each presented one additional witness.

On January 11, 1999, the parties submitted initial briefs, with reply briefs on January 22, 1999.

On March 1, 1999, the presiding officer mailed her decision to the parties.

FutureNet's Appeal

FutureNet filed an appeal on March 25, 1999, in which it alleged that the Commission lacked jurisdiction over the respondents, the Commission may not impose fines, that the record was misconstrued, that no showing of evil intent was made, that the fine was at odds with precedent, and that it violated the U.S. and California Constitutions.

In response to FutureNet's appeal, the Commission made the following changes to the presiding officer's decision:

- clarified the basis for personal jurisdiction;
- added additional discussion of the factual record supporting the determination that FutureNet offered electrical service to residential or small commercial customers;
- added a decision citation which addresses the requirement of "evil intent" or a mental state element;
- changed the duration of time FutureNet was deemed to have been operating as an ESP, which consequently changed the upper limit of the statutory fine range; and,
- changed the fraction of the fine suspended.

Summary of the Evidence

Consumer Services Division

CSD presented Oscar C. Price, a sales representative for Future Electric Networks. Mr. Price testified that he had become a power representative in January 1998. He stated that he had been provided with a sales brochure by FutureNet and that he had been told by FutureNet representatives that customers would save up to 40% off their current electric bill. Mr. Price offered one such brochure for the record, which was identified as Exhibit 1. The

brochure has an order form which is labeled "Future Electric Networks Service Request" and prominently displays the FutureNet name in several places, including the return address. Mr. Price stated that he repeated this information in his solicitations to customers, 35 of which signed contracts. He ceased his marketing activities when he went to FutureNet offices and found federal officers present in the offices, who indicated that the office was closed.

CSD next presented Mary Nold who testified that a person, who stated that he represented San Diego Gas and Electric Company (SDG&E), promised her 30% savings but that she would not be switched away from SDG&E. Upon calling SDG&E, the witness was told that she would be switched. She tried to cancel the agreement with FutureNet but could not reach them.

CSD's next witness was Alysha Fox who stated that a representative of Future Electric Network solicited her to become a customer. The representative stated that FutureNet was affiliated with SDG&E and that Ms. Fox would save 30 to 40% on her electric bill. Ms. Fox stated that she attempted to contact Eastern Pacific Energy at the suggestion of Commission staff to ensure that her service would not be switched but that she was told by Eastern that FutureNet was not authorized to solicit customers on their behalf.

CSD called Roy L. Price who stated that he became a power representative on January 23, 1998, and that he had signed up four or five power representatives and up to 15 customers by promising savings of up to 40% on their electric bill.

CSD's next called Kaiming Ho who stated that his wife had signed a contract to become a power representative after being solicited by his neighbor. She paid \$99 but did not receive the promised package of sales materials.

Lester Scotten was CSD's next witness. He stated that he became a power representative on January 21, 1998, and that he used the brochure which had been marked as Exhibit 1 to solicit customers in January. He went on to explain

that he paid an extra \$469 to upgrade his affiliation to "the 8th level in Future Electric Networks." The upgrade did not give him the promised benefits.

CSD next called Patricia A. Wankel who stated that she was very experienced in multi-level marketing and that she had been introduced to FutureNet by Alan Setlin and Larry Huff in January 1998 at a meeting with about 500 other people.

CSD's next witness was its investigator, Curtis Jung, who sponsored his declaration with a supplement. He summarized his findings as:

- Commission staff received more than 35 telephone inquiries from prospective investors and customers who had been solicited by FutureNet to pay into a two-tiered multi-level marketing system to sell electrical service as well as recruit other sales representatives.
- FutureNet was not registered as an Electric Service Provider.
- FutureNet used misleading promotional materials which indicated that FutureNet was an Energy Service Provider and promised highly questionable savings of up to 40%.
- Four FutureNet founders or officers have been convicted of crimes relating to consumer fraud and deceptive marketing practices.
- The FTC alleged that FutureNet was primarily marketing the recruitment of new account representatives rather than selling their product, which paralleled other illegal pyramid schemes.³

³ Federal Trade Commission v. FutureNet, Inc., Civil No. 98-1113 GHK (AIJx). In addition to establishing \$1 million consumer restitution fund, the stipulated final judgment prohibits the defendants from engaging in other pyramid schemes, selling electricity without state or local authorization, requires them to maintain a performance bond of up to \$1million to secure amounts owed to their marketing representatives, and imposes reporting requirements. Should the FTC determine that the defendants made material misrepresentations in their personal financial statements which were provided as part of this settlement, then the defendants are liable for a fine of \$21 million.

