

Decision 99-11-031

November 4, 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 Future Net, Inc., and Future New Online, Inc., dba; Future Electric Network, and Individuals in Control of Operations; Alan Setlin and Larry Huff.

I.98-04-033
(Filed April 23, 1998)

**ORDER GRANTING LIMITED REHEARING
OF DECISION (D.)99-06-055 TO MODIFY THE DECISION
CONCERNING THE LIABILITY OF ALAN SETLIN, AND
DENYING REHEARING IN ALL OTHER RESPECTS**

I. SUMMARY

By this decision, we hereby grant a limited rehearing so that we may modify language in the text of Decision (D.) 99-06-055 to remove Mr. Alan Setlin from being held jointly and severally liable for payment of the fine imposed in this matter. Rehearing of D.99-06-055, as modified, is denied in all other respects.

II. BACKGROUND

On April 23, 1998, we issued an Order Instituting Investigation and Order to Show Cause (0II) in response to the Commission 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 (PU) Code § 394(a),²

¹ FutureNet, Inc., FutureNet Online, Inc., dba Future Electric Networks, and Alan Setlin as "FutureNet") were named respondents in this proceeding. Larry Huff was also named as a respondent but never appeared, and no further action was initiated by the Commission.

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.³

The OII directed respondents to answer 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 May 27, 1998, FutureNet filed a Statement of Jurisdictional Objections claiming that we did not have in personam, or personal, and subject matter jurisdiction and that we could therefore not commence the proceeding. It also challenged our authority to impose sanctions against it directly. On that same day FutureNet filed an application for rehearing of the OII asserting that we did not have jurisdiction over it. It then filed a Motion for a Stay of Proceedings on June 1, 1998 asking that the hearing schedule set to begin on June 16, 1998 be stayed until the application for rehearing was ruled upon.

The Commission's Consumer Services Division (CSD) responded to all three FutureNet pleadings on June 3, June 4, and June 11, 1998 arguing that those pleadings were without merit, and asserting that FutureNet's application for rehearing was untimely since neither findings of fact nor conclusions of law had been determined. FutureNet reasserted its arguments on June 8, 1998 in its reply to CSD's responsive pleadings.

³ The FTC action was filed on February 23, 1998. FutureNet was charged with violations of Section 5(a) of the FTC Act. After FutureNet was placed under a temporary restraining order, it settled with the FTC and agreed to restructure its compensation plans for new sales representatives. Those plans were deemed by the FTC to be unlawful pyramid schemes. It also agreed to pay one million dollars in restitution to all of the individuals who had signed up as sales representatives with the corporate entity. As part of the settlement, FutureNet was barred from engaging in pyramid or multi-level marketing schemes in the future. FutureNet was also prohibited from offering to sell or resell electric power or other energy services unless it first

FutureNet's pleadings were denied on June 11, 1998 by an Administrative Law Judge ("ALJ") ruling. That ruling also held that the case would proceed in three phases. The first phase would involve the order to show cause hearing where we would determine interim relief; the second phase would address permanent prospective relief as well as sanctions for past conduct if such conduct was determined to be illegal, and the third phase would address FutureNet's lack of jurisdiction claims.

Commissioner Josiah L. Neeper and ALJ Maribeth A. Bushey conducted the show cause hearing on June 16, 1998 for the purpose of determining the imposition of the appropriate interim relief. 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. On June 17, 1998, CSD and FutureNet announced that they had reached an agreement which would apply to FutureNet's marketing activities during the pendency of this matter. This included FutureNet's agreement to cease and desist from any unlawful activity. Further hearings were suspended and the ALJ's decision approving the interim agreement became the decision of Commission in FutureNet, Inc., Decision 98-08-041. On August 6, 1998, FutureNet's application for rehearing was denied.

On December 15, 1998, hearings on sanctions and prospective limitations began, with the record to include the previous hearing record. On January 11, 1999, the parties submitted initial briefs, with reply briefs filed on January 22, 1999. On March 1, 1999, the presiding ALJ mailed her proposed decision to the parties.

FutureNet filed an appeal of the ALJ's March 1, 1999 proposed decision on March 25, 1999. FutureNet alleged in its appeal that we lacked personal jurisdiction over the OII's respondents, as well as over the subject matter,

registered with and obtained a valid license from the appropriate state and local authorities.

that we cannot directly impose fines, that the record was misconstrued, that no showing of wrongful or evil intent was made, that the fine was at odds with precedent, and that the fine violated the United States. and California Constitutions.

On June 10, 1999, we issued D.99-06-055 ("the Decision") in this matter. By D.99-06-055, we made the following changes to the presiding officer's decision in response to FutureNet's appeal:

- We clarified that we had properly based our assertion of personal jurisdiction over respondents on their presence in this state and because they participated fully in this proceeding (see D.99-06-055, mimeo, Conclusion of Law, #2.);
- We included additional discussion concerning the factual evidence in the record which supports our determination that FutureNet offered electrical service to residential or small commercial customers (see D.99-06-055, mimeo at pages 11 - 13.);
- We added a Commission decision citation, Communication TeleSystems International, D.97-05-089, mimeo, at p. 24, which responds to and negates respondents' alleged requirement of "evil intent" or a mental state element;
- We changed the duration of time FutureNet was deemed to have been operating as an Energy Service Provider (ESP) to 132 days, which consequently changed the upper limit of the statutory fine range. This resulted in the imposition of a \$1.3 million fine (see D.99-06-055, mimeo, Conc. of Law #17); and,
- We added and stayed an additional fine amount of \$700,000 (Id.).

On July 9, 1999, FutureNet Online, Inc. and Alan J. Setlin filed an application for rehearing of D.99-06-055 in which FutureNet renewed its objections to our assertion of our jurisdiction over FutureNet's corporate entity, over the named individual, over the subject matter at issue, regarding the imposition of monetary penalties, and to the sufficiency of the record evidence. CSD filed an out-of-time response to FutureNet's application for rehearing on

July 27, 1999. We find CSD's reasons for the late filing of its response reasonable and therefore accept the response for filing.

III. DISCUSSION

A. Jurisdiction Was Properly Asserted Over FutureNet And Alan Setlin In This Matter.

- 1. Personal jurisdiction was properly asserted over FutureNet and Alan Setlin due to, among other factors, their presence in this state and because they participated fully in this proceeding.**

FutureNet renews its claim in its application for rehearing that the limited nature of its special appearance at the June 16, 1998 hearing preserved its lack of in personam jurisdiction in this proceeding. It argues that consequently we did not have jurisdiction over either the corporate entity or the named individual, Alan Setlin.

In D. 99-06-055, we found that we had 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. (D.99-06-055, mimeo at p.8; 1 Cal. Jur. 3d (Rev) Part 2, Actions § 124.) This is consistent with Section 410.10 of the California Code of Civil Procedure which permits courts to exercise jurisdiction over corporations and unincorporated associations that appear in the state and that participate in state proceedings. Section 410.10 also permits jurisdiction over corporations that have incorporated or organized in the state, that consent to its jurisdiction, that do business in the state, that do an act in the state, that cause an effect in the state by an act or omission elsewhere, or that appoint an agent to appear in the state. FutureNet is incorporated in the State of California and is therefore a domestic corporation. Therefore, we also can claim jurisdiction over FutureNet based on that fact.

Consistent with Section 410.10, we have also asserted proper in personam jurisdiction over Alan Setlin. That section provides for in personam jurisdiction over natural persons based on presence, domicile, residence, citizenship, consent, appearance, doing business in a state, doing an act in a state, causing an effect in a state by an act or omission elsewhere, ownership, use or possession of a thing in a state, as well as other relationships to the state. Alan Setlin is the CEO and president of FutureNet Online, inc. He conducts business for FutureNet Online, Inc., FutureNet, Inc., and Future Electric Networks within the state. He has been domiciled in Beverly Hills, California since July 13, 1995.

