

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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In the Matter of Application of
Southern California Gas Company
(U904G) to establish a Compression
Services Tariff.

Application 11-11-011
(Filed on November 3, 2011)

**THE DIVISION OF RATEPAYER ADVOCATES' MOTION TO STRIKE
EXCERPTS OF SOUTHERN CALIFORNIA GAS' BRIEFS AND THE REPLY
BRIEFS OF LATE-INTERVENING PARTIES**

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I. INTRODUCTION

Pursuant to Rule 11.1 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) hereby files this motion to strike certain excerpts of Southern California Gas Company's (SoCalGas) Opening Brief (SCG's OB) and SoCalGas' Reply Brief (SCG's RB) containing facts based on evidence outside the record. DRA also moves to strike the Reply Briefs of any party, who has failed to participate during the proceeding and never filed an opening brief, but nevertheless filed Reply Briefs after the close of the evidentiary record. There appears to be a growing number of entities, already more than twenty, that after the close of hearings filed late motions for party status and only reply briefs (the "late-intervening parties").¹

These late-intervening parties and SoCalGas make or rely upon untested assertions that are not part of the evidentiary record. For the Commission to rely on these new untested assertions would be improper and would result in the violation of DRA's due process rights. The briefs should be stricken to the extent they assert or rely upon facts or

¹ Many of these parties failed to properly serve their reply briefs on the service list.

evidence not in the record. The late-intervening parties' reply briefs should be stricken for the additional reason that these briefs do not respond to any of the opening briefs.

II. SOCALGAS' ORCHESTRATION OF LATE INTERVENTIONS AND REPLY BRIEFS SHOULD NOT BE ALLOWED

The intervention by over twenty parties after the close of hearings to support the Application appears to have been orchestrated by SoCalGas. SoCalGas in its opening brief referred to some of the intervenors and stated that "SoCalGas expects additional market participants to support it [sic] proposal." (SCG's OB, p. 15). This prediction suggests that SoCalGas is behind this improper parade of late-filed briefs. Therefore, DRA's motion to strike does not blame the late intervenors for intervening late, but blames SoCalGas for its misconduct.

SoCalGas relies on these late interventions to support its argument that its proposed Compression/Natural Gas Vehicles (NGV) Refueling Services would not be unfairly competitive. (*See* SCG's OB, p.15, *see also* SCG's RB, p.30). However, none of this evidence is in the evidentiary record.

The Commission cannot reach the conclusion sought by SoCalGas, because DRA and the other active intervenors have never had an opportunity to cross-examine SoCalGas or any of the late intervenors as to *why* they all of the sudden are filing these interventions and reply briefs. For example, why would any of these intervenors support SoCalGas as a Compression/NGV Refueling Service provider instead of having an unregulated affiliate of SoCalGas providing the Compression/NGV Refueling Service, subject to the Commission's Affiliate Transaction Rules? One reason that SoCalGas' service would be preferred may be because SoCalGas may have offered deals to the late intervenors at the expense of its captive ratepayers, who may be subsidizing the service to the benefit of the late intervenors. Otherwise, the late intervenors' support may be based upon SoCalGas' misrepresentation of the record and SoCalGas' failure to acknowledge that its unregulated affiliate could provide the service, subject to the Commission's Affiliate Transaction Rules. The Commission has no record on this matter, because of

the lateness of the interventions, and the lack of any opportunity during the hearing to confront SoCalGas or the late intervenors on these issues.

DRA is not a market participant and, therefore, it does not matter to DRA who is competing, so long as the competition is fair and captive ratepayers are not subsidizing a utility, like SoCalGas. However, DRA, which represents the captive ratepayers, is concerned that SoCalGas may be exercising market power by offering deals to these late-intervening parties or otherwise relying on cost subsidization by captive ratepayers.

The Commission has a duty to independently assess whether or not, based upon the evidentiary record in this case, SoCalGas' proposed Compression/NGV Refueling Service is just and reasonable and not preferential. For example, in *Tejas Power Corp. v. FERC* (D.C. Cir. 1990) 908 F.2d 1003, 1003, which is a very analogous case involving the Federal Energy Regulatory Commission (FERC), the United States Court of Appeals for the D.C. Circuit rejected a settlement based upon the customers' nearly unanimous support or non-opposition of a proposed service of an interstate pipeline, because the FERC failed to independently review whether the new service was in the public interest. The Court found that the FERC's own rules required it to approve settlements only if the record contained substantial evidence to support the decision. *Id.* While numerous local distribution company (LDC) customers of the interstate pipeline had agreed that their interests were served, the Court found that "the public interest that the Commission must protect always includes the interest of the consumers in having access to an adequate supply of gas at a reasonable price. *See, e.g. FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 610... (1944) ('The primary aim of [the NGA] was to protect consumer against exploitation at the hands of natural gas companies.')" *Tejas Power Corp.* 908 F.2d at 1003. The concern of the Court was the ultimate consumer, because the Court recognized that the LDCs could pass along their extra costs to their captive customers. *Id.* at 1003-1004.

The Court further declared:

If the pipeline has significant market power with which to extract an agreement unfavorable to its LDC customers, then it would not require

much imagination for the pipeline also to require that they support the agreement fully before the Commission. In any event ...[the settlement may be] ...so structured as to enable the pipeline, through the exercise of significant market power, to impose unreasonable terms that will likely be paid for by end users that were not parties to the settlement. *Id.* at 1004.

Citing *Tejas Power Corp.*, the Court in *Laclede Gas Co. v. FERC* (D.C. Cir. 1993) 997 F.2d 936, 946 stated that “a mere ‘headcount’ of those supporting and opposing United’s settlement offer may have been an unreliable indicator of the reasonableness of that proposal. First, the history of the settlement negotiations suggests that some of the parties supporting the settlement may have done so to obtain concessions on issues unrelated to the [settlement].”

Just as the FERC is required to independently assess the merits of a proposal based upon record evidence, rather than a headcount of supporters, so too must the Commission decide issues in the present proceeding based upon the evidentiary record. DRA, as the representative of the captive ratepayers of SoCalGas, has demonstrated with record evidence numerous ways that SoCalGas’ ratepayers would be subsidizing or have already subsidized SoCalGas’ proposed Compression/NGV Refueling Service. (*See* DRA’s Opening Brief at pp. 12-20, and DRA’s Reply Brief at pp. 5-7, 10-11). SoCalGas’ orchestration of the late-intervenors was after the evidentiary record was closed.

III. THE INTRODUCTION OF NEW FACTS AND ALLEGATIONS AFTER THE CLOSE OF THE EVIDENTIARY RECORD VIOLATES THE DUE PROCESS RIGHTS OF DRA AND OTHER ACTIVE PARTIES

SoCalGas and the late-intervening parties’ attempt to supplement the record after hearings was after the time had passed for new evidence, facts or allegations to be submitted. Therefore, it would violate the due process rights of DRA and other active intervenors for the late-intervening parties’ claims supporting the Application to be introduced at this point in the proceeding.

As DRA established in its Reply Brief, pp. 3-5, with regard to SoCalGas’ references to late-intervening parties and four other areas that involve allegations not in

the record, it would be contrary to due process rights of DRA and other active parties for the Commission to rely upon these untested allegations.² The United States Supreme Court stated in *Railroad Commission of California v. Pacific Gas and Electric Company* (1938) 302 U.S. 388, 393 that a party has due process rights which include due notice and an opportunity to be heard and that the Commission must act upon evidence and not arbitrarily. As such, administrative agencies, when deeming that a hearing is necessary, can only consider evidence that was introduced at a hearing of which the parties had notice or were present. The Court in *Clark v. City of Hermosa Beach*, (1996) 48 Cal. App 4th 1152, 1172-1173, citing the California Supreme Court in *English v. City of Long Beach* (1950) 35 Cal. 2d 155, 158-159, held that parties must be provided the opportunity to refute, test, and explain all evidence during hearings before the administrative tribunal can consider and rely on the evidence to reach its decision. Decisions based on evidence or information where parties were not apprised is equivalent to denying those parties their right to a hearing. *Clark v. City of Hermosa Beach*, 48 Cal. App 4th at 1172.