At the December 15, 1998, hearing, CSD called James P. Lezie, CEO of Eastern Pacific Energy. Mr. Lezie stated that prior to February 10, 1998, FutureNet had no authority to market residential electric service from Eastern Pacific Energy. He explained that Eastern Pacific became aware of FutureNet "around Christmas of '97" when they began receiving complaints from their authorized commercial representatives that FutureNet was soliciting customers. FutureNet had engaged Pacific Advantage to oversee its marketing efforts. Apparently, Pacific Advantage had initiated contractual negotiations with FutureNet regarding multi-level marketing to residential customers. Mr. Lezie also noted that on December 23, 1997, Mr. Wilson of Pacific Advantage put out a notice to all their sales representatives indicating that multi-level marketing had not been authorized. Mr. Lezie explained that in the February 10, 1998, agreement with Pacific Advantage and FutureNet they were "trying to keep Pacific Advantage out of litigation with FutureNet."

Mr. Lezie recounted Eastern Pacific's understanding that during the time of negotiations between FutureNet and Pacific Advantage, beginning in October 1997, no actual customer solicitations were taking place. Eastern Pacific was surprised to discover that (1) Pacific Advantage had terminated all other sales representatives and was dealing exclusively with FutureNet and (2) that FutureNet was soliciting customers in late December 1997. Mr. Lezie concluded by stating that although Eastern Pacific has not officially terminated its contract with Pacific Advantage, they have acquiesced in Pacific Advantage ceasing to perform the contract.

FutureNet

At the June hearing, FutureNet called Jeffery S. Wilson, Executive Vice President of Pacific Advantage, as its first witness to describe the relationship between FutureNet, Pacific Advantage, and Eastern Pacific Energy, as well as

FutureNet's agreement with Pacific Advantage to market electric services provided by Eastern Pacific.

Mr. Wilson testified that Pacific Advantage approached Eastern Pacific Energy in October 1997 to become Eastern's exclusive sales representative for detached single family residential customers. In mid-December 1997, Eastern met with FutureNet and Pacific Advantage and tentatively agreed that FutureNet would become Pacific Advantage's exclusive multi-level marketing entity for residential electric service. The three parties finalized a written agreement on February 9, 1998.

Mr. Wilson stated that FutureNet was a marketing entity only, it did not intend to actually provide electric service. He also stated that upon hearing of the CSD's concerns about FutureNet's advertising, Pacific Advantage and FutureNet had changed all marketing materials to comply with CSD's concerns.

At the June 16, 1998 hearing, Mr. Wilson explained that Pacific Advantage hired approximately 40 individuals or companies to represent Eastern Pacific in the residential markets. Eastern Pacific contracts separately for its commercial services. Mr. Wilson testified that some non-FutureNet sales representatives used FutureNet documents obtained from FutureNet's web site in their solicitations.

Under cross-examination, Mr. Wilson reviewed Exhibit 1, the FutureNet brochure, and stated that Pacific Advantage had not approved it but that, in his opinion as a marketing expert, a reasonable person reading the brochure would conclude the Future Electric would sell electricity to the consumer.

At the December 15, 1998 hearing, FutureNet presented its Director of Legal Affairs, David Koerner, to testify about FutureNet's endeavors to operate as a marketing company on behalf of Eastern Pacific and to comply with CSD's requests. Mr. Wilson corrected assertions by Investigator Jung about FutureNet's

officers: Larry Huff was never an officer or director; David Soto was only involved in international efforts; Robert Depew resigned in August 1997; and Alan Setlin pleaded no contest to a misdemeanor charge.

Discussion

Jurisdiction

Personal Jurisdiction

The Commission has personal jurisdiction over respondents FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin due to their presence in this state and because these entities participated fully in this proceeding. (1 Cal. Jur. 3d (Rev) Part 2, Actions § 124.) CSD has not sought sanctions against Larry Huff for failure to appear. Counsel for all the corporate respondents and Setlin specifically reserved their clients' rights to challenge the Commission's subject matter jurisdiction, which they have in the briefs.

