

Decision 03-01-078 January 30, 2003

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.

Rulemaking 02-01-011  
(Filed January 9, 2002)

**ORDER GRANTING CITY OF CORONA'S PETITION  
FOR MODIFICATION FOR PURPOSES OF  
CLARIFYING DECISION 02-03-055**

By this order, we grant the Petition to Clarify or Modify Decision (D.) 02-03-055 (Implementation Decision) filed by the City of Corona (Corona).

**Background**

In its Petition, filed August 1, 2002, Corona requests confirmation by the Commission that the Implementation Decision did not suspend a utility distribution company's (UDC) obligation to enter into a service agreement with an Energy Service Provider (ESP) that has not previously offered direct access (DA) services in the UDC's service territory. Corona seeks clarification at this time because two UDCs, Pacific Gas and Electric Company (PG&E) and San Diego Gas & Electric Company (SDG&E), have refused to process UDC/ESP Service Agreements submitted by Corona to those respective entities.

Responses to the Petition were filed by PG&E and the Alliance for Retail Energy Markets and Western Power Trading Forum.

Prior to suspension of the Direct Access Program on September 21, 2001 in D.01-09-060, Corona registered as an ESP with Southern California Edison

Company (SCE) and then entered into 53 direct access contracts with City businesses for approximately 25 megawatts of power. All of these contracts were entered into on or before September 20, 2001. After September 20, 2001, Corona entered into additional contracts with DA customers outside of the Corona city limits (and within SCE service territory) whereby Corona replaced the DA customers' previous ESP (Enron Energy Services, Inc.), as allowed by the Implementation Decision. Corona now services approximately 1,300 accounts with a total peak load of approximately 50 megawatts (MW).

Corona has had informal discussions with public sector entities throughout California regarding Corona's ability to serve as their ESP in view of the fact that some ESPs are abandoning their DA contracts. During these discussions, Corona took the anticipatory step of submitting UDC/ESP Service Agreements to PG&E and SDG&E.

Both UDCs, however, refused to process those agreements on the grounds that the Implementation Decision prohibits new service agreements. The Implementation Decision lists several numbered criteria that establish the process for continuing limited DA service. Criteria 1 and 2 set forth the process for determining the validity of DA contracts entered into prior to the September 21, 2001 DA suspension date if the customer's Direct Access Service Request (DASR) has not yet been submitted to a UDC prior to that date. Criterion 1 states in its entirety:

ESP's 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.<sup>1</sup>

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<sup>1</sup> D.02-03-055, p. 20.

The discussion following Criterion 1 directs the UDCs to accept DASRs from ESPs for customers that were not on the October 5 list if both the DA customer and the ESP signed an affidavit stating that the customer had a valid DA contract in place prior to September 20, 2001.

Criterion 2 states in its entirety:

To submit an ESP list, or to submit DASRs for its accounts, an ESP must (1) have in effect a valid ESP/UDC Service Agreement as of September 20, 2001, and (2) ESPs serving small customers must have in effect as of September 20, 2001 valid Commission registration as required by law.

The sole comment following this criterion is that, “The need for valid service agreements and registration is not disputed.”

Corona argues that Criterion 2 directly relates to Criterion 1. Criterion 1 (and the ensuing discussion) sets forth the dates and process by which ESPs were to prove the eligibility and validity of any DA contracts in place as of the September 20, 2001 DA suspension date. Criterion 2 simply states that the only ESPs that may comply with Criterion 1 (i.e., by submitting a list of eligible DA contracts and to establish DA service for those customers by submitting DASRs for the customers on that list) were those ESPs with a valid service agreement in place on September 20, 2001.

PG&E filed a response to Corona’s Petition on September 3, 2002. PG&E claims that because Corona did not have an ESP service agreement with PG&E in effect as of September 20, 2001, PG&E believes it does not have the authority to enter into such an agreement with Corona now. PG&E claims Corona’s request is in direct conflict with the Criterion 2 requirement adopted by the Commission in D.02-03-055.

On this basis, because Corona's ESP service agreement was only with SCE, PG&E has refused to enter into any new UDC/ESP Service Agreements. PG&E indicates it "would welcome any clarification or modification the Commission wishes to provide regarding the ESP/UDC service agreement requirement in D.02-03-055." PG&E argues, however, that to the extent the Commission decides to modify D.02-03-055, and allow Corona and other new ESPs to enter the direct access market, that the Commission should also clarify whether switching to direct access service by bundled service customers is allowed at all. To avoid confusion and piecemeal decisionmaking, PG&E argues that any clarification or modification regarding the ESP/UDC service agreement requirement should occur at the same time the Commission resolves the pending rehearing issue identified in D.02-04-067. PG&E characterizes the D.02-04-067 rehearing as a reconsideration of whether or under what circumstances customers can sign up with "new ESPs" after returning to bundled service.

Corona disputes PG&E's interpretation of D.02-03-055, arguing that Criteria 1 and 2, when read **as a whole**, were meant only to restrict which ESPs could submit DASRs establishing initial service for those customers who had signed valid DA contracts on or prior to September 20, but were not on DA service on or prior to September 20. In other words, Corona contends that Criterion 2 solely affected which ESPs could comply with the requirements of Criterion 1, and no more than that.

Corona argues that in adopting the Implementation Decision, the Commission was focused **solely** upon stopping additional load from moving to direct access. The decision focuses on establishing the September 20 cut-off date, how to ascertain whether a customer had a valid DA contract in place on or prior

to that date, and how to limit additional load moving to direct access. Nowhere does the decision address preventing new ESPs from entering the market.

Corona disputes PG&E's claim that there is any basis to defer action on Corona's Petition until the rehearing issue identified in D.02-04-067 is resolved. Corona denies that the rehearing has anything to do with whether customers can sign up with "new ESPs." Corona argues that the rehearing issue in D.02-04-067 has no relevance to its Petition, but instead relates only to whether a DA customer may switch between DA and bundled service.

Corona claims that by refusing to execute any more ESP service agreements, the UDCs have artificially limited the number of available ESPs, thereby limiting existing DA customer choice. Corona argues that if new ESPs are not allowed to fill the void left by ESPs that have left the market, DA costs will increase with the lessened competition among remaining ESPs.

Corona argues that the Commission did not intend to limit the provision of DA service by ESPs to only those ESPs who had UDC/ESP Service Agreements in place on or prior to September 20, 2001. However, to clarify the issue for the benefit of the UDCs, Corona requests the following modification of Criterion 2 and the ensuing comments:

For the sole and limited purpose of submitting a list of those customers with a valid direct access contract in place as of September 20, 2001, and processing the initial DASRs for those customers not yet on DA service as of September 20, 2001, To submit an ESP list, or to submit DASRs for its accounts, an ESP must (1) have in effect a valid ESP/UDC service agreement as of September 20, 2001, and (2) ESPs serving small customers must have in effect as of September 20, 2001 valid Commission registration as required by law.

The need for valid service agreements and registration is not disputed. This requirement does not affect the UDCs' current

and continuing obligation to process and execute new service agreements with any qualified ESP that wants to provide direct access service in a UDC's service territory to existing direct access customers. This will give existing direct access customers needed flexibility in the event the customer chooses to switch to a new ESP.

### **Discussion**

We conclude that Corona's interpretation of D.02-03-055 as to the meaning underlying Criterion 1 and 2 is correct. Corona's proposed clarification language will remove an unintended impediment to its ability to execute new ESP service agreements with UDCs, and will facilitate DA customers' ability to switch from one ESP to another. As part of our effort to ensure that customers with pre-September 21 DA contracts can remain on DA service, the Implementation Decision specifically shall be modified to allow DA customers to switch from one ESP to another, and to allow assignment of DA contracts from one ESP to another.

No useful purpose is served by delaying Commission action on Corona's Petition until a decision on the pending rehearing of issues identified in D.02-04-067. As noted by Corona, the rehearing issue relates to customers' ability to switch between DA and bundled service. The rehearing issue in D.02-04-067 is independent of the issue raised in Corona's Petition which involves giving existing DA customers flexibility to sign up with ESPs. Accordingly, Corona's Petition for Modification of D.02-03-055 is granted. The revised language as set forth in the order below is hereby adopted.

### **Comments on Draft Decision**

The draft decision of the ALJ in this matter 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. Comments were filed on October 28, 2002. We have taken the comments into account in finalizing this order.

### **Assignment of Proceeding**

Geoffrey Brown and Carl Wood are the Assigned Commissioners and Thomas Pulsifer is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. D.02-03-055 set forth two criteria for determining the validity of contracts entered into prior to the September 20, 2001 suspension date.

2. The second of the prescribed criteria requires that to submit an ESP list, or to submit direct access service requests for its accounts, an ESP must have in effect a valid ESP/UDC service agreement as of September 20, 2001.

3. Since Corona did not have an ESP/UDC service agreement with PG&E in effect as of September 20, 2001, PG&E believes it does not have the authority to enter into such an agreement with Corona.

4. It is reasonable to modify D.02-03-055 to clarify that the requirement for the ESP to have a valid service agreement under the second criterion does not affect the UDC's continuing obligation to process and execute new service agreements with any qualified ESP that wants to provide direct access service in the UDC's service territory to existing direct access customers.

5. Corona's proposed clarification language will remove an unintended impediment to its ability to execute new ESP service agreements with UDCs, and will facilitate DA customers' ability to switch from one ESP to another.

### **Conclusions of Law**

1. The Petition for Modification filed by the City of Corona should be granted.

2. D.02-03-055 should be modified to clarify that it is not the intent of the Commission to prohibit new ESPs from entering the California direct access market in accordance with the language set forth in Ordering Paragraph 1 below.

3. There is no good reason to defer action on Corona's Petition until resolution of the rehearing issue in D.02-04-067.

4. UDCs should continue to process and execute new ESP/UDC Service Agreements.

5. UDCs should be required to execute an ESP/UDC service agreement with Corona, allowing Corona to serve direct access customers in PG&E's and SDG&E's service territories.

**IT IS ORDERED** that:

1. The Petition for Modification of Decision 02-03-055 filed by the City of Corona is granted.

2. The following modifying language is adopted for D.02-03-055, relating to Criteria 2, with new language shown in underlining, and deleted language, shown with strike-through markings:

For the sole and limited purpose of submitting a list of those customers with a valid direct access contract in place as of September 20, 2001, and processing the initial DASRs for those customers not yet on DA service as of September 20, 2001, ~~To submit an ESP list, or to submit DASRs for its accounts,~~ an ESP must (1) have in effect a valid ESP/UDC service agreement as of September 20, 2001, and (2) ESPs serving small customers must have in effect as of September 20, 2001 valid Commission registration as required by law.

The need for valid service agreements and registration is not disputed. This requirement does not affect the UDCs' current and continuing obligation to process and execute new service agreements with any qualified ESP that wants to provide direct access service in a UDC's service territory to existing direct access customers. This will give existing direct access customers needed flexibility in the event the customer chooses to switch to a new ESP.

This order is effective today.

Dated January 30, 2003, at San Francisco, California.

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

I dissent.

/s/ LORETTA M. LYNCH  
Commissioner

I will file a dissent.

/s/ CARL W. WOOD

**Commissioner Dissenting Opinion of Commissioner Carl Wood  
ON ITEM H-3 (Control Number 1208)**

The City of Corona should not be permitted to serve as an electric service provider (ESP) in the service territories of San Diego Gas and Electric Company (SDG&E) or Pacific Gas and Electric Company (PG&E), because it is not lawful for it to do so. To the extent it has been providing ESP services outside its municipal jurisdictional boundaries within the service territory of Southern California Edison (SCE), it must register with the Commission pursuant to Public Utilities Code Section 394. It has not done so to date.<sup>1</sup> The utilities should not process direct access service requests (DASRs) from Corona. I reach these conclusions based on the view that the statutes that describe the powers of local governments do not provide Corona with the unrestricted ability to act as an ESP. I do not reach the different question of whether the Legislature or the Commission has ended the ability of entities that are not local governments to register as ESPs and provide direct access service to the direct access loads existing as of September 20, 2001.

Corona is a general law city organized under the provisions of Title 4 of the Government Code. Government Code section 34000 et seq. There is no general authority in Title 4 for general law cities to sell goods and services outside of their municipal boundaries. Supplying electric energy for the municipal corporation or any of its inhabitants is a public utility service, Pub. Util. Code section 10001, which municipal corporations may “acquire, own, operate or lease.” Pub. Util. Code section 10002. Extra-territorial operation by a municipality is permitted only “...when necessary to supply the municipality, or its inhabitants or any portion thereof, with the service desired.” Pub. Util. Code 10004, emphasis added. Engaging in extraterritorial operation or activity for general commercial purposes is not authorized either by the Government Code or by the Public Utilities Code. .

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<sup>1</sup> The Commission maintains a database of registered ESPs on its website. Corona does not appear in that database. C.f.,

The limitation on providing utility services to those activities which contribute to the provision of service to local inhabitants is carried forward into AB 1890. Pub. Util. Code sections 218.3 and 394(a) accommodate the municipal authority to provide “electrical service” to its inhabitants by excluding from the definition of “electric service provider” (ESP) municipal entities that provide electrical service to “residential and small commercial customers within its jurisdiction.”<sup>2</sup> However, the exclusion from ESP status does not extend to providing such service to commercial and industrial customers generally. Providing non-facilities based electric service to those customers – of the type provided by ESPs – must be provided consistent with the statutory authorization and its limitations. For example, Corona may aggregate load within its municipal boundaries, and may – to the extent that it serves load within its municipal boundaries, include load outside its municipal boundaries in the aggregation. If it does so, it must be accompanied by registration with the Commission as an ESP pursuant to Pub. Util.-Code Section 394(b). Corona has not yet registered.

There is no legal support for Corona’s suggestion that a municipality or a municipal utility can move outside of its territory and become an energy entrepreneur. In addition, I believe it would be poor public policy to support such an interpretation of the law. There is no reason to encourage municipalities to take on the kind of business risk that have led many large and experienced energy providers to the brink of bankruptcy over the last two years. It does not serve the citizens of a municipality and it ultimately does not serve utility ratepayers. For these reasons, I dissent from the majority’s decision.

/s/ CARL W. WOOD  
Carl W. Wood

San Francisco, California  
January 30, 2003

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<sup>2</sup> Small commercial customer is defined by Pub. Util. Code section 331(h) as a customer having a peak demand of less than 20 kilowatts.