

Decision 06-12-034 December 14, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation Into the Gas Market Activities of Southern California Gas, San Diego Gas and Electric, Southwest Gas, Pacific Gas and Electric, and Southern California Edison and Their Impact on the Gas Price Spikes Experienced at the California Border from March 2000 through May 2001.

Investigation 02-11-040
(Filed November 21, 2002)

Order Instituting Investigation Whether San Diego Gas & Electric Company, Southern California Gas Company and Their Holding Company, Sempra Energy, Respondents, Have Complied With Relevant Statutes and Commission Decisions, Pertaining to Respondents' Holding Company Systems and Affiliate Activities.

Investigation 03-02-033
(Filed February 27, 2003)

In the Matter of the Application of Southern California Gas Company (U 904 G), San Diego Gas & Electric Company (U 902 M) and Southern California Edison Company (U 338 E) for Approval of Changes to Natural Gas Operations and Service Offerings.

Application 06-08-026
(Filed August 28, 2006)

**OPINION CLOSING INVESTIGATION (I.) 02-11-040 AND I.03-02-033 AND
TERMINATING CONDITIONS ON SHAREHOLDER AWARDS**

I. Summary

We address certain requests submitted by Southern California Gas Company (SoCalGas), San Diego Gas & Electric Company (SDG&E), and Southern California Edison Company (Edison) in Application (A.) 06-08-026. We

close I.02-11-040 and I.03-02-033 with prejudice. We also terminate conditions related to I.02-11-040 that the Commission imposed previously upon shareholder awards approved under SDG&E's gas procurement Performance Based Ratemaking (PBR) mechanism, SoCalGas' Gas Cost Incentive Mechanism (GCIM), and the gas Core Procurement Incentive Mechanism (CPIM) of Pacific Gas and Electric Company (PG&E). We defer the remaining issues raised in A.06-08-026 for further consideration.

II. Background

A. I.02-11-040 and I.03-02-033

The Commission initiated I.02-11-040 through an Order Instituting Investigation (OII) issued on November 21, 2002. We opened I.02-11-040 (also called the "Border OII") to examine reasons for the natural gas price spikes that occurred in California from March 2000 through May 2001 during the California energy crisis. The Border OII names SoCalGas and SDG&E as Phase I Respondents. Phase II was to address the transactions of PG&E, PG&E Energy Trading, Southwest Gas Corporation (Southwest Gas), Alenco Gas Services, Inc., Conwest Exploration, Ltd., Edison, and Edison Mission Energy, with Southwest Gas, PG&E, and Edison named as Phase II Respondents.

The Border OII provides that, if the Phase I investigation reveals that the conduct of SDG&E or SoCalGas contributed to the gas price spikes at the California border during 2000/2001, the Commission may modify or eliminate the companies' gas incentive mechanisms, reduce the amount of shareholder award for the period involved, or order refunds to ratepayers to offset the higher rates. On that basis, the Commission has made subsequent shareholder awards under SoCalGas' GCIM, SDG&E's PBR mechanism, and PG&E's CPIM subject to refund or adjustment based on the results of this investigation. (*See Decision*

(D.) 03-08-064, D.03-08-065, D.04-02-060, D.05-04-003, D.06-10-029, Resolution G-3341, and Resolution G-3348.)

On February 27, 2003, the Commission issued an OII initiating I.03-02-033 (also called the “Sempra Energy Affiliate OII”) to evaluate the business activities of SDG&E, SoCalGas, and their parent company Sempra Energy (Sempra), and consolidating that investigation with I.02-11-040. In D.03-09-070, issued in response to a petition for modification of the OII, we deconsolidated the two investigations and provided for an independent audit as the first step in I.03-02-033. We instructed that the independent audit be combined with the calendar year 2003 audit of affiliate compliance required by D.97-12-088 and D.98-08-035.

The assigned Commissioner issued a scoping memo for Phase I of I.02-11-040 on April 16, 2003. A March 20, 2004 administrative law judge (ALJ) ruling bifurcated Phase I. Phase I.A addressed the gas market activities of SDG&E and SoCalGas. Hearings were held in Phase I.A and a proposed decision was filed, which the Commission rejected on December 16, 2004. No further action has been taken in Phase I.A pending further investigation in Phase I.B.

Phase I.B was commenced to address whether Sempra or its non-utility affiliates played a role in causing the natural gas price spikes at the California border during the subject period and whether concerns about affiliates’ or the parent’s financial position caused SoCalGas and/or SDG&E to take actions that may have increased gas costs. Sempra and SCE submitted prepared testimony in Phase I.B in the Fall of 2005.

In the meantime, the independent audit directed in D.03-09-070 was performed by GDS Associates, Inc. (GDS) with oversight by the Commission’s Energy Division. Energy Division filed the GDS audit reports in I.03-02-033 on

February 28, 2006. Pursuant to ALJ rulings, Sempra also filed its calendar year 2004 and 2005 affiliate compliance audit reports in I.03-02-033.

On March 21, 2006, the assigned Commissioner issued a scoping memo for I.03-02-033 and ruled that I.03-02-033 and Phase I of I.02-11-040 would be coordinated for the purpose of addressing Sempra affiliate activities. The scoping memo set dates for submittal of testimony and scheduled evidentiary hearings.

On June 12, 2006, the ALJ granted a joint motion by SoCalGas, SDG&E, and Edison to stay the schedule in I.02-11-040 and I.03-02-033, based on the parties' representation that they had recently entered into a settlement agreement as a resolution among themselves of issues pending in these proceedings as well as certain other Commission proceedings.

On September 6, 2006, Edison filed motions in I.02-11-040 and I.03-02-033 requesting to withdraw all claims made by Edison in these proceedings against Sempra, SDG&E, SoCalGas, and other affiliates. Edison explains that its motions are related to its settlement agreement with SoCalGas and SDG&E, which the three parties submitted in A.06-08-026, as described below. No party responded to Edison's motions.

B. A.06-08-026 and Related Settlement Agreements

On August 28, 2006, SoCalGas, SDG&E, and Edison filed A.06-08-026. The applicants request Commission approval of certain proposed changes to the natural gas operations and service offerings of SoCalGas and SDG&E. These proposed changes arise from two separate settlement agreements reached earlier this year. SoCalGas, SDG&E, and Edison describe that they and other parties

have reached these agreements in an attempt to resolve remaining issues resulting from the energy crisis of 2000-2001.

The A.06-08-026 applicants describe that, on January 4, 2006, Sempra, SoCalGas, SDG&E, and other Sempra affiliates entered into a settlement of certain class action antitrust and unfair competition claims arising out of the energy crisis (the “Continental Forge Settlement Agreement”). That settlement agreement contains a package of going-forward proposed changes to SoCalGas and SDG&E gas operations.¹

The applicants describe further that, on May 30, 2006, Sempra, SoCalGas, SDG&E, other Sempra affiliates, Edison, and Edison International entered into a separate settlement agreement (the “Edison Settlement Agreement”).² The Edison Settlement Agreement contains additional proposed changes to the operations of and services provided by SoCalGas and SDG&E, and provides that Edison will support the changes to gas operations contained in the Continental Forge Settlement Agreement.

The Edison Settlement Agreement describes that it resolves all issues between Edison and the Sempra companies in I.02-11-040 and I.03-02-033. It provides further that Edison will take steps to withdraw all of its claims in those proceedings. Consistent with the terms of the Edison Settlement Agreement,

¹ The Continental Forge Settlement Agreement is attached to testimony submitted by SDG&E and SoCalGas with the application. It was approved on July 20, 2006 by the Superior Court of the State of California, County of San Diego, J.C.C.P. Nos. 4221, 4224, 4226, and 4228. Appeals of the judgment approving the settlement are pending in the State Court of Appeals, Fourth Appellate District.

² The Edison Settlement Agreement is attached to testimony submitted by SDG&E and SoCalGas with the application.

SoCalGas, SDG&E, and Edison request in A.06-08-026 that the Commission close I.02-11-040 and I.03-02-033 and that the Commission terminate the condition that certain SoCalGas GCIM and SDG&E PBR awards are subject to refund or adjustment consistent with I.02-11-040.³

In A.06-08-026, the applicants explain that settlement provisions relating to firm access rights proposals are under consideration in A.04-12-004⁴ and that another component of the Continental Forge Settlement Agreement, specifically, integration of the SoCalGas and SDG&E transmission systems, has already been addressed in D.06-04-033 in A.04-12-004.

An informational workshop was held in A.06-08-026 on October 18, 2006, to allow parties to seek clarification of the applicants' proposals. The following parties subsequently filed protests in A.06-08-026: Division of Ratepayer Advocates, BHP Billiton LNG International Inc. (BHP Billiton), Coral Energy Resources, L.P., Indicated Producers, and Southern California Generation Coalition. SoCalGas, SDG&E, and Edison filed a joint reply to the protests.

C. Curtailment Action Settlement Agreement

On November 21, 2005, the Attorney General of the State of California (California Attorney General) and the Commission filed an action in the Superior Court of California, County of San Diego.⁵ In that case, the Commission and the

³ SoCalGas, SDG&E, and Edison served the application on all parties in I.02-11-040, I.03-02-033, and the related incentive mechanism proceedings, among others.