Subject Matter Jurisdiction

The Legislature granted the Commission authority to register all entities that are "offering electrical service to residential and small commercial customers." (§ 394(a).) Overseeing such a registration system requires that the Commission make the initial factual determination that the entity proposing to register intends to offer electrical service to residential or small commercial customers. Where this factual threshold is met, i.e., the entity intends to offer such service, the statute is mandatory; the entity "shall register" with the Commission.

In granting the Commission jurisdiction to implement this registration system, the Legislature necessarily granted the Commission the jurisdiction to determine whether those facts exist:

Wherever a court or board is authorized to act upon the existence of a certain state of facts, it has jurisdiction to determine the existence or nonexistence of the requisite facts. Its jurisdiction cannot be affected by the circumstances that these facts are denied. (Palermo Land and Water Co. v. Railroad Comm'n, 173 Cal 380, 385 (1916)(citations omitted).)

In this case, the Commission has the jurisdiction to register entities which intend to offer electric service to residential and small commercial customers. Hence, it has jurisdiction to determine whether such an offer will or, in this case, has been made.

Should the Commission determine the entity will not offer electrical service to residential or small commercial customers, then the Commission's jurisdiction is at an end. The statutorily required factual predicate for continued jurisdiction has not been met.

If the outcome of that factual determination is that the entity in question did offer electrical service to residential or small commercial customers, and the entity is not registered as required by § 394(a), then the entity stands in violation of that section of the Code.

The Legislature also granted the Commission jurisdiction to enforce certain penalty provisions of the Code against registered entities. (§ 394.25(a).) This jurisdiction would not extend to entities which have not met the factual threshold of offering electrical service to residential and small commercial customers. Where the Commission has determined, however, that the entity meets the factual threshold and thus should have been registered but was not, then the Commission's statutory enforcement jurisdiction against registered entities comes into play.

Entities which offer electrical service to residential and small commercial customers must register with the Commission. Where the

Commission has determined that an entity meets the factual threshold and has not registered, then the Commission may treat the entity as registered for purposes of its enforcement jurisdiction. (Civil Code § 3529.) ("That which ought to have been done is regarded as done, in favor of him to whom, and against him from whom, performance is due.")

The contrary rule, as advocated by FutureNet, would allow entities which offer electrical service to residential and small commercial customers to avoid Commission jurisdiction entirely by simply declining to register. FutureNet's suggestion that the Legislature intended to place this duty on the overburdened civil court system is unsupported by specific statutory language and unreasonable, given the Commission's expertise and adjudicatory capacity. Many portions of the Pub. Util. Code do not contain express directions to the Commission to enforce the statute. (See, e.g., § 451 (requiring just and reasonable rates); § 2889.5 (requiring customer authorization prior to transferring customer from one long distance carrier to another).) Applying FutureNet's reading of the Commission's jurisdiction to all provisions of the Code would result in transferring large blocks of proceedings from the Commission to the civil courts and would be contrary to court decisions recognizing such jurisdiction.

Similarly unreasonable is FutureNet's final jurisdictional contention -- that the Commission lacks the authority to impose fines. FutureNet appears to contemplate a duplicative process whereby the Commission would undertake a full evidentiary hearing process to determine whether an entity has violated a law or order, and then upon an affirmative determination, the Commission would re-litigate the issues in Superior Court to obtain a fine. Severing the factual determinations from the penalty determinations would double the public resources necessary to resolve each case. Moreover, the California Supreme Court routinely lets stand Commission decisions imposing

finer, most recently in SO65955, Communications TeleSystems International v. California Public Utilities Commission, Application for stay and petition for writ of review denied, issued December 23, 1997, where the Commission imposed a \$20 million fine.

In sum, the Commission has jurisdiction to determine whether an entity is offering electrical service to residential and small commercial customers and, if so, to impose statutorily defined sanctions, including fines.

Did FutureNet Offer Electrical Service to Residential or Small Commercial Customers?

The record in this proceeding reveals that FutureNet obtained between 10,000 and 12,000 signed letters of authorization to transfer residential electrical service. Although no customers were actually transferred, no party disputes that electrical service was offered to residential customers by representatives of FutureNet.

The dispute is over which entity was offering to provide the service. CSD witnesses stated that based on the marketing materials, including the web site, they believed that FutureNet would be providing the service. FutureNet stated that it had no intention of providing electric service and that its only function was as a marketer. FutureNet contended that Eastern Pacific would be providing the electrical service and that FutureNet was only offering services on behalf of Eastern Pacific.

The evidence does not support FutureNet's assertion. Exhibit one is a marketing brochure which FutureNet power representatives used to solicit customers. This brochure prominently displays FutureNet's name in 13 places. There is only one reference to Eastern Pacific by name and four by its initials. The order form portion of the brochure states "I wish to receive my electricity through Future Electric Networks, beginning immediately" and the return

address is Future Electric Networks. FutureNet's own witness, Mr. Wilson, a marketing expert from Pacific Energy, conceded that a reasonable person viewing that brochure would think the electrical service was being provided by FutureNet.

CSD's witness Oscar Price testified that he was a "power representative" and that he had signed up approximately 35 members of his church as both "power representatives" and customers. He believed that he was selling electricity to be provided by Future Net, although he later heard Eastern Pacific Energy mentioned as the provider.

The form agreement Future Net used to sell "power representative" positions referred to FutureNet or FEN (Future Electric Networks) as the provider of electricity. In the version of the agreement printed from FutureNet's web site on February 4, 1998, Paragraph 8 states that each power representative must "obtain electricity request forms for the purchase of electricity supplied by FEN from California resident consumers." The agreement goes on to prohibit "the unauthorized switching of a customers electricity service to FEN" in paragraph 15.

FutureNet's second attempt at a sales brochure appeared to create the impression that Future Net would be reselling electricity it had purchased from Eastern Pacific to the customer. The brochure prominently displayed Future Net's name, and only mentions Eastern Pacific as "its Electric Service Provider." Prospective customers are promised "new, personalized Future Electric Networks Customer Service" and "More Power to Ya!" The brochure even contains a rather clear admission "We are a California-based network marketing company offering low-cost, environment friendly power through independent sales representatives." (Emphasis added.) The statute requires each entity "offering electrical services to residential or small commercial customers" to

register. Thus, Future Net's second brochure similarly violates § 394(a) because offering electrical service, even as a reseller, requires registration.⁴

California apparently was not the only state in which FutureNet was presenting itself as being authorized to provide electricity. In a letter dated February 26, 1998, Kelly Jackson, Staff Counsel to the Nevada Public Utilities Commission, stated that it had come to the Nevada Commission's attention that Future Net was "holding itself out as a provider of retail electric service in the State of Nevada."

The FTC apparently entertained similar views. In its settlement agreement with Future Net, the FTC explicitly prohibited Future Net from "offering the sale or resale of electrical power or other energy service unless [the defendants] are registered or licensed by the appropriate state or local authorities . . . and in compliance with the applicable state and local requirements relating to sellers and resellers of electrical power and other energy services."

FutureNet asserts that its marketing materials were later corrected to clearly show that Eastern Pacific was the actual provider of the electrical service. Section 394(a) contains no "grace period" nor does it offer "opportunities for correction." It requires "[e]ach entity offering electric service to residential or small commercial customers" to register with the Commission.⁵ (§ 394(a) (emphasis added).) FutureNet offered such service and did not register.

⁴ Future Net's attempt to portray itself as a reseller would also appear to be at odds with actual nature of its relationship with Eastern Pacific Energy.

⁵ The statute similarly contains no mental state element as advocated by FutureNet in their appeal. The Commission need not add such a requirement. (Communication TeleSystems International, D.97-05-089, mimeo., at p. 24.)

Did FutureNet Make Material Misrepresentations?

Section 394.25 provides that the Commission may revoke a registration where the registrant has made "material misrepresentations in the course of soliciting customers." The record in this proceeding contains evidence showing that FutureNet promised customers up to 40% savings on their electric bill as part of their solicitation. FutureNet presented no evidence to support this savings estimate or to refute the allegation that it was unreasonable.

Making a representation as to a fact, i.e., 40% savings, without any supporting calculations or analysis is a factual misrepresentation. The amount of projected savings is material to a customer's decision to switch energy service providers.

Accordingly, FutureNet has made material misrepresentations in the course of soliciting customers.

Penalties

Section 394.25 authorizes the Commission to enforce §§ 2101, 2103, 2104, 2107, 2108, and 2114 against registered entities. As discussed above, we treat FutureNet as a registered entity for the purposes of applying penalties because it was required to register. Because the penalty for violation of § 394 is not otherwise provided, the range of fines we may impose is set by § 2107. That section authorizes fines of between \$500 and \$20,000 for each offense. Section 2108 states that each day of a continuing violation is separate offense.