FutureNet's claim that its "special appearance" entered on June 16, 1998, preserved our lack of in personam jurisdiction also fails. A special appearance is a method of appearing before a court for the sole purpose of objecting to lack of jurisdiction of the person without submitting to jurisdiction. (See Davenport v. Superior Court (1920) 183 C. 506; Restatements 2d, Judgments Section 10; Restatements 2d, Conflict of Laws Section 81.) However, if a party makes a special appearance, the party must confine itself solely to the issue of jurisdiction. Here, FutureNet went beyond that issue and presented arguments on the merits. By doing so, its special appearance became a general appearance making it subject to our jurisdiction. (See Green v. Workers' Compensation Appeals Board (1993) 6 C.4th 1028, 1037.) Having been present during the proceeding and having availed itself of this Commission's practices and procedures throughout the course of this matter, FutureNet submitted to our jurisdiction. (See 2 Witkin, Cal Procedure [4th Edition. 1996] Jurisdiction Section 205, p.771; Pfieffer v. Ash (1949) 92 C.A. 2d 102.)

2. Subject Matter Jurisdiction Was Properly Asserted Over FutureNet In This Proceeding Because FutureNet Was Found To Have Offered Electrical Services To Consumers In This State.

FutureNet incorrectly claims that we did not have subject matter jurisdiction to determine if the acts committed by it were unlawful. While in personam jurisdiction focuses on the court's authority to enter a judgment binding on the particular defendants involved, subject matter jurisdiction focuses on the nature of the dispute.

The Legislature granted this Commission certain authority and jurisdiction over the activities of entities offering electrical services. (See Pub. Util. Code Sections 216, 217, 218, 394.2(a), 394(a).) Section 394(a) mandates that any entity offering electrical services must register with the Commission. (D.99-06-055, mimeo, at P. 8.) This authority is not limited to registered entities, and encompasses all entities that offer electrical services. (See Re: Electrical Services Industry Restructuring [D.98-03-072] (1998) _ CPUC2d __, 1998 Cal. PUC.LEXIS 184,163-164.) Section 394(a) was meant to ensure that consumers would be adequately protected in the restructured electric industry from all entities that offered electrical services whether they registered with this Commission or not. Since FutureNet offered such services to the public, this Commission had subject matter jurisdiction over this proceeding.

FutureNet's counter-argument, that it was not under our subject matter jurisdiction since it had not registered as an electrical service provider, would allow entities which offer electrical service to residential and small commercial customers to avoid our jurisdiction entirely by simply declining to register. FutureNet's suggestion that the Legislature intended to place this duty on the overburdened civil court system, and not on this Commission, is unsupported by specific statutory language and unreasonable, given this Commission's expertise and adjudicatory capacity.

B. This Commission Is Authorized To Impose Fines Upon Energy Service Providers And Their Agents Pursuant To Section 2107.

FutureNet alleges that we acted beyond our authority when, in D.99-06-055, we directly imposed penalties on FutureNet and Alan J. Setlin pursuant to Section 2107.⁴ While the Commission certainly has the authority to impose penalties on agents of Energy Service Providers, for the reasons discussed below in Section F, we find that the record does not support holding Alan Setlin jointly and severally liable for payment of the penalty. FutureNet argues that Section 2104⁵ prohibits us from imposing a fine directly on the company because it allegedly requires us to sue FutureNet in a superior court in order to have a fine assessed. FutureNet's interpretation of Sections 2107 and 2104 is wrong as evidenced by the plain language of Sections 394.25, 2107 and 2104.

As discussed in the Decision, Section 394.25⁶ expressly authorizes us to enforce Sections 2107 and 2108 against registered Energy Service Providers. We treated FutureNet as a registered entity for the purpose of applying penalties because FutureNet was required to register prior to offering to sell electrical energy to the public. Because the penalty levels for violation of Section 394 are not otherwise specifically provided by statute, the range of fines we may impose is set by Section 2107.⁷ Section 2107 authorizes fines of between \$500 and \$20,000 for each offense. We determined that a \$1.3 million fine was the appropriate penalty in this instance.

⁴ Section 2107 provides that any public utility which violates any provision of the Constitution or the Public Utilities Code, or any order or requirement of this Commission, in a case in which penalties have not otherwise been provided, is subject to penalties of \$500 to \$20,000 for each offense.

⁵ Section 2104 provides that "[a]ctions to recover penalties under this part shall be brought in the name of the people of the State of California, in the superior court" in the county or city in which the cause arose. (Emphasis added.)

⁶ Section 394.25 states, "The Commission may enforce the provisions of Sections 2102, 2103, 2104, 2105, 2107, 2108, and 2114 against registered entities as if those entities were public utilities as defined in these code sections."

⁷ Section 2108 further provides that each day of a continuing violation is a separate offense.

broad authority is supplemented by additional specific fine authority of up to \$2000 for each violation or compliance failure by any public utility, corporation or person with CPUC regulations and orders. This bill raises the maximum fine from \$2000 to \$20,000. The CPUC must go to the Superior Court to collect any fines which are levied." (Senate Third Reading of Sen. Bill No. 485 (1993-1994 Reg. Sess.), as amended April 19, 1993, p.1; emphasis added.)

The interpretation of Section 2107 provided by the Legislature above is entirely consistent with the manner in which we have interpreted our fining authority. Any other interpretation would not make administrative sense. It is doubtful that the Legislature would have authorized us to hear complaint proceedings and institute investigations regarding allegations of wrongdoing by a utility if the Legislature did not also intend that we would be able to levy sanctions, including a fine when appropriate, to enforce our orders and the law. "Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers - one that is practical rather than technical, and will lead to a wise policy rather than to mischief or absurdity." (People v. Aston (1985) 39 Cal. 3d 481, 492.)

When the Legislature amended Section 2107 in 1993, it made no reference as to how this Commission was, or should be, using this statute. This is further evidence that we have been correctly interpreting Sections 2104 and 2107. This presumption is consistent with the holding in Moore v. California State Bd. Of Accountancy, (1992) 2 Cal.4th 999, 1017. In this decision, the Court held that "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." (Id.) It must be assumed, unless shown otherwise, that the Legislature had knowledge as to how this Commission was applying Section 2107 when it amended the statute by increasing the maximum fine to \$20,000 from \$2,000.

In sum, Section 2107 provides us with authority to directly impose penalties against public utilities, and we interpret Section 2104 as the Legislature's way of assisting it in situations where utilities refuse to pay Commission-imposed fines without court intervention.⁸ Having been granted the authority by the Legislature to determine whether entities have met the statutory registration requirements under Section 394 prior to offering electrical service to the public, and finding that FutureNet did not do so, we lawfully imposed the \$1.3 million fine on FutureNet, pursuant to Section 2107.

C. The Record Amply Supports The Penalty Imposed By The Commission.

FutureNet also challenges whether the findings of fact in D.99-06-055, upon which the assessed \$1.3 million fine is based, are supported by the record. Its primary contention is that our sole evidentiary basis for finding that FutureNet violated Section 394(a) was Exhibit 1, the first marketing brochure which FutureNet sales representatives used to solicit customers. It contends that its first brochure was not so flawed as to be relied upon as the sole basis for the fine assessed against the company. It argues that even if this Commission was correct in its finding that a violation had occurred, we failed to adequately consider the remedial steps FutureNet took to correct the alleged problem. It further alleges that the time period relied upon for assessing the fine is in error.

Contrary to FutureNet's claim, we did not solely rely on FutureNet's first brochure when we determined that FutureNet should pay the fine of \$1.3 million. We considered numerous facts in the evidentiary record when assessing the appropriate penalty. The totality of circumstances led us to determine that the actions of FutureNet and its communications with the public

⁸ FutureNet cites Dimaggio v. Pacific Bell (1992) 43 CPUC 2d 392, 395, in support of its argument we have previously held that Section 2104 requires us to go to superior court to impose fines. As D.99-06-055 notes, that decision's holding was specifically overruled in Re Communications TeleSystems is International, [D.97-10-063, fn. 7.] (1997) ___ Cal. P.U.C.2d ___.

demonstrated a pattern by the company of continuously representing and holding itself out as an Energy Service Provider. This is in spite of the fact that FutureNet never registered with this Commission as an Energy Service Provider, as required under Section 394.

An examination of the printed materials created and disseminated by FutureNet, its web site, and the statements made by its sales representatives to the public clearly indicated to us that FutureNet had not presented itself solely as a marketing energy for Eastern Pacific Energy, a separate and distinct Energy Service Provider, as FutureNet has alleged.

The Decision contains more than adequate findings of fact and conclusions of law, as well extensive discussion in its text, in support of its determination that FutureNet violated the law. As the Decision notes, FutureNet obtained between 10,000 and 12,000 signed letters of authorization from end-use customers to transfer residential and small commercial electrical service. FutureNet's marketing materials used to solicit those customers presented the company as the Energy Service Provider. Therefore, the persons that signed all those letters of authorization very likely did so under the impression that they had signed with FutureNet as their Energy Service Provider. Although no customers appear to have been transferred, no party disputed that electrical service was offered to residential and small commercial customers by sales representatives of FutureNet.

Evidence was presented which negates FutureNet's claim that it was only offering services as a marketer on behalf of Eastern Pacific Energy. This included the order form portion of FutureNet's first brochure. This form stated: "I wish to receive my electricity through Future Electric Networks, beginning immediately." The return address is that of Future Electric Networks. The brochure names FutureNet in 13 places and there is only one reference to

Eastern Pacific by name and four by its initials. The brochure leaves the impression that there was only one entity involved, and that FutureNet was not separate from it. Both, David Koerner, in-house Counsel for FutureNet, and FutureNet's own witness, Jeff Wilson, a marketing expert from Eastern Pacific Energy, acknowledged that a reasonable person viewing the first brochure would think the electrical service offered was being provided by FutureNet. (D.99-06-055, mimeo, at p. 7; CSD Response, at p. 21.)

Many of FutureNet's sales representatives that solicited end-use consumers utilized the first brochure, and furthermore, made unsubstantiated representations to those customers about savings of between 25% to 40% if they signed up for service with FutureNet. FutureNet's internet website was found to have made the same unsupported representations to the public. Those facts and other testimony, considered in light of the whole record, provided us with substantial evidence to find a violation of Section 394 and to assess the fine we imposed.

FutureNet argues that, assuming for argument's sake that its actions were in violation of the statute, we nonetheless failed to take into account the reasonable steps FutureNet took to ensure compliance with the registration requirement. As reasonable responses on its part, FutureNet points to the creation, dissemination, and publication of a second brochure and the removal of its website.

FutureNet's arguments have no merit. The second brochure, developed in April, 1998, also contained unlawful language. It created the impression that FutureNet would be reselling electricity it purchased from Eastern Pacific to the customer. Offering electric service as a reseller without first registering with the Commission is a violation of Section 394(a). Furthermore, FutureNet was not responsive early on to requests from the Commission staff for it

to correct the violations. It only responded after the initiation of the OII, when it had received three prior warnings.

FutureNet also argues in its defense that neither this Commission nor our staff provided it with adequate guidelines that placed it on notice that its actions were not in compliance with the law. However, FutureNet was solely responsible for the dissemination of all materials as well as the manner in which those materials were used and distributed. It therefore was responsible for ensuring that the use of its brochures complied with the law. As the Decision notes, a cursory review of the statute would have revealed that soliciting customers in FutureNet's own name implicated registration requirements.

FutureNet is not the new and naive company that it portrays itself to be. This Commission considered in its deliberations FutureNet's prior experience in the provision of electrical energy to the public. The record shows that it had previous and extensive experiences in other jurisdictions which should have made FutureNet aware of distinctions between offering electrical energy as a marketer and serving as an Energy Service Provider. For example, 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 FutureNet was "holding itself out as a provider of retail electric service in the State of Nevada."

Also, FutureNet had earlier settled with the FTC in a case that involved similar charges of violations. (See Background Section, supra.) As part of the settlement, the FTC explicitly prohibited FutureNet 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."⁹ (See Background Section, supra.)

FutureNet also challenges Finding of Fact 6 which found that the company 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. (See D.99-06-055, mimeo, at p. 20, Finding of Fact No. 6.) FutureNet claims that it ceased soliciting end-use consumers in mid-February, 1998 when it stopped printing the Exhibit 1 brochure materials. However, while FutureNet may have ceased the printing of the brochure at that time, the record indicates that these materials apparently continued to be used by sales representatives until at least June, 1998. (Tr. Vol. 1, p. 33, lines 11-22.) FutureNet did not show that it halted the distribution of these materials by its sales representatives either prior to or even after that date. There is no evidence that the Exhibit 1 brochure materials have yet been removed from the public stream. It is uncertain whether FutureNet's sales representatives are now informed about the FTC settlement agreement and the resulting restitution fund. (CSD Response, at p. 25, citing Tr. Vol. 1, pp. 42, 82, and 90.)

The Decision did consider the mitigating factors of no direct consumer harm or financial loss to FutureNet. Those mitigating factors resulted in staying one-third of the fine, leaving a fine of \$1.3 million, rather than the \$2 million initially assessed. Should FutureNet violate any related statutes or Commission directives in the future, we have cautioned that we will review whether the \$700,000 should remain stayed.

Thus, this Commission did not arbitrarily investigate FutureNet with the purpose of singling it out and harassing it. The underlying investigation

⁹ As part of the settlement with the FTC, FutureNet agreed to pay \$ 1.0 million in restitution to the aggrieved parties.

was initiated in response to numerous public complaints and as part of the Legislature's decision to place the registration responsibility over Energy Service Providers with the Commission. As D.99-06-055 states, FutureNet's failure to register undermines the integrity of our administrative process and impedes our statutory duty to protect consumers from unscrupulous Energy Service Providers. (See D.99-06-055, mimeo, at pp. 8-11, 20, Finding of Fact No. 8.)

D. The Decision Does Not Violate The "Excessive Fine" Clauses Of The U.S. Constitution And The Due Process Clause Of The California Constitution.

FutureNet argues that the Decision's imposition of the fine is excessive and inappropriate under the U.S. and the California Constitutions. It cites various arguments in support of its claim, none of which compel rehearing. The imposed fine was necessary to prevent further offenses and to give FutureNet an opportunity to rehabilitate itself. The amount of the fine is appropriate in light of FutureNet's actions in ignoring its statutory registration requirements and its failure to cooperate with the Commission staff to bring its actions into compliance.

Electricity markets are newly competitive and unfamiliar to consumers who are unfamiliar with their options and lack experience in selecting providers. The potential for exploitation of vulnerable consumers requires that the Commission enforce to the fullest extent possible its consumer protection standards to achieve its goal of deterring further violations of this kind. We therefore found that the facts support a fine in the upper reaches of the range provided under Section 2107. (D.99-06-055, mimeo, at p. 19.) However, although FutureNet's failure to comply with our requirements seriously affect our ability to discharge our duties, we noted in D.99-06-055 that we wish to reserve the highest portions of the range of allowable fines for more egregious violations. (Id.) Thus, based on 113 total days of violations and the statutory fine limits found in Sections 2107 and 2108, we came up with a range of possible fines from

\$56,500 to \$2,260,000. We determined that achieving our goal of deterrence required imposing a fine of \$2 million.

As previously noted, the Decision did consider FutureNet's mitigating claim that no direct consumer harm occurred. We noted in D.99-06-055, however, that customers could have made business and personal decisions based on FutureNet's savings promises. (D.99-06-055, mimeo, at p. 19.) However, since no quantification of this amount is reflected in the record, we decided to stay one third of the fine, leaving a fine of \$1.3 million payable.

In its rehearing application, FutureNet argues for the first time that we failed to consider the ability of the company to pay the imposed fine. However, FutureNet provided no evidence which shows that the fine is disproportionate to FutureNet's ability to pay.

Accordingly, we found that the fine amount is proportionate to FutureNet's unlawful actions considering the company's sophistication, its compliance record, and the nature of its violations.

E. The Fine Imposed In The Decision Does Not Violate The Due Process Clause Of The California Constitution.

FutureNet argues that the imposition of the fine violates its due process rights under the California Constitution. However, it has failed to identify specifically what due process violations occurred. Consistent with the California Constitution, FutureNet was provided with adequate notice and opportunity to be heard throughout the proceeding. The OII itself gave notice to FutureNet as to what the charges against it were and, in paragraph 2(a), notified FutureNet that a fine could be imposed under Section 2107 should it be shown that violations of the law and the Commission's Rules occurred. FutureNet had the opportunity to be heard since it fully participated in the hearings and filed pleadings in this matter. The findings and conclusions upon which the fine is based are fully supported by

record evidence. Thus, FutureNet was not denied the due process protections afforded by the State Constitution.

F. The Decision Erred By Imposing A Fine On Alan Setlin Without Establishing That He Is Individually Liable.

Our Decision held that all named respondents, including Alan Setlin, shall be jointly and severally responsible for payment of the \$ 2 million fine. (D.99-06-055, mimeo, at p. 19; Finding of Fact No. 17.) FutureNet argues in its rehearing application that we cannot impose a fine on Mr. Setlin as an individual because Mr. Setlin is not a public utility or registered entity,¹⁰ and because there is no evidence in the record that establishes his individual liability. It contends that the Decision did not address whether Mr. Setlin is the “alter ego” of FutureNet or whether he personally committed unlawful acts that would justify making him jointly liable for the fine. FutureNet notes that the issue of whether he is the “alter ego” was not even alleged at the hearing. FutureNet states that Mr. Setlin is only a high ranking officer of the company, and a corporation is “ a distinct legal entity from its stockholders and officers,” citing Coral Communications, D.99-04-033, mimeo, at p. 8, [citing Merco Constr. Engineers Inc. v. Municipal Court (1978) 21 Cal.3d 724, 729-30].

FutureNet’s argument has merit. There is no discussion, finding or conclusion in the Decision which establishes a basis for finding that Mr. Setlin (as an individual), along with the company, can be made jointly and severally responsible for payment of the fine. Therefore, we will modify D.99-06-055 to remove Mr. Setlin from being held jointly and severally liable for payment of the fine.

¹⁰ It is noted that we have the authority to fine individuals, not just public utilities or registered entities, as long as there is evidence to support such a fine. (See, e.g., PU Code Sections 2111 and 2114.)

IV. CONCLUSION

For the reasons discussed above, we are granting limited rehearing of D.99-06-055 to modify the Decision to remove Mr. Alan Setlin from being held jointly and severally liable for payment of the fine imposed in this matter.

Rehearing of D.99-06-055, as modified, is denied in all other respects.

Therefore, **IT IS ORDERED** that:

1. A limited rehearing is granted to make certain modifications to the Decision.
 - (a) The last sentence in the second full paragraph of page 19 shall be modified to read as: "FutureNet shall be responsible for payment of this sum to the General Fund of the State of California."
 - (b) The named individual, Alan Setlin, shall be deleted from Conclusion of Law 17, at page 22.
 - (c) The named individual, Alan Setlin, shall be deleted from Ordering Paragraph No. 4, at page 23.
2. The Executive Director shall serve all parties in Investigation 98-04-033 with a copy of today's decision.
3. Except as ordered above, rehearing of D.99-06-055, as modified herein, is denied in all other respects.

This order is effective today.

Dated November 4, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners