Decision **DRAFT DECISION OF ALJ ECONOME** **(Mailed 9/20/2005)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Utilisource, a California Corporation, f/k/a Eastern Pacific Energy, Complainant, vs. San Diego Gas & Electric Company, a California Public Utility, Defendant.	Case 04-12-025 (Filed December 16, 2004)
Utilisource, a California Corporation, f/k/a Eastern Pacific Energy, Complainant, vs. Pacific Gas and Electric Company, a California Public Utility, Defendant.	Case 04-12-026 (Filed December 16, 2004)

OPINION GRANTING MOTIONS TO DISMISS

I. Summary

This decision grants San Diego Gas and Electric Company's (SDG&E) and Pacific Gas and Electric Company's (PG&E) respective motions to dismiss the cases against them filed by Utilisource, fka Eastern Pacific Energy, Inc. (Utilisource).

Utilisource is an electric service provider (ESP). On December 16, 2004, Utilisource filed these complaints against SDG&E and PG&E seeking an order finding Utilisource to be entitled to provide electric power to certain affected customers that had valid contracts prior to September 20, 2001. Utilisource also seeks an order that SDG&E and PG&E pay all lost profits of an unspecified amount to Utilsource for the utilities' failure to allow Utilisource to provide electric power to its direct access customers.

Utilisource filed a similar complaint against Southern California Edison Company (Edison) on May 10, 2004, and the Commission denied Utilisource's requested relief in Decision (D.) 05-06-030, 2005 Cal. PUC LEXIS 241 (the Edison case).[1] We grant the motions to dismiss and adopt the rationale of the Edison case. We conclude that Utilisource failed to comply with all applicable laws, tariffs, and Commission requirements.

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[1] Utilisource's complaints are vague as to the precise customers it seeks to serve. As we stated in D.05-06-030 with respect to Edison, we interpret Utilisource's complaint as seeking to provide electric power to customers with whom Utilisource had valid contracts before September 20, 2001, but for whom neither Utilisource nor the customer had filed a direct access service request (affected customers). Customers who had direct access on or prior to September 20, 2001, but who because bundled customers on or before September 20, 2001, cannot return to direct access after September 20, 2001. (See D.02-03-055, 2002 Cal. PUC LEXIS 195 *33.)

II. Procedural Background

SDG&E and PG&E filed their motions to dismiss on February 28, 2005 and March 17, 2005 respectively. At the March 21, 2005 prehearing conference, with the agreement of all parties, these two cases were consolidated because of common issues of law and fact.

At the prehearing conference, the parties also recognized that SDG&E and PG&E's motions to dismiss were based largely on the rationale of the Presiding Officer's Decision (POD) in the Edison case. The parties agreed that the SDG&E and PG&E cases could be resolved most effectively by waiting until the Commission acted on the Edison POD before resolving the pending motions to dismiss. The parties further agreed that if the schedule had the effect of extending the resolution of the cases beyond one year, efficiency and judicial economy achieved by awaiting Commission action on the POD constituted good cause for such extension.

The parties concluded the initial briefing on the motions to dismiss on May 16, 2005. At that point, the Commission had not yet acted on the Edison POD. Complainant requested permission to file supplemental briefing once the Commission acted on Edison's POD.

The Commission issued D.05-06-030 resolving the Edison case on June 16, 2005. The Commission adopted the rationale set forth in the POD. The parties in these consolidated cases filed supplemental briefs, and the supplemental briefing concluded on July 22, 2005.[2]

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[2] Utilisource's supplemental filing urges the Commission to refrain from acting on these motions to dismiss until it acts on Utilisource's application for rehearing of D.05-06-030 in the Edison case. As stated in the March 29, 2005 Scoping Memo issued after the prehearing conference, it was most efficient to wait until the Commission acted

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At the March 29 prehearing conference, it was determined that hearings may be necessary, but that this determination may be revisited depending on the outcome of the motions to dismiss. Because these cases can be resolved on motions to dismiss, we change the initial determination and conclude that hearings are not necessary in these cases. These cases were submitted upon the conclusion of the supplemental briefing on July 22, 2005.

III. Standard of Review

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and matters of law. The Commission treats such motions as a court would treat motions for summary judgment in civil practice. (See D.01-08-061, 2001 Cal. PUC LEXIS 512 **8-9.)

IV. Discussion

A. The Similarities With the Edison Case Warrant A Similar Result Here

As stated above, on May 10, 2004, Utilisource filed a complaint against Edison that is almost identical to its complaints against SDG&E and PG&E here. The Commission denied Utilisource its requested relief in the Edison case in D.05-06-030 on the grounds that Utilisource failed to comply with certain October 5 and November 1, 2001 deadlines, or timely failed to appeal, seek an extension, or request modification of the orders imposing those deadlines. A

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on the Edison POD before resolving these consolidated complaints. The Commission has now acted, and it is time to resolve these complaints. Moreover, after the proposed decision mailed, the Commission issued D.05-10-016 denying Utilisource's application for rehearing of D.05-06-030.

similar outcome should occur with these complaints because there are no disputed facts or applicable law which distinguish these cases from Utilisource's case against Edison. Because of the undisputed facts and applicable law common to all three cases, these motions to dismiss should be granted. For the sake of brevity, we do not repeat our entire discussion in D.05-06-030 but incorporate it herein by reference.

Utilisource's key claim is the same in all three complaints. Utilisource states that Edison, SDGE and PG&E were required by the Commission to notify Utilisource of its obligation to provide the utilities with the names and addresses of customers eligible for direct access by October 5 and November 1, 2001, as a condition precedent to denying Utilisource's request to provide direct access service to affected customers for failure to provide a timely customer list.

In D.02-03-055, 2002 Cal. PUC LEXIS 195, the Commission set forth eleven rules for the suspension of direct access. The first rule is as follows:

> "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." (2002 Cal. PUC LEXIS 195 *26.)

In adopting this rule, the Commission gave ESPs until November 1, 2001, to submit account specific details on the lists provided by October 5. The Commission reasoned that 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 [direct access service request] rejection." (*Id.*)

As stated in the Edison decision, we now recognize that the utilities did not notify Utilisource of the October 5 and November 1 deadlines, and that the

Commission's adoption of these deadlines occurred in March 2002, after the deadlines had passed. However, as we held in the Edison case, the fact that Utilisource did not receive notice of the deadlines until after they had passed does not provide a basis for relieving it from the deadlines here, because Utilisource failed to comply with its independent obligation to comply with all applicable laws, tariffs, and Commission requirements, including staying informed of relevant Commission proceedings.[3] Utilisource could have timely challenged the reasonableness of the October 5 and November 1 deadlines, or timely sought extension or modification of them, but failed to do so. Therefore, we reject Utilisource's due process argument as an impermissible collateral attack on D.02-03-055.

These complaints, and the October 5 and November 1, 2001 deadlines, arise from events which occurred during California's 2000 – 2001 energy crisis, set out in more detail in the Edison case. Initially, in California's restructured energy market, any customer from Edison, SDG&E, or PG&E's service areas could subscribe to "bundled service" from a utility or "direct access" service from an ESP.

With the extraordinary increases in energy prices beginning in mid-2000, events caused a radical change in direct access. On January 17, 2001, the Governor proclaimed that an emergency existed in the California electricity market that threatened the solvency of California's major public utilities. Shortly

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[3] Utilisource's obligations in this regard are set forth, *inter alia*, in its Energy Service Provider Agreement with SDG&E and PG&E which are attached to the complaint. (See Sections 2.1 of both agreements, stating that Utilisource must "remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements." (See also D.99-05-034, 86 CPUC2d 467, 487-488.)

thereafter, the Governor signed Assembly Bill (AB) 1X, which directed that direct access be suspended on a date set by the Commission. The Commission later suspended the right of customers to enter into direct access contracts after September 20, 2001. (See D.01-09-060, 2001 Cal. PUC LEXIS 846.) D.01-09-060 also gave further direction to the utilities to take steps to ensure that, among other things, the utilities only accepted DASRs[4] for contracts issued on or by September 20, 2001. (See 2001 Cal. PUC LEXIS 846, **12-13.)

The Edison case finds that Utilisource did not contact the utility or the Commission to seek clarification on how the suspension of direct access would affect Utilisource, nor did it participate in ongoing Commission proceedings concerning the suspension ordered in D.01-09-060. Utilisource's only communication during this approximate timeframe came after September and October 2001, specifically a November 2 letter from Utilisource to the Commission's Energy Division, where Utilisource requested that the Energy Division return its bond to the issuer. According to the letter, "Utilisource has not served any customers for over one year and one half. If we decide in the future to serve customers, we will reinstate our bond at that time." Rather than actively staying informed of all applicable laws, regulations, and Commission proceedings that may impact its business, during this time period Utilisource gave every indication that its business was inactive.

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[4] The method by which a utility distribution company, in these cases SDG&E and PG&E, is notified that one of its customers desires ESP service or desires to return to bundled service is when the ESP (usually) or the customer (rarely) files a DASR with the serving utility. Similarly, a DASR or affidavit is required to inform the utility that a contract has been assigned, or renegotiated, or terminated or extended, or has had additional locations incorporated.

D.02-03-055, which set forth 11 direct access rules, including the October 5 and November 1 deadlines, was issued in Rulemaking (R.) 02-01-011, regarding the implementation of the suspension of direct access pursuant to AB 1X and D.01-09-060. The Commission issued this rulemaking on January 9, 2002, and noticed it two days later in its Daily Calendar, a public document, which was also included on the Commission's website. Ordering Paragraph 3 required the Commission's Executive Director to serve the order instituting rulemaking on, *inter alia*, all registered ESPs. The order instituting rulemaking gave notice that the proceeding was to determine the implementation of the suspension of direct access pursuant to D.01-09-060, including the effect to be given contracts or agreements entered into on or before September 20, 2001. The rulemaking was to consider, among other things, whether to adopt a verification process to ensure that the DASR was for a contract entered into prior to the suspension date.

As we stated in the Edison decision, based upon this public notice and the ESP's obligations as discussed above, Utilisource was charged with notice that the Commission was developing rules for the implementation of direct access suspension, including but not limited to a suggestion in D.01-09-060 that the utilities obtain from each ESP a list of relevant identifying information for those customers that had entered into timely contracts but for whom DASRs had not been submitted. However, Utilisource did not participate in R.02-01-011. Had Utilisource monitored and participated in relevant Commission proceedings concerning direct access, it could have offered its position on the reasonableness of the October 5 and November 1, 2001 deadlines in a timely fashion, before they were ratified by the Commission in D.02-03-055 on March 22, 2002.

Moreover, in the Edison decision, the Commission found that Utilisource's Chief Executive Office James Lezie had heard of the October 5 and November 1, 2001 deadlines prior to the issuance of D.02-03-055.

> "'Well, this was the first notice from a decision, from an official decision. 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." (The Edison Decision, 2005 Cal. PUC LEXIS 241 * * 23-24.)

Lezie could not recall if he had reviewed D.02-03-055 within a week after its issuance, but stated that he read it shortly after its issuance. (*Id*. at *23.)

The Edison decision went on to explain that because Utilisource did not file a timely challenge to D.02-03-055, the Edison action was an impermissible collateral attack on D.02-03-055, or alternatively, that the Edison decision was barred by laches.

> "Thus, Utilisource had actual notice of the October 5 and November 1, 2001 deadlines prior to the issuance of D.02-03-055. When Utilisource learned about the October 5 and November 1 deadlines, prior to the issuance of D.02-03-055, it failed to seek information from the Commission or Edison. Even after the issuance of D.02-03-055, Utilisource did not attempt to file a timely application for rehearing. Thus, this action is an impermissible collateral attack on D.02-03-055.
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> "Utilisource might also have challenged D.02-03-055 by petitioning for modification under Pub. Util. Code § 1708 and Rule 47 of the Commission's Rules of Practice and Procedure. A petition for modification must be presented within one year of the effective date of the decision sought to be modified. (See Rule 47(d).) If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may

> summarily deny the petition. Utilisource has never filed a petition to modify D.02-03-055.
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> "Moreover, any future such petition by Utilisource should be barred by laches because, as Utilisource was aware, it was important to achieve prompt, final rules on the status of direct access contracts. Establishing a list of customers eligible for direct access (i.e., a list of names of all customers with direct access contracts in place by September 20, 2001) was suggested as an implementation step in D.01-09-060 to ensure a stable customer base for which the California Department of Water Resources (DWR) would purchase power. Such a list of the pool of customers eligible for direct access would provide certainty to all those managing the energy crisis, and could prevent later disputes concerning eligibility. Utilisource had knowledge of the importance for achieving finality of the lists not only through Commission decisions such as D.01-09-060, but also because the Legislature reduced the rehearing period of decisions such as D.02-03-055 from 30 to 10 days. (Pub. Util. Code § 1731(c).)" (2005 Cal. PUC LEXIS 241 * * 24-26, footnote omitted.)

A similar conclusion applies to these two complaint case, which were filed about seven months after the Edison complaint was filed.

We also conclude that here, as in the Edison case, that the complaints should be denied on an additional ground with respect to residential and small commercial customers. The version of Pub. Util. Code § 394(a) in effect on September 20, 2001[5] required Utilisource to register with the Commission in

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[5] As of December 2003, Utilisource needed to be a registered ESP to serve agricultural, and medium and large commercial customers, as well as residential and small commercial customers. (See D.03-12-015, 2000 Cal. PUC LEXIS 1153, implementing AB 117.)

order to provide electrical service to residential and small commercial customers. (See also D.98-03-072, 79 CPUC2d 239, 259-260.) The Commission suspended Utilisource's registration on May 29, 2001, and Utilisource never repaired the suspension. Thus, Utilisource would not have been eligible to serve residential and small commercial customers after May 29, 2001 (i.e., on September 20, 2001), and also would not have been eligible to submit the October 5 and November 1, lists for these customers. (See also Rule 2 in D.03-02-055, 2002 Cal. PUC LEXIS 195 *28.)

Finally, as in the Edison case, it is not clear the extent, if any, that Utilisource seeks to provide electric power to customers who had direct access on or before September 20, 2001, but who became bundled customers on or before September 20, 2001. Utilisource would be prohibited from serving these customers, because such service would require a new contract between a bundled utility customer and an ESP, which is prohibited by D.01-09-060. D.02-3-055 established that no exception is warranted in this situation. (See D.02-03-055, 2002 Cal. PUC LEXIS 195 *33.)

B. Utilisource's Allegations

Utilsource incorporates its prior pleadings in the Edison case here in making its argument. Similarly, we incorporate our response to these allegations in the Edison case herein by reference. (See the Edison case, 2005 Cal. PUC LEXIS 241, "Utilisource's Allegations" and "Appeal of the Presiding Officer's Decision" at * * 29-37.) We repeat here our response to Utilisource's primary argument; namely, that the utilities had the duty to inform Utilisource of the October 5 and November 1 deadlines. Our response in the Edison case is equally applicable in the instant cases:

"Utilisource argues that Edison had an obligation under D.02-03-055 to notify all ESPs of the October 5 and November 1, 2001 deadlines and that Edison's failure to do so has deprived Utilisource of due process if it is not allowed to serve the affected customers under its direct access agreements with them. Although Edison returned Utilsource's customers to bundled service and cancelled all pending DASRs because of Eastern Pacific's failure to maintain a scheduling coordinator on September 15, 1998, and again on August 31, 1999, Utilisource exchanged multiple telephone calls and emails with Edison after that time until June 2000. Utilisource believes that by this communication, Edison had notice that Utilisource intended to serve customers in the near future, and for this reason as well should have notified Utilisource of the above deadlines.

"However, D.02-03-055 did not order Edison to notify all ESPs of these deadlines. D.02-03-055 stated that the utilities had notified ESPs of the deadlines, and on that as well as other grounds found the deadlines reasonable.

"We now recognize that Edison did not notify Utilisource of the October 5 and November 1 deadlines, and that the Commission's adoption of these deadlines occurred in March 2002, after the deadlines had passed. However, the fact that Utilisource did not receive notice of the deadlines until after they had passed does not provide a basis for relieving it from the deadlines here, because Utilisource failed to comply with its independent obligation to comply with all applicable laws, tariffs, and Commission requirements, including staying informed of relevant Commission proceedings. Utilisource could have timely challenged the reasonableness of the October 5 and November 1 deadlines, or timely sought extension or modification of them, but failed to do so; therefore, we reject Utilisource's due process argument as an impermissible collateral attack on d.02-03-055." (2005 Cal. PUC LEXIS 241 * * 29-30.)

For the above reasons, we grant SDG&E and PG&E's respective motions to dismiss the complaints against them.

V. Comments on the Draft Decision

The draft decision of Administrative Law Judge (ALJ) Econome was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. Utilisource and SDG&E and PG&E (jointly) filed timely comments and/or replies. We make no substantive changes to the draft decision as a result of the comments, but do make several changes to improve the discussion and correct typographical errors.

In its comments, Utilisource requests that if the Commission decides against Utilisource in its application for rehearing of the Edison decision (D.05-06-030), that the Edison case be consolidated with these instant cases for writ review. We deny the request for consolidation here because we have already denied Utilisource's application for rehearing in D.05-10-016. Thus, there are no further proceedings before the Commission in the Edison case to consolidate with the instant cases.

VI. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Janet A. Econome is the assigned Administrative Law Judge in these cases.

Findings of Fact

1. On May 10, 2004, Utilisource filed a complaint against Edison that is almost identical to its complaints against SDG&E and PG&E here.

2. The Commission denied Utilisource its requested relief in the Edison case in D.05-06-030 on the grounds that Utilisource failed to comply with certain October 5 and November 1, 2001 deadlines, or timely failed to appeal, seek an extension, or request modification of the orders imposing those deadlines.

3. Section 2.1 of Utilisource's respective ESP agreements with SDG&E and PG&E provides that Utilisource must "remain in compliance with all applicable laws and tariffs, including applicable CPUC requirements."

4. After the Commission suspended direct access, Utilisource did not contact the utility or the Commission to seek clarification on how the suspension of direct access would affect Utilisource, nor did Utilisource participate in the ongoing Commission proceedings concerning the suspension ordered in D.01-09-060.

5. Utilisource did not participate in R.02-01-011. Had Utilisource monitored and participated in relevant Commission proceedings concerning direct access, it could have offered its position on the reasonableness of the October 5 and November 1, 2001 deadlines in a timely fashion, before they were ratified by the Commission in D.02-03-055 on March 22, 2002.

6. Utilisource had heard of the October 5 and November 1, 2001 deadlines after they had passed but prior to the issuance of D.02-03-055. Utilisource reviewed D.02-03-055 shortly after its issuance.

7. When Utilisource learned about the October 5 and November 1, 2001, deadlines, prior to the issuance of D.02-03-055, it failed to seek information from the Commission or the utilities. Even after the issuance of D.02-03-055, Utilisource did not attempt to file a timely application for rehearing or petition for modification.

8. Utilisource's registration was suspended by the Commission on May 29, 2001, and Utilisource never repaired the suspension. Thus, Utilisource would not have been eligible to serve residential and small commercial customers after May 29, 2001 (i.e., on September 20, 2001), and was also not eligible to submit the

October 5 and November 1, 2001 lists to the utilities for these residential and small commercial customers.

9. Utilisource is prohibited from serving customers who had direct access on or prior to September 20, 2001, but who became bundled customers on or before September 20, 2001, because such service would require a new contract which is prohibited by D.01-09-060.

Conclusions of Law

1. A similar outcome to the Edison case, D.05-06-030, should occur with these complaints because there are no disputed facts or applicable law which distinguish these cases from Utilisource's case against Edison.

2. As an ESP, Utilisource has an obligation to comply with all applicable laws, tariffs and Commission requirements. As part of this obligation, and in order to comply with Commission decisions, Utilisource is required to inform itself of applicable Commission decisions and proceedings that may impact its business.

3. This action is an impermissible collateral attack on D.02-03-055, pursuant to Pub. Util. Code § 1709.

4. Utilisource had notice that it was important to achieve finality on the rules implementing direct access, including the extent of the outstanding direct access contracts, not only through Commission decisions such as D.01-09-060, but also because the Legislature reduced the rehearing period of decisions such as D.02-03-055 from 30 to 10 days, pursuant to Pub. Util. Code § 1731(c).

5. Any future challenge by Utilisource to the propriety of the October 5 and November 1, 2001 dates by a petition for modification is barred by laches.

6. SDG&E and PG&E's respective motions to dismiss should be granted and Utilisource's complaints should be dismissed with prejudice.

7. This decision should be effective immediately in order to resolve uncertainty regarding direct access contracts.

O R D E R

IT IS ORDERED that:

1. San Diego Gas and Electric Company's February 28, 2005 motion to dismiss and Pacific Gas and Electric Company's March 17, 2005 motion to dismiss the complaints filed on December 16, 2004, against them by Complainant Utilisource, fka Eastern Pacific Energy, Inc., a California corporation, are granted.
2. Case (C.) 04-12-025 and C.04-12-026 are dismissed with prejudice.
3. C.04-12-025 and C.04-12-026 are closed.

This order is effective today.

Dated _____, at San Francisco, California.