In its briefs, CSD argues that FutureNet held itself out as an energy service provider from December 2, 1997, through June 16, 1998, a total of 198 days. Using this period of time as the basis of the total offense yields a fine within the range of \$99,000 and \$3,960,000. CSD did not recommend a specific number within the range. FutureNet concludes that a fine is unwarranted.

A. Principles Used in Assessing Fines

The Commission has recently adopted a summary of the principles it has historically used in assessing fines. Those principles are set out in Appendix B to Decision 98-12-075. Because those principles are generally applicable to Commission decisions assessing fines, we will use the analysis reflected in them to guide our determination of FutureNet's fine.

The guidelines first instruct that the purpose of fines is to deter future violations by either the current perpetrator or others. The two factors used by the Commission in setting fines which will effectively deter future violations are (1) the severity of the offense and (2) the conduct of the entity.

Turning first to severity of the offense, violations which include disregarding a statutory or Commission directive are accorded a high level of severity. Here, FutureNet disregarded the statutory requirement to register as an Electric Service Provider prior to offering electric service to residential or small commercial customers. FutureNet's actions undermine the integrity of the administrative process because consumers depend on the Commission to maintain an accurate list of registered entities in the newly deregulated electricity business and to ensure that these entities meet the minimal statutory standards to provide service. Therefore, it is appropriate to accord FutureNet's actions a high level of severity.

Moreover, the registration process adopted by the Legislature gives the Commission limited jurisdiction over Energy Service Providers. One particular subject area that prospective registrants are directed to disclose is a history of violations of consumer protection statutes or regulations. Such information is one of the extremely limited grounds for the Commission to deny a registration. (§ 394.1(c).) Because the Commission's jurisdiction is narrowly confined to registering ESPs and specifically excludes on-going review of rates or terms and

conditions of service, it is absolutely critical to the proper functioning of the Commission's regulatory authority that all entities offering electrical service to residential or small commercial customers register and allow their consumer protection history to be examined. Where, as here, that history contains multiple instances of highly questionable business conduct, the Commission is unable to fulfill its statutory mission to protect electricity consumers. Accordingly, failure to comply with the registration requirement constitutes a high level of severity.

The second factor is the conduct of the entity in preventing the violation, detecting the violation, and in disclosing and rectifying the violation. Here, FutureNet failed to take reasonable steps to ensure compliance with the statute. A cursory review of the statute would have revealed that soliciting customers in its own name implicated registration requirements. Thus, this component weighs heavily against FutureNet.

The second component of this factor is detection. The record does not reveal any actions on FutureNet's part to detect this violation but rather that it reacted to the FTC's and Commission staff's enforcement efforts. CSD states that FutureNet required repeated written directions to cease its statutory violations.

The final component of this factor, actions in disclosing and rectifying the violation, similarly offers FutureNet no basis for mitigation of its fine. FutureNet did not disclose the violation; state and federal regulators did. As for rectifying the violations, FutureNet's restitutionary actions were mandated by the injunction from the federal court. Thus, FutureNet took no voluntary actions to "promptly and cooperatively report and correct violations."

The next factor that the guidelines consider is the financial resources of the entity. The record in this proceeding is not clear as to FutureNet's exact financial resources but witness testimony shows it to be a going concern and a publicly traded corporation. In any event, given the FTC enforcement actions, any

diminished financial resources would appear to be of its own making and thus would be inappropriate for use as a mitigating factor.

The guidelines next direct the Commission to consider the totality of the circumstances in furtherance of the public interest. The public is currently experiencing for the first time the opportunity to purchase electricity from competitive sources. The Legislature has directed that these entities have minimal regulation from the Commission. These minimal standards must be evenhandedly enforced to maintain a competitive market and give customers reliable service providers from which to choose. Thus, the public interest weighs heavily in favor of serious deterrence of future violations of the registration statute.

The totality of the circumstances also includes the FTC restraining order and \$1 million restitution fund. This restitution fund mitigates the overall harm caused by FutureNet's actions, but the fact that FutureNet failed to comply with the restraining order's prohibition against offering to sell electricity without a proper authorization is an aggravating factor.

