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Decision 01-06-080 June 28, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SOUTHERN CALIFORNIA GAS COMPANY for Authority Pursuant to Public Utilities Code Section 851 to Sell Certain Intellectual Property Known as Energy Marketplace.	Application 99-10-036 (Filed October 27, 1999)

O P I N I O N

1. Summary

We impose penalties of $300,000 on Southern California Gas Company (SoCalGas) for violating a Commission order and Commission Rules in connection with its offering of electric choice programs on an Internet website known as Energy Marketplace. The website, since sold to Excelergy Corporation,[1] assertedly facilitated customer choice of energy providers through web-based links to such providers, sign-up forms and the like. Decision (D.) 99-02-059, issued on February 18, 1999, authorized SoCalGas to use the website to facilitate choice in core *gas* aggregation services, but required further Commission approval for other uses of the website, including those offered to facilitate *electric* choice. Rather than obtain this approval and remove the already-existing electric platform

[1] We authorized the sale to Excelergy in D.00-06-005.

from the site until it had such approval, SoCalGas left the electric platform on the website for more than a year.

While there are mitigating factors that lessen the amount of the penalty, as described below, SoCalGas was clearly operating without Commission approval. Such conduct warrants penalties.

2. Procedural History

The Commission approved the website's sale to Excelergy on June 8, 2000, but set up a second phase of the proceeding to consider penalizing SoCalGas for continuing to maintain an electricity platform on the site after issuance of a decision on the issue. In its approval of the website sale, the Commission voiced its concern that SoCalGas had violated an earlier Commission decision, D.99-02-059, which disallowed use of the website for electric programs without Commission approval:

> There is no question that SoCalGas should have complied with the Affiliate Transaction rules in expanding the website beyond core gas aggregation services. In D.99-02-059, we stated that,
>
> > This decision only addresses the use of this website to support the core aggregation program. If SoCalGas seeks to provide other services on the website, it must first file an [a]dvice [l]etter pursuant to Rule VII.E. of the [A]ffiliate [T]ransaction rules.
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> While SoCalGas sought modification of this portion of D.99-02-059, we ruled that it abandoned that motion when it filed this Application to sell the site. Likewise, while it attempted to comply with D.99-02-059 by filing the ordered [a]dvice [l]etter, the Commission rejected the [a]dvice [l]etter because SoCalGas had not met

> D.99-02-059's requirement that SoCalGas file the letter before it modified the website, rather than after the fact.
>
> *Thus, while it may be true that SoCalGas attempted to comply with our rules, it does not appear to have accomplished compliance.* This raises the issue of whether it is appropriate to allow SoCalGas' shareholders potential gains from the Energy Marketplace sale, or whether penalties would be appropriate. Therefore, we approve the sale and accounting treatment here, but will conduct a second phase of the proceeding to determine whether SoCalGas violated the Affiliate Transaction rules, and, if so, whether it should suffer penalties.[2]

The assigned Administrative Law Judge (ALJ) initiated the penalty phase of this proceeding by ruling dated July 20, 2000 (Second Phase Ruling). That ruling gave SoCalGas notice of the issues to be decided in the second phase, as follows:

A. Whether, before "seek[ing] to provide other services on the website, [SoCalGas] . . . first file[d] an [a]dvice [l]etter pursuant to Rule VII.E. of the [A]ffiliate [T]ransaction rules," as ordered in Decision (D.) 99-02-059.

B. If SoCalGas did not meet the condition in (A), why it did not.

C. If SoCalGas contends it was not required to meet the condition in (A) because the Commission issued D.99-02-059 after SoCalGas had already begun "provid[ing] other services on the website," why SoCalGas could not have ceased providing those other services until the Commission approved such provision.

D. Whether it is appropriate for a party to disregard a Commission order if the conduct ordered should have happened in the past.

[2] D. 00-03-004 at 11-12 (emphasis added); *see also* Conclusion of Law 8 (repeating quoted passage).

E. Why SoCalGas did not persist in attempting to gain approval "to provide other services on the website" after the Energy Division rejected SoCalGas' [a]dvice [l]etter seeking such approval.

F. Whether SoCalGas should be excused from meeting the condition in (A) because it has sold the Energy Marketplace website.

G. Whether SoCalGas should have contested the Commission's draft decision dismissing SoCalGas' Petition for Modification of D.99-02-059 (Petition). SoCalGas' Petition had sought elimination of the requirement that SoCalGas gain Commission approval before expanding the website beyond core gas aggregation services.

H. If it did not meet the condition in (A), whether SoCalGas should be penalized for violating the Commission's order and its Affiliate Transaction rules. Pub. Util. Code §§ 701, 798, 2107; D.98-12-075, 1998 Cal. PUC Lexis 1016.

I. If penalties are appropriate, the nature and amount of such penalties.

The Second Phase Ruling also gave SoCalGas an opportunity to seek a hearing on the penalty phase issue, which SoCalGas accepted. On August 29, 2000, the ALJ held a prehearing conference to discuss hearing procedure, and after some rescheduling, held the hearing on December 13, 2000. SoCalGas submitted prehearing testimony, and presented the testimony of three witnesses at the hearing. The ALJ admitted Exhibits A-F and 1, 2 and 4, and questioned the witnesses.[3] At the request of the ALJ, SoCalGas submitted late-filed Exhibit 3, containing

[3] Prior to the hearing, the ALJ had ordered the Office of Ratepayer Advocates (ORA) to participate in the second phase of the proceeding. (ORA had participated in the first phase.) ORA declined to participate, stating, "ORA takes no position on the issues in this [phase], and will not be participating further in this matter. ORA's interest in this docket is on the disposition of the Energy Marketplace Website, and ORA is satisfied with the Commission's recent Decision approving the Settlement Agreement between . . . SoCalGas . . . and ORA. *Pre-Hearing Conference Statement of the Office of Ratepayer Advocates*, filed August 22, 2000, at 1-2.

financial information about SoCalGas, on December 19, 2000. The ALJ provided that Exhibit 3 would be in evidence on the date SoCalGas submitted it; thus, Exhibit 3 is now in evidence. After the hearing, on January 12, 2001, SoCalGas filed its Post-Hearing Brief, and the matter was deemed submitted at that time.

3. Discussion

A. Unauthorized Continuation of Electric Platform on Website

The evidence demonstrates that after February 18, 1999, when the Commission issued its decision disallowing the addition of the electricity platform before complying with the requirements of the Affiliate Transaction Rules, SoCalGas was in violation of this order. Some background on the website is appropriate here.

SoCalGas launched Energy Marketplace on November 20, 1997.[4] It added the electricity platform (which SoCalGas calls the "electricity enhancement") in January 1999.[5] Enron Corporation (Enron) filed a complaint challenging SoCalGas' operation of Energy Marketplace without prior Commission approval.[6] Enron's essential complaint was that the website was anticompetitive because it gave SoCalGas inappropriate access to information about its competitors. The Commission dismissed the complaint on February 18, 1999 in D.99-02-059. However, in response to Enron's comments on the draft decision, issued

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[4] *Post-Hearing Brief of Southern California Gas Company*, filed January 12, 2001 (Post-Hearing Brief), at 2. *See also* Testimony of Southern California Gas Company, Hearing Exhibit 1, dated October 2, 2000, at I-5 (testimony of Richard M. Morrow).

[5] Hearing Exhibit 1 at I-6 (SoCalGas / Morrow).

[6] Case (C.) 98-03-005, filed March 3, 1998.

on January 14, 1999, the final decision contained language prohibiting use of Energy Marketplace for services other than core gas aggregation. In addition, D.99-02-059 required SoCalGas to file an advice letter under Rule VII.E. of our Affiliate Transaction rules before expanding its use of the Energy Marketplace website.[7]

The Commission rejected the advice letter SoCalGas filed in response to this order because SoCalGas filed the advice letter while still maintaining the electric platform on the website. The advice letter rejection asserted that D.99-02-059 was clear in its intent: as of that decision's issuance on February 18, 1999, SoCalGas was not authorized to continue offering electricity services on the website. Rather, SoCalGas was required to get prior advice letter approval for such offering. Since SoCalGas had not discontinued the electricity platform after the Commission issued D.99-02-059, and indeed was still offering the platform as of the date of the advice letter rejection, SoCalGas was in violation of the order and could not have its advice letter approved under those circumstances.

SoCalGas' noncompliance with D.99-02-059 continued even after the advice letter rejection. SoCalGas claims it was confused about what to do thereafter. Because D.99-02-059 did not order it to discontinue offering services on the website other than core gas aggregation, SoCalGas claims it assumed it had the right to continue offering those services.

Most prohibitory laws proscribe certain conduct. It is not necessary that a person or an entity be ordered to stop such conduct, and disobey

[7] D.99-02-059, *mimeo.* at pp. 9 and 10.

such order, in order to be found in violation of the law. The mere existence of the prohibition is enough to preclude the conduct.

SoCalGas would have the law apply differently. It contends it must be told not only not to do something without approval, but also, if it is already engaged in the prohibited act at the time it is told not to do it, ordered to discontinue the prohibited act. The company's attempt to create confusion where there should be none shifts the burden of ensuring compliance with law, rule and order from itself to the Commission. SoCalGas contends that if it is not ordered not to do something that it is told is prohibited, it is entitled to continue doing it. This is simply not the way the law works. If something is disallowed, it must stop. The disallowance does not implicitly "grandfather" the existing prohibited conduct; rather, all such conduct, present or future, must cease.

Evidence that SoCalGas understood the mandate of D. 99-02-059 to obtain permission for the electricity portion of the website is contained in its March 15, 1999 advice letter filing seeking the approval mandated in the decision.[8] While it devoted some portion of the advice letter filing to disputing that such filing was required, it ultimately offered facts purporting to demonstrate that the electric portion of the website complied with the Commission's affiliate transaction rules.[9] SoCalGas contends that the Commission simply sat on the advice letter for months.[10] However, both Enron and ORA protested the advice letter, and SoCalGas revised the

[8] We take official notice of the advice letter filings pursuant to Commission Rules 72-73.

[9] Letter from Lee Schavrien, SoCalGas, Director, Regulatory Case Management and Tariff Administration, to Paul Clanon, dated December 3, 1999 (Hearing Exhibit 1, Exhibit A) (Schavrien 12/3/99 letter).

[10] Post-Hearing Brief, at 5.

advice letter twice to respond to the protests. In all, the Commission received nine communications from SoCalGas, Enron or ORA related to the advice letter on the following dates:

- March 15, 1999 (SoCalGas' original advice letter 2793 filing),
- April 15, 1999 (Enron's protest to advice letter 2793),
- April 12, 1999 (SoCalGas' response to Enron's protest of advice letter 2793),
- April 23, 1999 (ORA's support for Enron's protest of advice letter 2793),
- May 4, 1999 (SoCalGas' response to ORA's protest of advice letter 2793),
- July 8, 1999 (SoCalGas' supplemental advice letter 2793-A),
- July 28, 1999 (Enron's protest to advice letter 2793-A),
- August 4, 1999 (SoCalGas' response to Enron's protest of advice letter 2793-A), and
- October 14, 1999 (SoCalGas' second supplemental advice letter 2793-B).

Only a month after SoCalGas' final revision to its advice letter, on November 23, 1999, the Commission rejected advice letters 2793, 2793-A and 2793-B. The Commission made clear that the reason for this rejection was SoCalGas' failure to obtain permission prior to having electric services listed on the website:

> This is to inform you that your [a]dvice [l]etter 2793 and subsequent supplements A and B are rejected. The [a]dvice [l]etter is not in compliance with Decision 99-02-059, dated February 18, 1999, in Case 98-03-005. That Decision required that if [SoCalGas] expands its use of the energy marketplace beyond the function of supporting the gas core aggregation, it must first file an [a]dvice [l]etter under Rule VII.E. of the [A]ffiliate [T]ransaction rules.

> Your initial filing of [a]dvice [l]etter 2793 indicated that "Prior to a final decision in the complaint case and in response to customer requests, SoCalGas added to Energy Marketplace an electricity platform, as a natural extension of the website, to facilitate interactions between consumers and marketers." *Neither the original advice letter nor the subsequent supplements indicate that the electricity platform has been discontinued so that the conditions precedent to approval of an [a]dvice[l]etter pursuant to D.98-03-005 [sic] can be met.*[11]

SoCalGas' Lee Schavrien testified at the hearing that SoCalGas received this letter shortly after the Commission sent it.[12] Thus, as of approximately November 23, 1999 at the earliest - seven months before the Commission authorized the Energy Marketplace sale to Excelergy – SoCalGas knew that discontinuance of the electricity platform was a "condition precedent" to advice letter approval.

SoCalGas professes surprise at the advice letter's rejection: "The Energy Division's rejection of SoCalGas' Advice Nos. 2793, 2793-A, and 2793-B on November 23, 1999, came as a complete surprise. The advice letters had been pending for months without any indication from the Energy Division that it considered the advice letters procedurally defective."[13]

SoCalGas claims it had various oral communications with the Commission's Energy Division after receiving the November 23, 1999 advice letter rejection. Then, on December 3, 1999, SoCalGas sent the

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[11] Letter from Paul Clanon, Director, Energy Division, to Sid Newsom, SoCalGas, dated November 23, 1999 (Hearing Exhibit C) (advice letter denial letter) (emphasis added).

[12] Reporter's Transcript (RT) 31:8-11.

[13] Testimony of Lee Schavrien (Hearing Exhibit 1, Tab IV), at IV-5.

Energy Division's Paul Clanon a letter proposing resolution to the advice letter issue in light of SoCalGas' pending sale of the website.[14] The proposal consisted of four components:

- Energy Marketplace will continue to operate with the electricity platform included pending the outcome of A.99-10-036;

- Should the Commission approve A.99-10-036, then the issue regarding the need for advice filings for the electricity platform is moot;

- Should the Commission deny A.99-10-036 and the operation of the site returns to SoCalGas then SoCalGas will *shut down the electricity platform pending the filing of an advice letter and subsequent approval to add the electricity platform*;

- Should Excelergy terminate the September 1, 1999 agreement application to buy Energy Marketplace and the operation of the site returns to SoCalGas, SoCalGas *will shut down the electricity platform pending the filing of an advice letter and subsequent approval to add the electricity platform*.[15]

The Commission never responded to this proposal in writing, and there is no follow-up correspondence from SoCalGas on the matter. Nonetheless, the letter is revealing because it demonstrates SoCalGas' belief that "shut[ting] down the electricity platform pending the filing of an advice letter and subsequent approval to add the electricity platform" might meet the Commission's expectations.

SoCalGas' professed confusion relates to whether it was required to shut down the electricity platform pending advice letter approval of its

[14] Schavrien 12/3/99 letter, s*upra* n. 10

[15] *Id.* (emphasis added).

presence on the website.[16] SoCalGas indicates it received mixed signals from Commission staff about what to do. This may be true; however, there is no written communication from the Commission telling SoCalGas what to do except the Commission's February 18, 1999 order and the November 23, 1999 advice letter denial. In both of those communications, the message is clear: the electricity platform was disallowed without advice letter approval. SoCalGas nowhere claims it had such approval.

We believe SoCalGas' explanations for its conduct are insufficient to excuse it from penalties. In the next section, we discuss the appropriateness and amount of penalties in light of the factors militating both for and against them.

B. Standards for Imposing Penalties and Their Applicability to SoCalGas' Conduct

In D.98-12-075, (the Penalty Decision) the Commission established standards for determining the level of penalties in a case involving violation of the Commission's affiliate transaction rules. That decision is applicable here. We discuss each penalty criterion, and its applicability to SoCalGas' conduct vis-à-vis Energy Marketplace, below.

> **Physical Harm**: The most severe violations are those that cause physical harm to people or property, with violations that threaten such harm closely following.

In SoCalGas' case, there is no evidence of physical harm to people or property; thus, this criterion does not affect the amount of penalties.

[16] *Id.* ("SoCalGas could not have filed an advice letter seeking prior approval to add the electricity platform to the web site, because that platform had already been added before the issuance of D.99-02-059.")

> **Economic Harm**: The severity of a violation increases with (1) the level of costs imposed upon the victims of the violation, and (2) the unlawful benefits gained by the Applicant. Generally, the greater of these two amounts will be used in setting the fine. The fact that economic harm may be hard to quantify does not diminish the severity of the offense or the need for sanctions.

While there is no evidence in this proceeding that any person or entity suffered economic harm as a result of the continued presence of the electricity platform on the website,[17] there is evidence of undue gains by SoCalGas. At the hearing, SoCalGas' witness Mark Gaines testified that by the website received "ten to 15,000 hits per month."[18] Approximately half of these were due to the electricity platform being on the site.[19] The electric platform also enhanced the potential value of the website when it was sold to Excelergy. The electricity platform was on the website for approximately 16 months without authorization, from February 18, 1999 through June 8, 2000, when the Commission authorized SoCalGas to sell Energy Marketplace.[20] Customer reaction to the electricity platform was positive,[21] and having the platform on the site brought SoCalGas customer

[17] Enron alleged harm in its complaint against SoCalGas, but did not produce evidence of how to value that harm.

[18] RT 35:8.

[19] RT 36:11-19; 37:4-6.

[20] RT 35:27-36:5.

[21] RT 37:17-24.

goodwill.[22] Goodwill is always a benefit to a large company such as SoCalGas.[23] Thus, this criterion militates in favor of penalties.

> **Harm to the Regulatory Process**: A high level of severity will be accorded to violations of statutory or Commission directives, including violations of reporting or compliance requirements.

This case falls directly into a category of violations encompassed by the "harm to the regulatory process" criterion. The Commission issued an order, and the Energy Division issued an advice letter rejection, which told SoCalGas their current practices were not in compliance with law or Commission Rule. SoCalGas offered no evidence that anyone at the Commission – let alone the Commissioners themselves – ever definitively authorized the continued presence of the electricity platform on the website.

> **The Number and Scope of the Violations**: A single violation is less severe than multiple offenses. A widespread violation that affects a large number of consumers is a more severe offense than one that is limited in scope.

SoCalGas committed a continuing violation by leaving the electricity platform on the website for almost 1-1/2 years. Under Pub. Util. Code § 2108, "in case of a continuing violation each day's continuance thereof [is] a separate and distinct offense." Here, the violation commenced on February 18, 1999, when the Commission issued D.99-02-059 disallowing the electricity platform without advice letter approval. It ended on

[22] RT 37:25-38:20.

[23] RT 38:18-20.

June 8, 2000, when the Commission authorized the Energy Marketplace sale. Thus, there were 475 separate violations.

Moreover, half of the 10,000-15,000 customers accessing the website over that period did so due to the electricity platform, by SoCalGas' admission. Thus, 5,000-7,500 hits per month occurred because of SoCalGas' violation. This occurred for approximately 16 months, from February 18, 1999 through June 8, 2000. Thus, SoCalGas had as many as 120,000 website hits due to the presence of the electricity platform alone. The number and duration of the violations, and the number of customers affected by virtue of site hits, justify an increased penalty under this criterion.

> **The Applicant's Actions to Prevent a Violation**:
> Applicants are expected to take reasonable steps to ensure compliance with applicable laws and regulations. The Applicant's past record of compliance may be considered in assessing any penalty.

SoCalGas did attempt to seek clarification from the Energy Division, and also filed a Petition for Modification of D. 99-02-059. These steps are indicative of an attempt to comply with the law.

We are unaware of any other cases in which we have penalized SoCalGas for disobeying a Commission order or other directive in the past five years. If we have overlooked any such case, we direct SoCalGas to call it to our attention in comments on this decision.

Overall, this criterion neither increases nor decreases the penalty.

> **The Applicant's Actions to Detect a Violation**:
> Applicants are expected to diligently monitor their activities. Deliberate, as opposed to inadvertent wrongdoing, will be considered an aggravating factor.

> The level and extent of management's involvement in, or tolerance of, the offense will be considered in determining the amount of any penalty.

There is no dispute that at least as of November 23, 1999, when the Commission's Energy Division rejected SoCalGas' advice letter, and stated that removing the electricity portion of the site was a "condition precedent" to advice letter approval, SoCalGas' failure to comply was a violation. Moreover, a reasonable person would have understood the Commission's February 18, 1999 decision to require discontinuance of the electricity platform pending advice letter approval.

Thus, the February 18, 1999-November 23, 1999 presence of the electricity platform merits enhanced penalties. SoCalGas does allege that there was a long delay between the time it submitted its advice letter on March 15, 1999 and the time the Commission issued the advice letter denial on November 23, 1999, but we are not persuaded that this delay misled the company. As noted, SoCalGas amended the advice letter twice, and several protests were received. Those actions are the only evident basis for the delay in the advice letter denial.

Moreover, there is no doubt that SoCalGas understood the Commission's desires after the issuance of the advice letter denial on November 23, 1999. According to SoCalGas' witness, after receiving the denial, SoCalGas representatives had discussions with the Energy Division in which both sides allegedly "agreed that there was no need for SoCalGas to close the electricity platform and refile its advice letter."[24] Mr. Schavrien

[24] Hearing Exhibit 1, Tab III, at III-9.

testified that SoCalGas confirmed this "agreement" by letter dated December 3, 1999.[25]

However, SoCalGas' December 3, 1999 letter did more than state that "there was no need for SoCalGas to close the electricity platform and refile its advice letter." The December 3 letter laid out four possible options, two of which involved "SoCalGas . . . clos[ing] the electricity platform and refil[ing] its advice letter." Thus, Mr. Schavrien's testimony is inconsistent with SoCalGas' December 3 letter.

Moreover, Mr. Schavrien acknowledged that the November 23, 1999 advice letter denial was an example of "one of those . . . where the Energy Branch [sic] tells you something that you may not agree with."[26] He further acknowledged understanding from the November 23, 1999 advice letter denial – whether he agreed with it or not – that the "Energy Branch [sic] was telling [SoCalGas] in writing as of [that date] that discontinuance of the electricity platform was a condition precedent to approval of an advice letter. . . ."[27] Thus, however SoCalGas might quarrel with the wording of the February 1999 Commission decision, it cannot dispute its knowledge of Commission desires as of November of that same year.

Finally, all of the SoCalGas employees giving testimony in this matter were management level personnel, and one employee is an officer

[25] Hearing Exhibit I, Exhibit A.

[26] RT 30:15-16.

[27] RT 30:17-23.

of the Company.[28] Thus, there was heavy "management [ ] involvement in, [and] tolerance of, the offense . . . ."

Overall, this criterion justifies a penalty increase.

> **The Applicant's Actions to Disclose and Rectify a Violation**: Applicants are expected to promptly bring a violation to the Commission's attention. What constitutes "prompt" will depend on circumstances. Steps taken by an Applicant to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

As noted in other sections, SoCalGas did nothing to "rectify" its violation, although its contacts with the Energy Division after the latter issued its advice letter rejection might be construed as attempts to disclose the violation. However, SoCalGas' entire purpose in contacting the Energy Division was to avoid removing the electricity platform from the website. Thus, on balance, this criterion dictates an increase, rather than a decrease, in penalties.

> **Need for Deterrence**: Fines should be set at a level that deters future violations. Effective deterrence requires that the Commission recognize the financial resources of the Applicant in setting a fine.

It is troubling that SoCalGas demonstrates no remorse for its actions. SoCalGas' lack of contrition concerns us, and the need for deterrence is greater here than it would be for a party that acknowledges error and agrees not to repeat it.

As to the financial resources of Applicant, Exhibit 3 demonstrates that SoCalGas had net income of $201 million in 1999, and $151 million for the first nine months of 2000. (Because the Commission authorized the

[28] RT 28:26-29:23, 41:19-42:12.

Energy Marketplace sale in June 2000, we will assume that the net income for the January-June 2000 period is 6/9 of that for the January-September 2000 period, or approximately $83 million.)

> **Constitutional Limitations on Excessive Fines**: The Commission will adjust the size of fines to achieve the objective of deterrence, without becoming excessive, based on each Applicant's financial resources.

The law allows a penalty based on the number of instances of wrongdoing. As noted above, each day the electricity platform was on the website without authorization was a separate violation; in this case, SoCalGas committed 475 separate violations. The law authorizes a penalty of "not less than five hundred dollars ($500) nor more than twenty thousand dollars ($20,000) for each offense.[29] Under this formula, the minimum penalty we could impose is $500 x 475 violations = $237,500. The maximum penalty would be $20,000 x 475 = $9,500,000.

> **The Degree of Wrongdoing**: The Commission will review facts that tend to mitigate the degree of wrongdoing as well as facts that exacerbate the wrongdoing.

Facts that might mitigate the degree of wrongdoing include the following:

- SoCalGas' apparent reliance on the Energy Division's alleged agreement after issuance of the November 23, 1999 advice letter denial not to require it to remove the electricity platform;

[29] Pub. Util. Code § 2107.

- The delay between SoCalGas' March 15, 1999 advice letter filing and the November 23, 1999 rejection (although the evidence indicates this delay was due to factors having nothing to do with the Commission);

- The lack of any explicit order in D.99-02-059 to remove the electricity platform from the website (although we believe the order was clear, as noted above); and

- The lack of any proven economic harm to ratepayers from SoCalGas' continued maintenance of the electricity platform on the website.

Facts that exacerbate the wrongdoing include:

- SoCalGas' disobedience of a Commission decision (D.99-02-059) and the advice letter denial, in view of the Penalty Decision's finding that, "A high level of severity will be accorded to violations of statutory or Commission directives . . . ."

- The high number of website "hits" – and concomitant enhancement to SoCalGas' customer goodwill – as a result of the presence of the electricity platform on the website;

- The length of time the violation continued;

- The clarity of the violation, especially in view of the advice letter denial's clear language that discontinuance of the electricity platform was a "condition precedent" to approval of the enhancement to the website; and

- SoCalGas' lack of contrition and steadfast refusal ever to acknowledge any error in its conduct.

The Public Interest: In all cases, the harm will be evaluated from the perspective of the public interest.

It is essential to the regulatory process that the entities we regulate follow our directives. If there were any plausibility to SoCalGas' claims of

confusion, its arguments against penalties might receive a more positive reception. However, SoCalGas is unwilling to acknowledge wrongdoing, or to make any representation as to its planned future conduct. In such a case, we believe that the public interest militates in favor of a penalty.

> **The Role of Precedent**: The Commission will consider (1) previous decisions that involve reasonably comparable factual circumstances, and (2) any substantial differences in outcome.

We are unaware of other cases similar to this one. Thus, we impose penalties based on the unique facts of this individual case, without reliance on precedent.

As noted above, the minimum penalty we could impose is $237,500 and the maximum is $9.5 million. In view of the facts militating for and against a penalty, and taking into account all other factors set forth herein, we opt for a penalty of $300,000. We could have imposed a much higher penalty, and the interests of deterrence would dictate that a company of SoCalGas' size and income be penalized much more strongly. However, we believe that one factor – the lack of ratepayer harm – most strongly dictates in favor of a more modest penalty. If we had evidence of ratepayer harm, we would not have hesitated to impose a much stricter sanction.

Comments on the Draft Alternate Decision

The draft alternate decision of Commissioner Duque in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.6 of the Rules of Practice and Procedure. Comments

were filed on _____, and reply comments were filed on _____.

Findings of Fact

1. The Commission decided on February 18, 1999 in D.99-02-059 that SoCalGas was not allowed to operate the electricity platform of the Energy Marketplace website without advice letter approval.

2. SoCalGas did not discontinue offering the electricity portion of the website with the issuance of D.99-02-059.

3. SoCalGas filed the requisite advice letter on March 15, 1999.

4. Enron and ORA protested SoCalGas' advice letter filing, causing SoCalGas to amend the filing twice.

5. SoCalGas continued filing information responsive to the advice letter protests with the Commission until October 14, 1999.

6. On November 23, 1999, approximately one month after SoCalGas filed its final supplement to its advice letter, the Commission's Energy Division denied the advice letter. The Energy Division informed SoCalGas clearly that discontinuing the electricity platform of the website was a condition precedent to advice letter approval.

7. SoCalGas received the November 23, 1999 advice letter denial shortly after it was issued.

8. There was a delay between SoCalGas' original advice letter filing and the advice letter denial. The delay was due to the receipt of protests and supplements to the advice letter.

9. SoCalGas did not discontinue the electricity platform upon receiving the advice letter's denial.

10. SoCalGas viewed the November 23, 1999 advice letter's denial as "one of those . . . where the Energy Branch tells you something that you may not agree with."

11. After receiving the November 23, 1999 advice letter's denial, SoCalGas met with the Energy Division concerning the discontinuance the electricity platform.

12. SoCalGas wrote the Energy Division a letter on December 3, 1999 in which it acknowledged its understanding that shutting down the electricity platform might meet the Commission's expectations.

13. No one at the Commission ever responded to SoCalGas' December 3, 1999 letter in writing.

14. The sole written communications from the Commission or staff on the subject of the electricity platform made clear that such platform was disallowed without further approval.

15. A reasonable person would have interpreted the Energy Division's November 23, 1999 advice letter denial to affirm D.99-02-059's requirement that the electricity platform be discontinued immediately.

16. SoCalGas disobeyed the Commission's order in D.99-02-059.

17. SoCalGas has undue gains from the electricity platform in the form of goodwill.

18. The electricity platform was on the website between February 18, 1999, when D.99-02-059 was issued, and June 18, 2000, when the Commission authorized SoCalGas to sell Energy Marketplace in D.00-06-005. Thus, SoCalGas was in violation of D.99-02-059 for 475 days.

19. SoCalGas did not discontinue the electricity platform at any time between February 18, 1999 and June 18, 2000.

20. The evidence is mixed as to whether SoCalGas took steps to ensure compliance with Commission directives.

21. SoCalGas' employees providing testimony in the Energy Marketplace electricity platform matter were managers of the company.

22. SoCalGas showed no contrition for its actions and has not acknowledged wrongdoing.

23. SoCalGas had net income of $201 million in 1999 and $83 million for the period January – June 2000.

Conclusions of Law

1. SoCalGas was required by D.99-02-059 to discontinue the electricity platform until it obtained advice letter approval to offer the platform on the Energy Marketplace website.

2. SoCalGas disobeyed D.99-02-059 and thereby disobeyed Commission directive.

3. SoCalGas disobeyed the Energy Division's instruction that discontinuing the electricity platform was a condition precedent to approval of its advice letter.

4. SoCalGas committed a continuing violation pursuant to Pub. Util. Code § 2108. The violation continued for 475 days; thus, SoCalGas committed 475 separate violations.

5. The penalty amount the Commission may assess pursuant to Pub. Util. Code § 2107 ranges from $500 - $20,000 per violation.

6. A reasonable person would have understood D.99-02-059 to require discontinuance of the electricity platform.

7. A reasonable person would have interpreted the November 23, 1999 advice letter denial to require discontinuance of the electric platform.

8. The public interest justifies a penalty of $300,000 in this case.

ORDER

1. Southern California Gas Company (SoCalGas) violated Commission Decision (D.) 99-02-059 in not discontinuing the electric platform on its Energy Marketplace website as of February 18, 1999.

2. SoCalGas' violations continued for 475 days until June 18, 2000, when the Commission authorized SoCalGas to sell the website to a third party in D.00-06-005.

3. SoCalGas shall be assessed a penalty of $300,000 payable to the General Fund of the State of California within 30 days of the effective date of this order.

4. Upon making such payment, SoCalGas shall file an advice letter with the Commission's Energy Division attaching a cancelled check or other proof of satisfaction of the penalty obligation we impose in this decision.

5. This proceeding is closed.

Dated June 28, 2001, at San Francisco, California.

HENRY M. DUQUE
RICHARD A. BILAS
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/LORETTA M. LYNCH
President

I will file a dissent.

/s/CARL W. WOOD

Commissioner