

Decision 05-10-016

October 6, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

UTILISOURCE, f/k/a EASTERN
PACIFIC ENERGY, INC., a California
Corporation,

Claimant,

vs.

SOUTHERN CALIFORNIA EDISON
COMPANY, a California Public Utility,

Defendant.

C.04-05-014
(Filed on May 10, 2004)

ORDER DENYING REHEARING
OF DECISION (D.) 05-06-030

I. SUMMARY

In D.05-06-030, we denied Utilisource’s complaint against Southern California Edison Company (“Edison”) for failing to put its customers on direct access. Utilisource, an Electric Service Provider (“ESP”),¹ attempted to submit direct access service requests (“DASRs”) for certain customers in the Edison service territory in October 2002. Edison rejected the request pursuant to *Implementation of Direct Access Suspension Decision* [D.02-03-055] (2002) ___ Cal.P.U.C.3d ___, which set forth rules for the implementation of the direct access (“DA”) suspension.² In D.02-03-055, we also affirmed as reasonable implementation deadlines of October 5 and November 1, 2001, as

¹ Formerly known as Eastern Pacific Energy, Inc.

² In accordance with Water Code Section 80110, the Commission in D.01-09-060 suspended direct access (“DA”), and made it effective as of September 21, 2001. (See *Direct Access Suspension Decision* (continued on next page))

agreed upon by ESPs after a Rule 22 meeting which discussed deadlines for DASRs. Those deadlines required all ESPs to respectively, provide a list of DA customers by October 5, and submit by November 1 relevant identifying information for those customers that have entered into timely direct access contracts, but for whom DASRs have not been submitted.

Utilisource filed a timely application for rehearing. Utilisource alleges the following: (1) the evidence does not support our Decision finding Utilisource had reasonable sufficient notice of the deadlines; (2) Utilisource was denied due process when Edison failed to provide notice that an ESP's failure to submit customer lists would later result in rejection of its DASRs; (3) the Commission wrongly concluded Utilisource is making a collateral attack on D.02-03-055; and (4) the rights of Utilisource's customers have been violated under their contracts.

Southern California Edison filed a response to the application for rehearing. Edison argues because Utilisource had never served customers in Edison's territory, and its predecessor (Eastern Pacific Energy, Inc.) had not served customers in Edison's territory since September 1999, Edison was not unreasonable for failing to provide notice of the deadlines to Utilisource, an inactive ESP. (Edison's Response, p. 3.) Edison argues by focusing on the issue of notice, Utilisource's attempts to obfuscate the meaning of D.01-09-060, and collaterally attacks D.02-03-055. (Edison's Response, p. 14.) Edison also claims Utilisource chose to effectively go out of business, and thereby willingly deprived itself (and its customers) of the benefit of their bargain. (Edison's Response, p. 13.)

We reviewed each and every allegation in the application for rehearing, and are of the opinion that Utilisource has failed to demonstrate legal error. Accordingly,

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[D.01-09-060] (2001) ___ Cal.P.U.C.3d ___, as affirmed by *Order Modifying Decision (D.) 01-09-060, and Denying Rehearing, As Modified ("Rehearing Order for D.01-09-060")* [D.01-10-036] (2001) ___ Cal.P.U.C.3d ___.)

good cause does not exist for granting rehearing. Therefore, Utilisource's application for rehearing of D.05-06-030 is denied.

II. DISCUSSION

A. Sufficiency of the Evidence

Utilisource first argues the evidence does not support our finding Utilisource had reasonable sufficient notice of the deadlines. (Application for Rehearing, pp. 2-3 & 15.)³ This argument has no merit.

The following evidence demonstrates the fact Utilisource received notice: D.01-09-060 provided Utilisource with sufficient notice there would be subsequent implementation of the suspension. (See *Direct Access Suspension Decision* [D.01-09-060], *supra*, at p. 8 (slip op.)) At the evidentiary hearing, Utilisource's Chief Executive Officer James Lezie admitted he reviewed the *Direct Access Suspension Decision* [D.01-09-060] "more or less contemporaneously from when [it] was issued." (R.T. Vol. 2, pp. 188:-190; see also, D.05-06-030, p. 12.) Lezie acknowledges his understanding that there would "some requirement" subsequently. (R.T. Vol.2, p. 178.) Despite any uncertainty Utilisource may have had, Utilisource was aware of subsequent Commission proceedings, and should have kept itself apprised of such future proceedings.

In fact, Utilisource had notice of the Rule 22 workshop held on October 2, 2001 (R.T. Vol. 2, p. 186.), but it made a business choice not to attend. It made this choice despite its concern "on [its] behalf as to whether this deregulation, as it was known, was going to continue and what opportunities there would be to really save customers money." (R.T. Vol. 2, p. 187 (Lezie/Utilisource).) If it had attended the Rule 22 workshop on October 2, 2001, Utilisource would have known the ESPs agreed the October 5 date was reasonable for the ESPs to submit names of eligible direct access

³ Since Utilisource believes that the evidence does not show that it had reasonably sufficient notice, it claims the Commission erroneously concluded that Utilisource had not complied with "all applicable laws, tariffs, and regulations," when Utilisource failed to meet the deadlines for submitting the lists. (Application for Rehearing, p. 20.)

customers, but a longer period—November 1st—would be necessary to submit account specific details.

Clearly, Utilisource felt it necessary to keep informed of the DA suspension decisions, including D.01-10-036, issued that same month. Lezie testified: “[W]e did see those decisions. Those were reviewed.” In addition, Lezie testified to Utilisource’s reaction to the *Implementation of Direct Access Suspension Decision* [D.02-03-055], *supra*, issued six months later: “We had – before this time we had heard through other sources, but unfortunately, after the time that was set up by the utilities to provide a list we had heard about that, and then this came out, and it essentially adopted those dates.” (R.T. Vol. 2, pp. 192 – 193.) Lezie admittedly knew of the deadlines, and yet, in the span of seven months between September 2001 and March 2002, Utilisource failed to contact either Edison or the Commission to inquire of its obligations. (R.T. Vol. 1, p. 116.) In fact, Utilisource’s only communication with Edison during that time was a notification of a change of phone number. (See D.05-06-030, pp. 9-10; R.T. Vol. 1, p. 116.) Thus, from the time Lezie reviewed D.01-09-060 until Utilisource finally submitted its DA customer list to Edison in October 2002, a full year had already passed.

Therefore, it is Utilisource’s own inaction that resulted in its failure to meet the deadlines that were agreed to by the ESPs and later affirmed by *Implementation of Direct Access Decision* [D.02-03-055], *supra*.

B. Due Process

1. Interpretation of the DA Suspension Decisions

Utilisource next argues, contrary to our interpretation, both the *Direct Access Suspension Decision* [D.01-09-060] and the *Direct Access Implementation Decision* [D.02-03-55] affirmatively order the utilities to notify all ESPs of the DA customer identification deadlines. Utilisource asserts Edison’s failure to provide adequate notice constituted a violation of due process. Utilisource’s due process arguments are without merit.

We determined the issue herein is not about the utilities failure to notify all ESPs of the DA customer identification deadlines; rather the issue is whether the utility was responsible to notify those ESPs, such as Utilisource, that appeared to no longer be an ESP.⁴ There was no such requirement in D.01-09-060, and none was needed. In D.01-09-060, we stated:

“We direct on the utilities not to accept any direct access service requests (DASRs) for any contracts executed or agreements entered into after the effective date of this decision. Steps that the utilities might take to ensure compliance with this order may include obtaining from each energy service provider a list of relevant identifying information for those customers that have entered into timely contracts, but for whom DASRs have not been submitted.”

(*Direct Access Suspension Decision* [D.01-09-060], *supra*, at p. 9 (slip op.), (emphasis added).) Logically and implicitly, this meant the utilities would need to notify all active ESPs in order to ensure compliance. However, contrary to Utilisource’s assertion, none of our decisions require the utilities to notify those that were no longer ESPs.⁵ Since Utilisource was not an active ESP, the utilities acted reasonably in notifying only active ESPs.⁶

⁴ Even though Utilisource did mention to Edison it intended to become an active ESP throughout 1999 and 2000, Utilisource made no outward effort to reestablish itself as an active ESP after the Commission suspended its ESP registration in May 2001. (See Application for Rehearing, pp. 15-18; see also, D.05-06-030, p. 4; R.T. Vol.1, p. 17 (Navarrete/Edison).) Utilisource failed to take the necessary steps, including extending its bond, and resolving with the Commission staff its suspension as a registered ESP. (See D.05-06-030, p. 4; see also, Exh. 100 & Exh. 101, (Edison); Exh. 7 & Exh.11 (Utilisource).) In fact, on November 2, 2001, Utilisource sent a letter to ESP Registration in the Energy Division requesting that its ESP bond be returned to the issuer. (See D.05-06-030, p. 10.) That letter stated, “Utilisource has not served any customers for over a year and a half. If we decide in the future to serve customers, we will reinstate our bond at that time.” (See D.05-06-030, p 10.) Further, at the evidentiary hearing, Lezie testified that Utilisource had no procurement contracts at the time of the DA Suspension Decision, and admitted Utilisource was “not purchasing power now.” (R.T. Vol. 2, p. 184.)

⁵ The reference to “inactive” also includes suspended, as well as no longer doing business as an ESP.

⁶ Utilisource indicated that Edison is not the only utility that allegedly did not tell Utilisource about the deadlines. (R.T. Vol. 2, p. 196.) There are pending proceedings, C. 04-12-025 and C. 04-12-026, involving PG&E and SDG&E, respectively, regarding the deadlines, and we note that today’s decision is not intended to dispose of or prejudice those proceedings.

The fact we dealt with the same issue of notice in *Implementation of Direct Access Suspension Decision* [D.02-03-055], *supra*, at p. 20 (slip op.), does not mean notice to inactive or suspended ESPs were subsequently required. In that decision, there was no need to order utilities to notify the ESPs of the deadlines, as the deadlines had since passed. In D.02-03-055, we simply observed: “The utilities had notified ESPs of the deadlines.” (*Id.* at p. 20 (slip op.); see also, D.05-06-030, p. 19.) D.02-03-055 merely affirmed the agreements made at the Rule 22 meeting on October 2, which Utilisource could have attended or otherwise followed-up on what happened.⁷

Utilisource argues the correct notice it should have received was Edison’s email received by other ESPs. However, the failure to receive Edison’s email does not eliminate the fact that if Utilisource attended the October 2, 2001 workshop or requested a report of the workshop’s discussions, it would have learned of the deadlines agreed to by the ESPs.⁸ Therefore, the fact Utilisource did not receive Edison’s email does not

⁷ We also assumed that notice had already been provided to the ESPs. As D.02-03-055 states, in relevant part:

“The utilities shall implement the suspension as set forth below.

1. ESPs shall have provided by October 5, 2001 a list of names of all customers with direct access contracts in place as of September 20, 2001.

At the October 2, 2001 workshop, ESPs (including several ARem members) agreed that the October 5 date was reasonable for ESPs to submit names of eligible direct access customers, but that a longer period, until November 1, would be necessary to submit account specific details. Establishing a list of eligible customers within a reasonable time was suggested as an implementation step by the Commission in D.01-09-060. The October 5 date for customer names, and the November 1 date for account specific details are fair – they are based on what ESPs said they could meet, and each utility notified ESPs in advance in writing that failure to submit names and account specific details as of the deadlines would lead to later DASR rejection. The October 5 and November 1 dates do not require that the utility processed the DASR by those dates.”

(*Implementation of Direct Access Suspension Decision* [D.02-03-055], *supra*, at p. 20.)

⁸ Utilisource argues it requested Edison to provide information from workshops that it could not attend, and cites an email from Tracy Rush on June 6, 2000, and a letter dated June 7, 2001. (Application for Rehearing, p. 26.) However, given the timing of these requests, neither is persuasive to show Utilisource was proactive in performing its obligations as an ESP in light of the DA suspension.

constitute legal error. Accordingly, we correctly determined Utilisource's due process rights were not violated.

If we were to conclude otherwise, we would be creating an exception for Utilisource. This exception would result in rewarding Utilisource for its own failure to keep adequately informed about Commission proceedings, decisions, rules and regulations, including its failure to attend the October 5 Rule 22 workshop or follow-up on the workshop meeting it could not attend.

2. Utilisource's Obligation to Inform Itself of Applicable Commission Decisions and Proceedings

Utilisource next disputes our conclusion Utilisource breached its obligation, as set forth in *Utilisource v. Southern California Edison Company* [D.04-05-030, p. 28 (slip. op.)] (2004) ___ Cal.P.U.C.3d ___, to "inform itself of applicable Commission decisions and proceedings that may impact its business." (Application for Rehearing, p. 20.) Utilisource disagrees it is required to attend rule-making meetings, interpret Commission decisions and predict the actions of the Commission well before the Commission took the subject action. (Application for Rehearing, p. 22.) Utilisource argues its obligation is undermined by Edison's overarching responsibility to provide notice as required by D.01-09-060 and D.02-03-055. (Application for Rehearing, p. 21.) This argument has no merit.

Utilisource seems to argue it should not be responsible for performing all necessary business obligations of an ESP, including knowing the laws, rules, and regulations of the California Public Utilities Commission. However, this is counter to Utilisource's responsibilities that it assumed in becoming an ESP. For example, Utilisource's Energy Service Provider Agreement with Edison demonstrates it accepts the company must "remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements."⁹ (D.05-06-030, p. 12; Complaint of Utilisource, Exh.

⁹ Compare Edison's Energy Service Provider Agreement No. 1029 with Utilisource, Section 2.1. (Complaint of Utilisource, Exh. No. 1.)

No.1.) Even Utilisource's CEO Lezie acknowledges Utilisource is "required to be aware of the decisions and rules of the CPUC." (R.T. Vol. 2, p. 177; see also, D.05-06-030, p. 12.) Thus, Utilisource's apparent argument is contrary to the role it had assumed as an ESP.

Further, Utilisource appears to argue we should ignore the fact Utilisource had notice and an opportunity to participate in the Rule 22 workshop regarding the deadlines. However, regardless of the extreme concern it had regarding the developments in the energy industry, Utilisource offers no explanation as to why it chose not to attend the workshop or why it failed to obtain a report. Nor does Utilisource offer an explanation why it waited a whole year before submitting its customer list to Edison, although it knew of the relevant decisions involving the DA suspension. We also considered evidence Utilisource did not seek clarification from Edison prior to (or after) the issuance of D.02-03-055. (D.05-06-030, p. 28.) Essentially, Utilisource argues lack of notice should negate a whole year of inaction by Utilisource in which it could have easily complied with the DA suspension decisions. Thus, there is no law requiring us to excuse Utilisource for its own inaction. Thus, there is no legal error demonstrated.

C. Utilisource's Collateral Attack of D.02-03-055

Utilisource's due process claim constitutes a collateral attack on D. 02-03-055. It is important to note our *Direct Access Implementation Decision* [D.02-03-055] was initiated by Rulemaking 02-01-011, which was noticed on January 14, 2002. Utilisource admittedly kept abreast of the DA suspension proceedings and decisions since the issuance of D.01-09-060 in September 2001, and through March 2001 when D.02-03-055 was issued. (R.T., Vol. 2, p. 193.) If our statements regarding the reasonableness of the deadlines in D.02-03-055 were wrong, Utilisource could have been corrected this alleged mistake by participating in the rulemaking or even challenging the decision in an application for rehearing. Since it did not, Utilisource may not do so now, because such a challenge constitutes a prohibited collateral attack of D.02-03-055, as we correctly concluded in the Decision. (See Pub. Util. Code, §1709; see also, D.05-06-030, p. 20.)

D. The Commission Does Not Violate the Customer' Right to Contract.

Utilisource next alleges the purpose of the ESP customer lists as required by D.02-03-055 does not outweigh the need for Utilisource's customers to obtain the benefit of their bargain. Utilisource maintains that the rights of the customers should be one of the most important public policy determinations by the Commission. Apparently, Utilisource is essentially arguing that the Commission interfered with Utilisource's customers contracts by applying the deadlines agreed to by the ESPs at the Rule 22 workshop. This argument has no merit.

The requirement for the ESP to provide DA customer lists by certain deadlines was to make sure only those customers who had valid contracts before the suspension date would be permitted to continue to receive DA service. In D.01-09-060, we clearly explained the policy reasons for implementing the suspension order and how the need to establish a stable customer base was necessary to recover the costs of energy DWR purchased on behalf of the utilities. Neither this requirement, which was affirmed in D.02-03-055, nor its application in D.05-060-030 in any way interferes with any contracts between Utilisource and its DA customers. Thus, Utilisource failed to demonstrate legal error.

As to the validity of Utilisource's alleged 2,649 contracts, the evidence suggests those customers may not qualify for DA service pursuant to D.01-10-036. According to the *Order Modifying Decision (D.) 01-09-060, And Denying Rehearing, As Modified* [D.01-10-036], utilities are required to process DASRs relating to contracts or agreements that were executed on or before September 20, 2001, including DASRs for service to new facilities or accounts provided the underlying contract of those DASRs allowed for the provision of that additional service. Utilisource's customers had contracts in place from Utilisource's predecessor, Eastern Pacific Energy, Inc., prior to the DA suspension date. However, those customers were placed on bundled service, first on 1998 and later in 1999, when Eastern Pacific breached its Energy Service Provider Service Agreement with Edison. (*See* D.05-06-030, p. 9; Exh. No. 100, Appendices 1 &

2 (Edison).) Those customers remained on bundled service from August 1999 through the DA suspension. This, coupled with the fact the Commission suspended Utilisource's ESP registration in May 2001, suggests Utilisource may not have had viable contracts eligible for DA service. (Exh. 101, p. 1 (Edison).)

In all respects, Utilisource was an inactive ESP. Since May 2001, Utilisource's ESP registration was suspended by the Commission for failure to extend its bond. Their suspension was not addressed until November 2, 2001, when Utilisource sent a letter to ESP Registration in the Energy Division requesting that its ESP bond be returned to the issuer. That letter stated, "Utilisource has not served any customers for over a year and a half. If we decide in the future to serve customers, we will reinstate our bond at that time." (See D.05-06-030, pp. 10, 14; see also, Exh. 101, (Edison); Exh. 7 & Exh.11 (Utilisource).) During the evidentiary hearings, Utilisource's witness Lezie testified Utilisource had no procurement contracts at the time of the *DA Suspension Decision* [D.01-09-060], *supra*, and admitted Utilisource was "not purchasing power now." (R.T. Vol. 2, p. 184:2.) Thus, depending on the contractual terms, Utilisource's agreements may no longer have been valid when Utilisource failed to maintain its ESP status. If that is the case, Utilisource attempts to submit *new* agreements rather than existing valid contracts. Such new agreements executed after the suspension date are expressly prohibited by Commission decisions. If we ignored the fact Utilisource failed to act due diligently, then we would be acting inconsistent with our previous suspension and implementation decisions.

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III. CONCLUSION

Based on the above, good cause does not exist for the granting of rehearing of D.05-06-030. Accordingly, we deny Utilisource's Application for Rehearing.

Therefore, **IT IS ORDERED** that:

1. Utilisource's Application for Rehearing of D.05-06-030 is denied.
2. Complaint (C.) 04-05-014 is hereby closed.

This order is effective today.

Dated October 6, 2005, at Los Angeles, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
Commissioners

Commissioner John A. Bohn,
being necessarily absent, did not
participate.