The final consideration for the Commission is to compare the instant fine to fines in other decisions. The only other enforcement case involving an Energy Service Provider is Boston Finney, I.98-02-004, which involved allegations of an illegal multi-level marketing structure and unsupported claims of customer savings and potential earnings for marketing representatives. In that proceeding, the Commission revoked Boston Finney's registration but imposed no fines. Boston Finney had ceased all business functions and its principals were wanted by the Attorneys General of California and other states as part of on-going criminal and civil lawsuits at the time the docket was closed.

Other than Boston Finney, no Commission decision addresses facts which parallel FutureNet. The Commission has not previously encountered a market

participant (1) which had not obtained operating authority, (2) where the regulatory compliance history of the officers raised serious doubt about its ability to meet the Commission's consumer protection standards, (3) in a newly competitive market, (4) that made material misrepresentations to customers regarding potential savings.

B. Calculating the Fine

CSD advocates using a statutory fine range of between \$99,000 and \$3.96 million based on days of operation as an ESP as the violation. Using the number of customers which actually signed a letter of authorization, 11,500, as the measure results in a fine range of between \$5.75 million and \$230 million. We reject the latter fine range as being excessive given the financial impact of FutureNet's actions.

We also reject the duration of FutureNet's days of operation as an ESP. In its appeal, FutureNet notes that its operations were effectively terminated by the FTC's actions in March 1998.

FutureNet executed "(Proposed) Stipulated Final Judgment and Order for a Permanent Injunction as to Defendants FutureNet, FutureNet Online, Lobato and Setlin" on March 25, 1998, although the agreement apparently was not filed until April 15, 1998, with the United States District Court. This agreement prohibits all defendants from engaging in any multi-level marketing activities, which respondents here assert included all of FutureNet's actions at issue in this proceeding. Thus, we will use March 25, 1998, as the termination of FutureNet's holding itself out as an ESP. Using 113 total days and the statutory fine limits yields a range of \$56,500 to \$2,260,000.

We find that FutureNet's actions in ignoring its statutory registration requirements and failing to cooperate with Commission staff to bring its actions into compliance enhance the severity of this violation. The fact that the electricity

market is newly competitive and that consumers are unfamiliar with their options and lack experience in selecting providers requires that the Commission enforce to the full extent possible its consumer protection standards to achieve its goal of deterring further violations of this kind. The facts all point toward a fine in the upper reaches of the range.

In mitigation, FutureNet points out that customers were not actually transferred from their provider of choice and that no customer suffered direct financial loss to FutureNet. While we note that customers could have made business and domestic decisions based on FutureNet's savings promises, no quantification of this amount is reflected in the record.

Although FutureNet's actions seriously affect the Commission's ability to discharge its duties, we wish to reserve the highest portions of the range for more egregious violations; thus, we find that achieving our goal of deterrence requires imposing a fine of \$2.0 million. However, the mitigating factor of no direct consumer harm supports staying one third of the fine, leaving a fine of \$1.3 million payable within 180 days. Should FutureNet violate any statutes or Commission directions in the future, the Commission will review the penalty amount stayed. All named respondents shall be jointly and severally responsible for payment of this sum to the General Fund of the State of California.

Prospective Limitations

Should FutureNet, any corporate affiliates, any of its officers, directors, management employees or contractors, or 5% or greater shareholders, seek registration as an Energy Service Provider, such registration request must be in the form of a formal application to the Commission as provided in § 394(d). Any Energy Service Provider which is engaged in a business relationship with any of the above-listed entities with respect to offering electric service to residential or small commercial customers must disclose such relationship via a letter to the

Director of the Commission's Consumer Services Division within 30 days of the effective date of this decision or 30 days from the commencement of such relationship. This decision shall be served on all Energy Service Providers.

Findings of Fact

1. FutureNet obtained 11,500 signed letters of authorization to transfer residential electrical service.
2. FutureNet's witness, a marketing expert from Pacific Energy, conceded that a reasonable person viewing that FutureNet's marketing brochure would think the electrical service was being provided by FutureNet.
3. FutureNet offered electrical service to residential or small commercial customers in California.
4. FutureNet made material misrepresentations in the course of soliciting customers.
5. FutureNet is not a registered Energy Service Provider.
6. The record shows that FutureNet solicited customers as early as December 2, 1997, and continued through March 25, 1998, the date the settlement agreement between FutureNet and the FTC became binding on the parties.
7. No restitution to end user consumers is necessary.
8. FutureNet's failure to register undermines the integrity of the Commission's administrative process and impedes the Commission in its statutory duty to protect consumers from unscrupulous Energy Service Providers.
9. FutureNet failed to take reasonable steps to ensure compliance with the registration requirement, or to detect such violations, and did not disclose the violation.
10. FutureNet, Inc. is a publicly-traded corporation with on-going business activities.

11. Using days of violation of the statute, the fine range based on § 2107 is \$56,600 to \$2.26 million.

12. Using number of customers that signed letters of agency, the fine range based on § 2107 is \$5.75 million and \$230 million.

Conclusions of Law

1. At no time was FutureNet a registered Energy Service provider within the meaning of § 394.

2. The Commission has personal jurisdiction over FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin due to their presence in this state and because they participated fully in this proceeding.

3. Section 394 requires all entities providing electrical service to residential and small commercial customers to register with the Commission.

4. The Commission has jurisdiction to determine whether an entity is offering electrical service to residential or small commercial customers.

5. The Commission has jurisdiction to enforce §§ 2102, 2103, 2104, 2105, 2107, 2108, and 2114 against registered entities.

6. FutureNet is considered registered for purposes of the Commission's enforcement jurisdiction because FutureNet was required to register.

7. The Commission is authorized to impose fines upon Energy Service Providers pursuant to §§ 2107 and 2114.

8. The Commission adopted a set of principles, distilled from earlier Commission decisions, to use as guidelines in assessing penalties in Decision 98-12-075.

9. The purpose of fines is to deter future violations.

10. The severity of the offense and the conduct of the utility are factors the Commission uses in setting a fine.

11. The Commission has limited jurisdiction over Energy Service Providers.

12. The public interest requires that the newly deregulated electricity markets provide evenhanded competition among reliable service providers.

13. The public interest requires significant deterrence of further violations of the Energy Service Provider statutes.

14. No Commission decision addresses failure to register as an Energy Service Provider in a factual circumstance similar to this proceeding.

15. The public interest requires that the fine range be bounded by the number of days FutureNet offered electric service to residential and small commercial customers.

16. Deterrence of future violations supports a fine in the upper reaches of the range but this amount should be partially stayed because no consumer was actually transferred nor did a customer incur direct financial loss.

17. The public interest in effectively deterring further violations of the §§ 394 - 396 requires that FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin, jointly and severally, pay a fine of \$1.3 million to the General Fund of the State of California, with an additional amount of \$700,000 stayed.

18. The public interest requires that should FutureNet, any corporate affiliates, any of its officers, directors, management employees or contractors, or 5% or greater shareholders, seek registration as an Energy Service Provider, such registration request must be in the form of a formal application to the Commission as provided in § 394(d) and that any Energy Service Provider which is engaged in a business relationship with any of the above-listed entities with respect to offering electric service to residential or small commercial customers must disclose such relationship via a letter to the Director of the Commission's Consumer Services Division within 30 days of the effective date of this decision or 30 days from the commencement of such relationship.

ORDER

Therefore, **IT IS ORDERED** that:

1. FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin shall cease and desist from offering electric service to residential or small commercial customers.

2. All registered Energy Service Providers engaged in a business relationship with respect to offering electrical service to residential or small commercial customers with FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, Alan Setlin, any corporate affiliates, any of its officers, directors, management employees or contractors, or 5% or greater shareholders, shall disclose such relationship via a letter to the Director of the Commission's Division of Consumer Services within 30 days of the effective date of this order or 30 days from the initiation of the relationship.

3. This decision shall be served on all Energy Service Providers.

4. FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin shall pay a fine of \$1.3 million to the General Fund of the State of California within 180 days of the effective date of this order.

5. An additional fine amount of \$700,000 is stayed but such stay will be reviewed by the Commission should any respondent fail to comply with future directives of the Commission or applicable statutes.

6. Should FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, Alan Setlin, any corporate affiliates, any of its officers, directors, management employees or contractors, or 5% or greater shareholders, seek to register as an Energy Service Provider, such registration must be through the formal application process, and this proceeding and its outcome must be disclosed.

7. This proceeding is closed.

This order is effective today.

Dated June 10, 1999, at San Francisco, California.

RICHARD A. BILAS

President

HENRY M. DUQUE

JOSIAH L. NEEPER

LORETTA M. LYNCH

JOEL Z. HYATT

Commissioners