The Commission in *the Matter of the Application of Apple Valley Ranchos Water Company (U346 W)* Decision (D.) 06-0-039 (2006), 2006 Cal. PUC LEXIS 209, at *11, *12, itself has recognized that evidence not in the record offered in comments is untimely and outside the record. In *Apple Valley*, the Commission relies on Public Utilities Code section 1757(a)(4) for the proposal that the Commission decision must be based on record evidence. *Id.*

² Specifically, DRA urges the Commission to strike the excerpts in SoCalGas' opening brief: 1) referring to recent pleadings of late-intervening parties (*see* SCG'S OB, p. 15); 2) quoting its testimony in its general rate case (*see* SCG'S OB, pp. 22-23); 3) quoting from a website for a recent interview of Clean Energy CEO Andrew Littlefair (*see* SCG'S OB, p. 20 and n. 38); 4) simply alleging (without any cite to any source) that it has used its low cost of capital in setting rates for other tariffed services, and implying that there were other competitors offering these other tariffed services. (*See* SCG's OB, pp. 24-26); and 5) alleging that unreimbursed costs by ratepayers would be compensated by a supposed adjustment to the uncollectable revenue charge in the tariff (*See* SCG's OB, p. 30). Similarly, DRA urges the Commission to strike excerpts in SoCalGas' reply brief referring to the pleadings and support of the late-intervening parties. (*See* SCG's RB, p.30).

The time to introduce evidence is during the evidentiary hearing or by motion if submitted after the conclusion of evidentiary hearings. D.12-03-034, 2012 Cal. PUC LEXIS 83. Unless otherwise submitted and received, the evidentiary record for a proceeding is closed prior to the submission of briefs. D.06-07-034, 2006 Cal. PUC LEXIS 284, at *8; D.95-04-074, 1995 Cal. PUC LEXIS 203, at *6, D.01-12-018 2001 Cal. PUC LEXIS 1137, at *7, D.93-02-032 1993 Cal. PUC LEXIS 92, at *1.

The Commission does not favor accepting assertions of new facts, allegations or evidence after hearings “in the interests of judicial economy, the integrity of the schedule and due process.” D.12-06-12, 2012 Cal. PUC LEXIS 2701, at *9-10. “If the record is left open-ended with continuing additions of updated information, the timeliness of the Commission’s deliberative process could be compromised.” *Id.*

IV. REPLY BRIEFS MUST BE LIMITED TO REBUTTING ARGUMENTS MADE WITHIN THE OPENING BRIEFS

The numerous last minute attempts of the approximately twenty late-intervening parties to participate in this proceeding through reply briefs undermine the integrity of the Commission’s Process and Procedures and are extremely prejudicial to parties. The purpose of a reply brief is to use record evidence to rebut arguments made by parties in their Opening Briefs. The Commission has stated that “Reply briefs are to be used to respond to issues argued in Opening Briefs and not raise new issues.” *See* D.92-09-080, 1992 Cal. PUC LEXIS 931, at *140, fn 56; *See also* D.94-10-032 (striking issues raised for the first time in briefs). In D.99-02-085, 1999 Cal. PUC LEXIS 33, at fn 6, the Commission stated that an issue raised for the first time in reply brief did not “afford other parties the opportunity to reply thereto.” The reply briefs of the late-intervening parties do not rebut any arguments made in the opening briefs. Instead of rebutting any specific allegations in the opening briefs, the parties allege their general support for the Application. As such, all the Reply Briefs filed by the late-intervening parties should be stricken from the record.

V. CONCLUSION

When the hearings ended, the evidentiary record was closed. SoCalGas' briefs contain asserted facts that are not in the record. Specifically, the Commission should strike the excerpts from SoCalGas' briefs: 1) referring to recent pleadings of late-intervening parties (*see* SCG'S OB, p. 15); 2) quoting its testimony in its general rate case (*see* SCG'S OB, pp. 22-23); 3) quoting from a website for a recent interview of Clean Energy CEO Andrew Littlefair (*see* SCG'S OB, p. 20 and n. 38); 4) simply alleging (without any cite to any source) that it has used its low cost of capital in setting rates for other tariffed services, and implying that there were other competitors offering these other tariffed services. (*See* SCG's OB, pp. 24-26); and 5) alleging that unreimbursed costs by ratepayers would be compensated by a supposed adjustment to the uncollectable revenue charge in the tariff (*See* SCG's OB, p. 30).

Similarly, DRA urges the Commission to strike excerpts in SoCalGas' reply brief referring to the pleadings and support of the late-intervening parties. (*See* SCG's RB, p.30). The reply briefs of the late-intervening parties also rely upon untested allegations outside of the record. Moreover, those reply briefs are not responsive to opening briefs. Consequently, DRA respectfully submits that the Commission should strike them from this proceeding.

Respectfully submitted,

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