⁴ A proposed decision and an alternate proposed decision addressing firm access rights were submitted in A.04-12-004 on October 31, 2006.

⁵ *The People of the State of California ex rel. Bill Lockyer, Attorney General of the State of California, and the California Public Utilities Commission, Plaintiffs, v. Sempra Energy, a California corporation; San Diego Gas & Electric Company, a California corporation; Southern*

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California Attorney General alleged, among other things, that Sempra, SDG&E, and SoCalGas, commencing as early as January 1998 and continuing at least until September 2002, engaged in an illegal course of conduct in making certain written and oral representations and other statements before the Commission that resulted in inadequate resource planning and system capability, culminating in periods of curtailment of natural gas service to certain SDG&E non-core customers in 2000 and 2001.

On September 21, 2006, the Commission and the California Attorney General entered into a settlement agreement (the "Curtailment Action Settlement Agreement") with Sempra, SoCalGas, and SDG&E. The Superior Court approved the Curtailment Action Settlement Agreement on October 11, 2006, and it became effective on that date.⁶

The Curtailment Action Settlement Agreement provides that SDG&E will obtain an option, effective on October 1, 2011, to acquire at book cost El Dorado Energy LLC, which is the Sempra subsidiary that owns and operates the El Dorado gas-fired power plant in Boulder City, Nevada, and associated electric transmission facilities. SDG&E would liquidate El Dorado Energy LLC and, as a result, would directly own the El Dorado plant. SDG&E's decision on whether to exercise this option, which we expect would be based upon the results of a

California Gas Company, a California corporation; and Does I – 50, Defendants, Case No. GIC 857224.

⁶ We take official notice of the Superior Court action and the Curtailment Action Settlement Agreement, pursuant to Rule 13.9 of the Commission Rules of Practice and Procedure.

competitive solicitation, would be subject to Commission review.⁷ The Curtailment Action Settlement Agreement contains other consideration by the Sempra parties, including payments to SDG&E ratepayers totaling approximately \$5.7 million over a two-year period commencing October 1, 2009.

A condition precedent for receipt of these agreed-upon considerations is set forth in Section 2.2(c) of the Curtailment Action Settlement Agreement as follows:

By 90 days after the effective date of the [Curtailment Action] Settlement Agreement, the Commission must permanently and finally close, with prejudice, all phases of the Border OII and Sempra Energy Affiliate OII proceedings and determine that this closure will extinguish in any other Commission proceedings any possible refund liability or adjustment contingency tied specifically to the Border OII through the entry of duly authorized orders of the Commission, by lawful vote of a quorum of the Commission concluding and terminating said proceedings.⁸

The Curtailment Action Settlement Agreement does not require that the Commission close the Border OII (I.02-11-040) and the Sempra Energy Affiliate OII (I.03-02-033). Rather, Section 2.3(c) provides that the Commission will provide an opportunity for and consider any responses to requests to close these proceedings, while reiterating that their permanent closure with prejudice is a

⁷ It is anticipated that the acquisition would also be subject to Federal Energy Regulatory Commission approval.

⁸ Section 2.3(d) of the Curtailment Action Settlement Agreement specifies that the time limitations for the Commission's decisions in Section 2.2(c) refer to the time to issue the Commission's original decision, and do not refer to the time necessary to issue a decision on any applications for rehearing.

condition precedent for the obligation of the Sempra companies to provide the considerations described above.

III. Discussion

As a threshold issue, we find that the settlement-based proposals submitted in A.06-08-026 do not constitute the type of settlement governed by Article 12 of the Commission Rules of Practice and Procedure.⁹ Article 12 applies only to settlements submitted after a prehearing conference in a proceeding (Rule 12.1(a)). Rule 12.1(a) also provides that resolution of issues presented in a settlement submitted under Article 12 “shall be limited to the issues in the proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.” As another requirement, Rule 12.1(b) requires at least one settlement conference prior to parties entering a settlement.

Instead, the parties entered into the settlement agreements submitted in A.06-08-026 outside of Commission proceedings. Some of the proposals in the Continental Forge and Edison settlement agreements regarding the going-forward changes to SoCalGas and SDG&E gas operations have been considered in A.04-12-004, with the remaining proposals submitted in a new proceeding, i.e., A.06-08-026. Additionally, the Edison Settlement Agreement addresses closure of I.02-11-040 and I.03-02-033 and termination of conditions on shareholder awards imposed in several other proceedings. No settlement conference has been convened in A.06-08-026 or any other proceeding. Further, the applicants

⁹ All references to Articles and Rules are to the Commission Rules of Practice and Procedure.

did not invoke the Commission's settlement rules in filing their proposals in A.06-08-026.

In A.04-12-004, we have already considered on its merits the proposal to integrate the SoCalGas and SDG&E transmission systems (D.06-04-033) and are considering on its merits the proposal to establish a system of firm access rights. Because Article 12 does not apply, the proposals submitted in A.06-08-026 should be assessed similarly on their individual merits, rather than in the context of the settlement agreements that gave rise to them.

The parties filing protests in A.06-08-026 raise various concerns about the going-forward changes to the gas operations and service offerings of SoCalGas and SDG&E proposed in the application. In their joint reply, SoCalGas, SDG&E, and Edison acknowledge that hearings on the contested proposals are needed. We expect that the assigned Commissioner and ALJ will establish a schedule to develop the record on these contested issues.

We find that the applicants' proposals that I.02-11-040 and I.03-02-033 be closed and that the conditions on GCIM and PBR shareholder awards related to I.02-11-040 be removed should be granted at this time, for several reasons. Significantly, while protesting other portions of A.06-08-026, none of the protesters take issue with these limited proposals.¹⁰ The opportunity in

¹⁰ In its comments on the proposed decision, BHP Billiton disagrees with our characterization that none of the protesters take issue with the limited proposal to close I.02-11-040 and I.03-02-033. BHP Billiton notes that protesting parties take issue with moving forward with the application *as a whole* before first providing further opportunity for discovery and hearings. While we recognize parties' categorical opposition to moving forward with *any* aspect of the application at this juncture, the fact remains that no party has identified any *specific* objection that would justify delaying the closure of I.02-11-040 and I.03-02-033. As observed below, the limited act

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A.06-08-026 for parties to respond to the request that I.02-11-040 and I.03-02-033 be closed satisfies the notice commitment in Section 2.3(c) of the Curtailment Action Settlement Agreement.

Additionally, closure of I.02-11-040 and I.03-02-033 and removal of the conditions on GCIM and PBR shareholder awards will satisfy the condition precedent in the Curtailment Action Settlement Agreement for receiving substantial consideration for SDG&E's ratepayers, including making available additional supplies of energy at Commission-regulated rates that would not have been available otherwise.

Closure of I.02-11-040 and I.03-02-033 will have added benefits, as set forth by the parties, of avoiding costs and delays associated with further litigation regarding what took place in the natural gas market during the 2000-2001 energy crisis. This will allow the Commission and parties to focus resources and attention on other matters, including the proposed changes presented in A.06-08-026. At the same time, closure of I.02-11-040 and I.03-02-033 will not limit or impede the Commission's ability to address the range of forward-looking changes in natural gas operations and service offerings proposed in A.06-08-026.

As an added assurance, we note that in Rulemaking (R.) 05-10-030 the Commission is addressing the relationship of the major energy utilities with their

of closing these proceedings in no way limits or forecloses parties' due process rights to address the full range of prospective changes in natural gas operations and service offerings proposed in R.06-08-026. Accordingly, the objections opposing closure of these proceedings at this time, as posed by BHP Billiton, are not persuasive.

parent holding companies and affiliates, and the extent to which there should be revisions to the Commission's affiliate transaction rules and General Order 77-L.

For these reasons, we conclude that it is reasonable to close I.02-11-040 and I.03-02-033 and to remove the conditions on SoCalGas GCIM and SDG&E PBR shareholder awards related to I.02-11-040. With closure of I.02-11-040, the condition related to I.02-11-040 that the Commission imposed on a PG&E CPIM shareholder award in Resolution G-3348 should also be removed.

To satisfy the condition precedent in the Curtailment Action Settlement Agreement, I.02-11-040 and I.03-02-033 should be closed with prejudice. The Commission will not investigate further or make findings upon the merits of the issues within our jurisdiction that were set for hearing in either I.02-11-040 or I.03-02-033, either on our own motion or if parties attempt to raise them in future proceedings. As recognized in Section 2.3(e) of the Curtailment Action Settlement Agreement, the closure of I.02-11-040 and I.03-02-033 with prejudice in no way limits the Commission's ongoing and future regulatory authority or jurisdiction in other respects, including the Commission's consideration or adoption of new or revised affiliate transaction rules in R.05-10-030. We reiterate that applicants' proposed changes in gas operations and service offerings of SoCalGas and SDG&E on a prospective basis will be addressed on their merits in A.06-08-026.

We turn now to Edison's motions to withdraw its claims in I.02-11-040 and I.03-02-033. Edison wishes to withdraw all claims it made against the Sempra companies in these investigations, "however these claims were presented, including pleadings, testimony, briefs, oral argument, and ex parte presentations." In light of our decision to close I.02-11-040 and I.03-02-033 with prejudice and in the absence of objections from any other party, we do not object

to Edison's withdrawal of its claims. Indeed, since closure of these proceedings with prejudice will prevent Edison from pursuing its claims before us, Edison's motions could be viewed as moot.

The investigations in I.02-11-040 and I.03-02-033 were initiated and undertaken on the Commission's own motion. Considerable resources have been expended, both by the parties and by the Commission and our consultant GDS, in developing the record in these proceedings. While we do not make findings on the merits of the issues raised by the OIIs, the extensive record that has been developed in these investigations provides significant insight into these matters and should be retained. Even if we were so inclined, it would be difficult, if not impossible, to identify and extricate each of Edison's claims from the record in the two proceedings. Edison has made no recommendation or request in this regard. The record includes Edison's representation in its motions that the Edison Settlement Agreement resolved between the parties all claims that Edison had raised in these investigations, so the record is clear in this regard. For these reasons, while we grant Edison's motions to withdraw its claims, the record in I.02-11-040 and I.03-02-033 will be preserved in its entirety.

IV. Comments on Proposed Decision

The proposed decision of the ALJs in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. PG&E and BHP Billiton filed comments on the proposed decision. SoCalGas and SDG&E jointly filed reply comments. We have considered the filed comments and have made changes to the proposed decision as appropriate.

V. Assignment of Proceedings

Geoffrey F. Brown is the assigned Commissioner and Charlotte F. TerKeurst is the assigned ALJ in I.02-11-040 and I.03-02-033. Michael R. Peevey is the assigned Commissioner and Thomas R. Pulsifer is the assigned ALJ in A.06-08-026.

Findings of Fact

1. Parties entered into the Continental Forge and Edison settlement agreements outside of Commission proceedings, with the proposals related to issues in multiple Commission proceedings. No settlement conference regarding these settlements has been convened, in A.06-08-026 or any other proceeding.
2. The proposals submitted in A.06-08-026 should be assessed on their individual merits, rather than in the context of the settlement agreements that gave rise to them.
3. With closure of I.02-11-040, it is reasonable to terminate the conditions on GCIM, PBR, and CPIM shareholder awards related to I.02-11-040 that the Commission imposed in D.03-08-064, D.03-08-065, D.04-02-060, D.05-04-003, D.06-10-029, Resolution G-3341, and Resolution G-3348.
4. The extensive record developed in I.02-11-040 and I.03-02-033 provides significant insight into the issues raised by the OIIs.

Conclusions of Law

1. The settlement-based proposals submitted in A.06-08-026 are not consistent with Article 12, including Rules 12.1(a) and 12.1(b).
2. I.02-11-040 should be closed with prejudice.
3. I.03-02-033 should be closed with prejudice.
4. SCE's motions to withdraw claims in I.02-11-040 and I.03-02-033 should be granted to the extent set forth in this decision.

5. The record developed in I.02-11-040 and I.03-02-033 should be retained.

6. This order should be effective today in order to comply with a condition precedent in the Curtailment Action Settlement Agreement.

O R D E R

IT IS ORDERED that:

1. Investigation (I.) 02-11-040 is closed with prejudice.

2. I.03-02-033 is closed with prejudice.

3. The shareholder awards approved for Southern California Gas Company (SoCalGas) under its Gas Cost Incentive Mechanism (GCIM) in Decision (D.) 03-08-064, D.03-08-065, D.04-02-060, D.05-04-003, and D.06-10-029 are no longer subject to revision or adjustment related to I.02-11-040.

4. The shareholder award approved for San Diego Gas & Electric Company under its gas procurement Performance Based Ratemaking mechanism in Resolution G-3341 is no longer subject to revision related to I.02-11-040.

5. The shareholder award approved for Pacific Gas and Electric Company under its gas Core Procurement Incentive Mechanism in Resolution G-3348 is no longer subject to revision related to I.02-11-040.

6. The Motion to Withdraw Claims filed by Southern California Edison Company (Edison) in I.02-11-040 is granted to the extent set forth in this decision.

7. The Motion to Withdraw Claims filed by Edison in I.03-02-033 is granted to the extent set forth in this decision.

8. The Executive Director shall serve this order on the parties to the following SoCalGas GCIM proceedings: Application (A.) 01-06-027, A.02-06-035, A.03-06-021, A.04-06-025, and A.05-06-030.

This order is effective today.

Dated December 14, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners