

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

November 20, 2020

TO PARTIES OF RECORD IN CASE 20-03-011, DECISION 20-11-056:

On October 19, 2020, a Presiding Officer's Decision in this proceeding was mailed to all parties. Public Utilities Code Section 1701.2 and Rule 15.5(a) of the Commission's Rules of Practice and Procedure provide that the Presiding Officer's Decision becomes the decision of the Commission if no appeal or request for review has been filed within 30 days of the mailing of the Presiding Officer's Decision.

No timely appeals to the Commission or requests for review have been filed. Therefore, the Presiding Officer's Decision is now the decision of the Commission.

The decision number is shown above.

/s/ ANNE E. SIMON

Anne E. Simon
Chief Administrative Law Judge

AES:lil

Attachment

Decision 20-11-056

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Bluebeyond Fisheries, LLC,

Complainant,

vs.

Southern California Edison Company,
(U338E),

Defendant.

Case 20-03-011

Cameron Eglington, Bluebeyond Fisheries, LLC,
Complainant.

Anna Valdberg, Robin Z. Meidhof, Attorneys at Law,
for Southern California Edison Company,
Defendant.

DECISION GRANTING MOTION TO DISMISS

Summary

Complainant Bluebeyond Fisheries, LLC (Bluebeyond or Complainant) brought the instant Complaint against Defendant Southern California Edison Company (SCE) seeking reinstatement into the Agricultural Pumping - Interruptible (AP-I) Program (Program). The Complaint claimed that SCE inappropriately removed the Complainant from the Program. SCE filed an Answer and a Motion to Dismiss. Complainant did not oppose the Motion. The Motion is granted, and the Complaint is dismissed with prejudice.

This proceeding is closed.

1. General Background

Complainant Bluebeyond Fisheries, LLC, (Bluebeyond or Complainant) asserts that Southern California Edison Company (SCE or Defendant) wrongfully removed the Complainant from the Agricultural Pumping - Interruptible (AP-I) Program (Program). Complainant alleges that the Defendant did not properly notify the Complainant of an event called under the Program, and that Complainant's continued use of a Prohibited Resource (PR) should therefore be excused and the Complainant should be reinstated in the Program.

SCE timely answered the instant Complaint and a Prehearing Conference (PHC) took place on May 26, 2020. On June 10, 2020, SCE filed a Motion to Dismiss the Complaint (Motion), stating that the parties agreed no factual disputes existed, and that the tariff governing the Program required dismissal of the Complaint.

Complainant has not formally filed a response to the Motion. However, Complainant has sent an e-mail to all parties¹ accepting that its removal from the Program was proper, which was attached to the Motion.

1.1. Procedural and Factual Background

On March 16, 2020, Bluebeyond filed its Complaint. Bluebeyond is a fish farm in Desert Hot Springs, CA. Bluebeyond's Complaint concerns its removal from SCE's AP-I Program. The Complaint alleges that SCE improperly removed Bluebeyond from the Program for use of a PR during a Program event, without providing Bluebeyond with proper notice of the event.² The event in question

¹ See attachment A.

² Complaint, p. 2.

took place on September 04, 2019.³ Bluebeyond was removed from the Program on January 03, 2020.⁴ The Complaint seeks re-instatement into the Program, as well as a refund for any charges.

On April 23, 2020, SCE timely filed an Answer. In its Answer, SCE asserted that Bluebeyond admitted to violating the Schedule AP-I tariff (Tariff) governing the Program,⁵ and that the violation required removal of Bluebeyond from the Program for a period of 12 months.⁶ SCE also asserted that the Tariff did not require any notice before calling a Program event.⁷

On May 26, 2020, a duly-noticed PHC was held. Both parties attended by WebEx. At the PHC, parties discussed the proposed scope. SCE asserted that no refund was due, as no charges were assessed to Blue Beyond for removal from the Program.⁸ Bluebeyond did not comment.⁹ The parties also agreed there were no factual disputes.¹⁰

On June 10, 2020, pursuant to Commission Rules of Practice and Procedure Rule (Rules) 11.2, SCE filed a Motion to Dismiss the Complaint, stating that Bluebeyond admitted via e-mail dated May 31, 2020 that there were no factual or

³ See attachments to Complaint, pages 8-17 (e-mails and correspondence between Bluebeyond Fisheries, LLC and Southern California Edison Company discussing incident in question).

⁴ Motion to Dismiss Complaint, p. 7.

⁵ Southern California Edison Tariff Schedule AP-I governs the Agricultural and Pumping - Interruptible Program.

⁶ Answer, pp. 5-6.

⁷ Answer, pp. 4-5.

⁸ PHC Transcript, pp. 10:12-28.

⁹ PHC Transcript, p. 11:1-6.

¹⁰ PHC Transcript, p. 8:5-9; 16:19-23.

legal disputes,¹¹ and that Bluebeyond was properly removed from the Program.¹² Bluebeyond filed no response to the Motion to Dismiss.

On June 22, 2020, an Assigned Commissioner's Scoping Memo and Ruling was issued, laying out the issues and schedule of the proceeding. On July 2, 2020, SCE filed a Motion to Suspend the Scoping Ruling Schedule, stating that the Commission should consider the unanswered Motion to Dismiss before continuing the proceeding. The Motion to Suspend was granted via e-mail ruling on July 3, 2020.

2. Review and Grant of the SCE Motion to Dismiss

SCE's Motion to Dismiss asserts that the Complaint as a matter of law does not allege that SCE violated any applicable law, Commission rule or Order, or tariff.¹³ The Motion states there are no longer any factual disputes in this proceeding, and that the Complainant now recognizes that the removal from the Program was properly carried out according to the Tariff.¹⁴ SCE attached to the motion a May 31, 2020 e-mail sent to the service list by the Complainant as evidence in support of these assertions. SCE states it is also prevented by the Tariff from providing the relief sought by the Complaint.¹⁵ The Complainant has provided no response to the Motion to Dismiss, or to any of the other formal filings since the PHC. The Motion is reviewed and granted.

¹¹ Motion to Dismiss the Complaint (Motion), pp. 5-6; p. 12, Attachment 1.

¹² Motion, pp.6-7.

¹³ Motion, p. 8.

¹⁴ Motion, pp. 5-6; p. 12, Attachment 1.

¹⁵ Motion, pp. 8-9.

2.1. Standard for Review of a Motion to Dismiss

A “[c]omplaint may be made ... by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility ... in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.”¹⁶ Pursuant to the standards set forth in Pub. Util. Code § 1702,¹⁷ a competent complaint must allege that a public utility has either engaged in an act or has failed to engage in an act in violation of a law or a Commission order or rule.¹⁸

Commission’s Rule 11.2 specifically recognizes a motion to dismiss “based on the pleadings.” The Commission’s review of a motion to dismiss “is analogous in several respects to a motion for summary judgment in civil practice.”¹⁹ Like summary judgment procedure, the purpose of a motion to dismiss is to permit determination “before hearing whether there are any triable issues as to any material fact,” and in doing so, a motion to dismiss, like a motion for summary judgment, “promotes and protects the administration of justice and expedites litigation by the elimination of needless trials.”²⁰

The Commission asks that Motions to Dismiss show “that the moving party must prevail based solely on undisputed facts and matters of law.”²¹ The Commission requires the same kind of showing in a motion to dismiss that the courts require in a motion for summary judgment:

¹⁶ California Public Utilities (Pub. Util.) Code Section 1702. All references to Code Sections in this decision is to the California Public Utilities Code, unless otherwise specified.

¹⁷ All references to the “Code” shall be to the Public Utilities Code.

¹⁸ D.14-03-032.

¹⁹ D.94-04-082, referring to Rule 56, the predecessor to Rule 11.2.

²⁰ *Ibid.*

²¹ D.04-05-006 at 8.

The party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his own to make a prima facie showing of the existence of a triable issue of material fact.²²

The moving party must make a prima facie showing of the non-existence of any triable issue of material fact. If the moving party does so, a rebuttable presumption is created, and the opposing party must counter this with its own prima facie showing of the existence of a triable issue of material fact. If the Motion successfully establishes the non-existence of any triable issue of material fact, we may make determinations on matters of law. Here, it is fair to note that Bluebeyond chose not to answer the Motion to Dismiss, and therefore has chosen not to challenge any prima facie showings by SCE. Therefore, if SCE can establish the non-existence of triable issues of material fact and establish as a matter of law that it did not violate any applicable Commission laws or rules, the Complaint may be dismissed.

2.2. Substantive Review of the SCE Motion to Dismiss

The Answer and Motion to Dismiss filed by SCE both assert that:

1) Bluebeyond agreed to comply with the Commission's PR Policy;²³ 2) The PR policy and Tariff both required Bluebeyond not to use a PR during a demand response event;²⁴ and 3) Bluebeyond committed a Type II violation under the tariff on September 04, 2019, by using a PR during a demand response event.²⁵

²² 25 Cal.4th 826, 850.

²³ Answer, p. 3-4; Motion, p. 3-4.

²⁴ Answer, p. 2-3; Motion, p. 4-5.

²⁵ Answer, p. 5-6; Motion, p. 5-6.

SCE notes that the penalty for Type II violations under the tariff is dismissal from the Program for a period of at least 12 months.²⁶ SCE also alleges that Bluebeyond has admitted to running its PR during the event in question, and that notice of an event being called is not a requirement under the tariff.²⁷

As noted above, Pub. Util. Code § 1702 sets forth the requirement that a complaint allege that a public utility is in violation of a law or Commission order. We must ask whether there are grounds for the Complaint to allege that SCE is in violation of a law or Commission order such that SCE should provide Bluebeyond's requested relief. If there are no such grounds, then the Complaint may be dismissed.

As noted in the Scoping Memo issued June 22, 2020, the issues are:

- 1) Whether SCE properly applied the AP-I tariff when it dismissed Bluebeyond from the Program;
- 2) Whether SCE was required by its Tariff to provide notice to Bluebeyond in advance of calling an AP-I event, and
- 3) Whether SCE should be required to place Bluebeyond back into the AP-I Program.

After reviewing the filings by both parties as well as the pertinent tariff, we find that SCE did not violate any applicable Commission rules or laws in dismissing Bluebeyond from the AP-I Program, and Bluebeyond is not entitled to re-instatement into the program or any refunds.

2.2.1. SCE Was Not Required to Provide Notice Prior to Calling an AP-I Program Event

Much of the Complaint's argument for reinstatement relies on the fact that Bluebeyond was not properly notified of an impending Program event.

²⁶ Motion, p. 6.

²⁷ Answer, p. 4-5; Motion, p. 5-6.

Bluebeyond admits, in the Complaint and in later communications, that it used the PR during the event.²⁸ However, if Bluebeyond had received proper notice, the Complaint alleges, then Bluebeyond would not have inappropriately used a Prohibited Resource.

SCE states that the tariff does not require it to provide notice prior to calling a Program event.²⁹ Bluebeyond has not pointed out any legal authorities for its claim that notice was required, nor has Bluebeyond filed any other kind of response to the Motion. A review of the relevant tariff shows no notice requirement.³⁰ Although the Complainant may have historically received notice³¹ (and attempts to do so were apparently made in this instance), there is no legal authority requiring notice. As such, the claimed lack of notice has no effect on whether the removal of Bluebeyond from the Program was appropriate. As a result, there exist no triable or material facts related to this issue. We find that SCE did not violate any applicable laws or statutes, as required by Pub. Util. Code § 1702, with regards to the amount of notice it provided Bluebeyond prior to calling the Program event in question.

2.2.2. SCE was Required by the AP-I Program Tariff to Remove Bluebeyond from the Program Following the Violation

At issue here is whether the AP-I Program Tariff required dismissal of Bluebeyond from the Program. As directed by Commission Resolution E-4906,³²

²⁸ Complaint, p. 2; Motion, Attachment A.

²⁹ Answer, pp. 5-6, Motion, p. 5.

³⁰ Southern California Edison Tariff Schedule AP-I governs the Agricultural and Pumping - Interruptible Program.

³¹ See communications attached to the Complaint, pp. 8-17.

³² Resolution E-4906, Ordering Paragraph 25, pp. 97-98, SCE Tariff Schedule AP - I, Sheet 8, p. 64104-E (effective Dec. 21, 2018).

SCE's AP-I Program tariff states that when a customer uses a PR to reduce load during a demand response event, such act shall be a Type II Violation.³³ "A customer identified with a single instance of a Type II Violation shall be removed from this Schedule for one year..."³⁴ The material fact is therefore whether Bluebeyond used a PR during a Program event. The Motion provides evidence that both parties agree that Bluebeyond used a PR during a Program event on September 04, 2019.³⁵ SCE has therefore established a rebuttable presumption that Bluebeyond used a PR during a Program event. Bluebeyond has not filed a response to the Motion disputing this. As Bluebeyond has not made an attempt to rebut this assertion on the only triable or material fact, we may now rule on this issue.

Based on the terms of the tariff, this was a Type II violation and required removal from the program for a period of at least 12 months. The Tariff does not provide SCE with discretion on this matter. With no factual disputes, we find as a matter of law that SCE lawfully removed Bluebeyond from the Program.

2.2.3. SCE is Barred from Placing Bluebeyond Back into the Program

Bluebeyond seeks to be placed back on the Program, as well as a refund of any charges related to the dismissal. As discussed above, SCE has shown that no notice was required prior to the event and that the removal of Bluebeyond from the Program was appropriate. We have therefore found no evidence that SCE violated applicable laws or rules. Additionally, as noted above, the Tariff requires SCE to remove Bluebeyond from the Program for a period of 12 months.

³³ SCE Tariff Schedule AP - I, Sheet 8, p. 64104-E (effective Dec. 21, 2018).

³⁴ *Id.*

³⁵ Motion, pp.5-6; Attachment 1.

SCE does not have the discretion to place Bluebeyond back on the program. Given that SCE properly followed its Tariff in removing Bluebeyond, and has no discretion to place Bluebeyond back into the Program, Bluebeyond is not entitled to re-instatement into the Program at this time.

SCE has also stated that it did not assess any charges towards Bluebeyond in removing it from the Program.³⁶ Bluebeyond clarified in an e-mail to the parties and to the assigned Administrative Law Judges that it was no longer seeking any refund.³⁷ We find that Bluebeyond is not due any refund.

2.3. Conclusion

Upon applying the summary judgement standard, the Motion to Dismiss should be granted. SCE makes a prima facie showing that there are no disputes as to material facts. Complainant has failed to carry his burden of production to show an existence of a triable issue of material fact. The Complaint fails to show “any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission.”³⁸ SCE’s Motion to Dismiss should be granted based on the presented facts and matters of law and the instant Complaint is dismissed.

3. Categorization and Need for Hearings

The categorization of this proceeding is adjudicatory. Because there are no disputed issues of material fact, there is no reason to hold evidentiary hearing: all issues raised in the Complaint are decided as a matter of law in accordance with this decision. Therefore, the Complaint must be dismissed and the

³⁶ PHC Transcript, pp. 10:12-28.

³⁷ Motion, Attachment A.

³⁸ See Commission’s Rule 4.1(a); Pub. Util. Code § 1702.

evidentiary determination is changed to state that no evidentiary hearings are necessary.

4. Assignment of Proceeding

Martha Guzman Aceves is the assigned Commissioner, and Garrett Toy and Zhen Zhang are the assigned Administrative Law Judges and Presiding Officers in this proceeding.

Findings of Fact

1. SCE removed Bluebeyond from the AP-I Program on January 03, 2020.
2. SCE did not charge Bluebeyond any fees for removal from the Program.
3. On June 10, 2020, SCE filed a Motion to Dismiss the Complaint.
4. SCE has provided evidence that Bluebeyond agrees that it ran a PR during an AP-I Program event on September 04, 2019.
5. SCE has made a prima facie showing that Bluebeyond operated a PR during an AP-I Program event on September 04, 2019.
6. Bluebeyond did not file a response or reply to the Motion to Dismiss the Complaint.

Conclusions of Law

1. SCE has carried its burden to show that there are no triable issues as to any material fact.
2. The AP-I Program Tariff does not require SCE to provide notice before calling an event.
3. Pursuant to the terms of the tariff governing the API Program, Bluebeyond committed a Type II violation on September 4, 2019.
4. SCE's AP-I Program Tariff requires the removal of any participants who commit Type II violations, for a period of at least 12 months.
5. Pursuant to its Tariff, SCE appropriately removed Bluebeyond from the AP-I Program for using a PR during a program event.

7. Bluebeyond is not eligible for re-instatement into the AP-I Program for 12 months, starting from January 3, 2020, the date of its removal from the program.

8. Bluebeyond's Complaint, based on the undisputed facts and relevant law, does not lead us to conclude that SCE violated a law or Commission order, as required by Pub. Util. Code § 1702 and should be dismissed.

9. Because there are no disputed issues of material fact, no evidentiary hearings are necessary.

10. As a matter of law, SCE's Motion to Dismiss should be granted.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company's Motion to Dismiss the Complaint of Bluebeyond Fisheries, LLC, is granted.

2. Case 20-03-011 is closed.

This order is effective today.

Dated November 20, 2020, at San Francisco, California.

ATTACHMENT 1

Re: C.20-03-011, Email Ruling Setting May 26, 2020 Prehearing Conference

Mark Eglington <bluebeyondfisheries@gmail.com>

Good day Your Honour,

Thank you for taking time to handle our case C.20-03-011, Bluebeyond Fisheries LLC v. Southern California Edison Company.

After hearing the answers from Robin Meidoff (from SCE), and some of your comments I feel that we have taken the wrong approach to resolving our issue as we understand and accept that our removal from the Agriculture Pumping Interruptible (AP-I) program is dictated by law as we did use a prohibited resource (diesel generator) during an AP-I event in September 2019.

I would like to summarize our issue for the sake of brevity:

Our problem is that despite a request to SCE (exhibit is in our filing) in September 2018 to change contact numbers for the AP-I alert call (that we had received on all previous events over the years), and numerous calls over the following months until we were informed that our request was completed. When it came to the September 2019 event in question, it turns out that the calls went out to our old numbers (exhibit is in our filing) to the surprise of our SCE representative (exhibit is in our filing).

I was retiring from daily involvement and provided company phones to the responsible staff.

I appreciate that you perceived that a mediator would possibly be a better direction for us to take in resolving this issue: a precedent set by SCE of calling us with an impending AP-I event warning, then for this incident (during a time when daily warnings of wildfire de-energizing power shut-offs were being announced), calling numbers that were meant [believed] to have been updated by SCE which turn out to be the uncorrected numbers.

We are asking for a remedy of SCE retroactively re-instating our involvement in the program.

Respectfully yours,
Mark Eglington
Bluebeyond Fisheries, LLC

On Tue, May 5, 2020 at 9:25 AM Zhang, Zhen <Zhen.Zhang@cpuc.ca.gov> wrote:

The email ruling dated May 1, 2020, 4:42 p.m. contained inconsistent dates for the prehearing conference. This email ruling supersedes the May 1, 2020 email ruling.

Due to the current COVID-19 physical distancing constraints and the shelter in place orders, the prehearing conference for C.20-03-011, Bluebeyond Fisheries LLC v. Southern California Edison Company, will occur via Webex. Alternatively, parties may also join by audio conference (telephone) option, as a backup. The parties are directed to attend according to the information provided below:

Hearing Date/Time: May 26, 2020, 9:00 a.m.

Webex Information:

Event

Address: <https://cpuc.webex.com/cpuc/onstage/g.php?MTID=ec8954d0269093198c102f1baa35a1665>

Event Number (Access Code): 965 884 475

Audio Conference Information:

Audio Conference Phone Number: 1-855-282-6330

Audio Conference Number (Access Code): 965 884 475

Participants must follow procedural ground rules which will ensure an orderly remote hearing.

1. All counsel and parties agree to prepare their respective remote attendance technology and be connected at least 15 minutes prior to the time set for the evidentiary hearing;
2. All counsel and parties agree to adhere to all formal rules of decorum;
3. All counsel and parties will be muted upon entering the WebEx hearing. The Judge will call upon each person directly to speak. If it is not your turn to speak, but you wish to have the opportunity to be heard, please use the hand button next to your name;
4. Only the Judge and the speaking party will be visible on the screen; and if you have not been identified by the Judge to speak, you will be muted and not be visible on the screen;
5. All counsel and parties agree to use headphones to reduce background noise and ensure optimal sound quality; and
6. WebEx suggests using Google Chrome to run its applications.

IT IS SO RULED.

THE DOCKET OFFICE SHALL FORMALLY FILE THIS RULING.

Zhen Zhang

Administrative Law Judge

California Public Utilities Commission

zz1@cpuc.ca.gov

Notice: This communication may contain confidential and/or legally privileged information for the use of the intended recipient(s). Unauthorized use or disclosure is prohibited. If you are not the intended recipient, please contact the sender and destroy all copies of the communication.

(END OF ATTACHMENT 1)