

Decision **DRAFT DECISION OF COMMISSIONER BROWN (Mailed 4/5/2005)****BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Investigation into the Gas Market Activities of Southern California Gas Company, 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)

**OPINION DENYING “MOTION TO REVERSE
ADMINISTRATIVE LAW JUDGE’S RULINGS
AND GRANT MOTIONS FOR COSTS”****I. Summary**

Sempra Energy Trading Corporation (SET) has filed a motion asking the full Commission to reverse the rulings of the Law and Motion Administrative Law Judges (ALJs) requiring SET to provide certain discovery, pursuant to subpoenas duces tecum issued in this investigation, at its own expense. We deny the motion since we generally disfavor interlocutory appeals of discovery issues except upon an extraordinary showing of good cause. We have carefully reviewed SET’s claims, but the required showing has not been made.

II. Background

SET’s motion (filed January 3, 2005) arises in the context of Phase I of our investigation of spikes in natural gas prices at the California border in 2000 and 2001. In Phase I, Southern California Gas Company (SoCalGas) and San Diego Gas & Electric Company (SDG&E) are named as respondents. An important

component of the inquiry is whether there were improper transactions involving these companies and their affiliates. SoCalGas' and SDG&E's relationship with their corporate affiliates, including SET, is repeatedly identified for investigation during the proceeding. (*See* Issue 2, Scoping Memo for Phase I of I.02-11-040 and Ruling of Assigned Commissioner at 4-6 (April 16, 2003) ("Did any of SoCalGas and SDG&E's affiliates or their parent company, Sempra, play a role in causing the increase in border prices?")¹)

Southern California Edison Company (Edison) has participated as an active party in the proceeding, and may have been affected by any impermissible transactions involving respondents and their affiliates. Upon Edison's request, the Commission on August 27, 2003, issued a series of subpoenas duces tecum requiring SET's production of certain documents identified in earlier data requests propounded by Edison. At a law and motion hearing on February 13, 2004, the Law and Motion ALJ ordered SET to search back-up electronic tapes of corporate e-mails for documents responsive to the subpoenas.

On February 25, 2004, SET filed a motion for an order requiring Edison to pay SET's costs in responding to the subpoenas. Edison opposed the motion and another Law and Motion ALJ heard the matter on April 15, 2004. SET argued that California Evidence Code Section 1563, pertaining to discovery costs incurred by a witness not a party to a proceeding, required Edison to reimburse SET for e-mail recovery and review costs. The Law and Motion ALJ, however, ruled that SET was required to bear the costs of responding to the subpoenas. The ruling indicated that Evidence Code Section 1563 is not directly applicable to

¹ The assigned ALJ bifurcated Phase I, with Issue 2 to be addressed in Phase I.B.

a Commission-initiated investigation and, furthermore, the Commission has special powers and obligations to investigate allegedly impermissible transactions between utilities and their corporate affiliates. (*See* ALJ Ruling on Motion Concerning Discovery Costs (April 15, 2004).)

On May 11, 2004, SET filed a motion for reconsideration of the ALJ Ruling. The Law and Motion ALJ denied the motion for reconsideration on June 25, 2004. (*See* ALJ Ruling Denying Reconsideration of Ruling on Motion Concerning Discovery Costs (June 25, 2004).) Thereafter, SET filed a petition for a writ of mandate with the California Court of Appeal. With the court's permission, SET subsequently withdrew its petition without prejudice. SET then proceeded to file the pending motion with us on January 3, 2005. SET represents that it has spent almost \$220,000 as of that date in complying with the e-mail discovery rulings. SET asks us to reverse the ALJ rulings concerning discovery and order Edison to reimburse SET for the reasonable cost of responding to the subpoenas. Edison opposes the motion.

III. Discussion

SET's motion is for interlocutory relief concerning a discovery matter during an ongoing proceeding. We have consistently discouraged interlocutory appeals concerning procedural and evidentiary matters except for extraordinary circumstances. Our reluctance to entertain interlocutory matters avoids piecemeal litigation, prevents vexatious interference with the Commission's regulatory functions, and helps the Commission to complete its proceedings within the statutory time periods. (*See, e.g., In re AT&T Communications of California, Inc. & WorldCom, Inc.*, D.02-05-042, 2002 Cal. PUC LEXIS 286, at *32 (2002) ("[W]e note that the Commission generally looks with disfavor on interlocutory appeals of ALJ rulings."); *In re Southern California Gas Co.*,

D.03-12-057, 2002 Cal. PUC LEXIS 1061 (2003) (“[O]n rare occasion the Commission may choose to reconsider some interim rulings, including Scoping Memos.”).)

We have said, “Nothing in the Public Utilities Code, or in our Rules of Practice and Procedure, authorize[s] interlocutory appeals as a right of the parties. Interlocutory appeals delay the orderly functioning of the Commission and are not tolerated.” (*In re Roseville Telephone Co.*, D.99-06-051, 1999 Cal. PUC LEXIS 308, at *42 (1999).) With particular relevance to this proceeding, we have admonished that “the presiding officer must have the authority to rule on discovery motions and impose sanctions for discovery abuse. Without this authority, material evidence would remain undisclosed or unconscionable delay would occur as parties seek relief from the Commission.” (*See In re AT&T Communications of California, Inc. & WorldCom, Inc.*, *supra*, at *33.)

While enabling the presiding officer to properly manage a proceeding without disruption, our procedural rules expressly provide two avenues for the Commission to address disputed ALJ rulings. The usual opportunity is when the presiding officer submits a draft decision or a proposed decision to us for our consideration on the merits. Any previously filed motions are then before the Commission as it reviews the draft or proposed decision. At that time, the Commission may act to affirm, modify, or reject the prior ALJ ruling.

The second avenue is Rule 65, which allows the presiding officer, during a proceeding, to refer evidentiary rulings to the Commission when “necessary to promote substantial justice.” (*In re AT&T Communications of California, Inc. & WorldCom, Inc.*, *supra*, at *32.) Under Rule 65, the Assigned Commissioner and Administrative Law Judge are ideally positioned to identify those few but important interlocutory matters that should be referred to the entire Commission

for determination. Indeed, the legislative scheme created by Public Utilities Code Section 1701 *et seq.* contemplates that, in almost all respects, the conduct of contested Commission proceedings is entrusted to the Assigned Commissioner and the assigned ALJ. With reference to SET's motion, both the Assigned Commissioner and the assigned ALJ have recommended against our interlocutory review of the discovery rulings.

Although not explicitly provided in our rules, under extraordinary circumstances the Commission may grant a direct request by a petitioner for interlocutory review of an ALJ's ruling. (*See, e.g., Application of Pacific Gas & Electric Co.*, D.86-12-101, 23 CPUC 2d 352, 353 (1986).) Such interlocutory appeals are rarely granted; and, under Rule 87, the petitioner must demonstrate good cause for deviating from the Commission's Rules, which expressly provide the previously described two avenues for reviewing an ALJ's ruling during a proceeding.

In this instance, SET has not convincingly demonstrated extraordinary circumstances under Rule 65 or for a direct appeal of an interlocutory ALJ ruling. We have weighed SET's stated need for interlocutory relief against our regulatory interest in an expeditious investigation of the underlying facts of potential market abuse. SET has been conducting the ordered e-mail recovery and review process for over a year. The costs SET indicates it has incurred in complying with the subpoenas are relatively small when compared with the potential magnitude of natural gas market abuse that is alleged in this proceeding. If the full Commission decides to reallocate these costs as it reviews the draft or proposed decision, SET faces minimal risk in its ability to collect its costs from Edison, a sizeable entity in its own right and subject to our ongoing jurisdiction and orders. SET's discovery costs, under the facts of this case, do not

present such an extraordinary circumstance that the Commission should address its claims now. Indeed, SET's efforts to secure judicial review and our review of the ALJ rulings have distracted attention from the merits of our investigation. Under these circumstances, SET has not demonstrated the extraordinary circumstances warranting interlocutory review or relief.

IV. Comments on Draft Decision

On April 5, 2005, the Assigned Commissioner's draft decision in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. The following comments were received on _____.

V. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Charlotte F. TerKeurst is the assigned ALJ in this proceeding.

Findings of Fact

1. Upon Edison's request, the Commission on August 27, 2003, issued a series of subpoenas duces tecum directed to SET requiring the production of certain documents identified in earlier data requests propounded by Edison.
2. At a law and motion hearing on February 13, 2004, the Law and Motion ALJ ordered SET to search back-up electronic tapes of corporate e-mails for documents responsive to one of the subpoenas.
3. In a ruling dated April 15, 2004, the Law and Motion ALJ ruled that SET was required to bear the costs of responding to the subpoenas.
4. On May 11, 2004, SET filed a motion for reconsideration of the ALJ's ruling. The Law and Motion ALJ denied the motion for reconsideration on June 25, 2004.

5. The process for recovering and reviewing the subpoenaed corporate e-mails has been underway for a year.

6. If the Commission ultimately reallocates the e-mail recovery and review costs against Edison, SET will be in a favorable position to recover its costs since Edison is a large, financially viable entity; is subject to the Commission's ratesetting authority; and as a public utility, is otherwise subject to the Commission's orders.

Conclusions of Law

1. Public Utilities Code Section 1701 *et seq.* contemplates that, in almost all respects, the conduct of contested Commission proceedings is entrusted to the Assigned Commissioner and the assigned ALJ.

2. While a proceeding is pending, the Commission accepts and hears interlocutory appeals of procedural and evidentiary determinations made by the Assigned Commissioner or ALJ only in extraordinary circumstances. This rule is especially pertinent in adjudicatory or investigatory matters.

3. SET has not provided facts or legal arguments sufficient to demonstrate the extraordinary circumstances warranting interlocutory appeal of the Law and Motion ALJs' rulings concerning the scope of discovery and the allocation of discovery costs in this proceeding.

O R D E R

IT IS ORDERED that:

1. Sempra Energy Trading Corporation's (SET) Motion for Permission to Reply in Support of its Further Motion to the Full Commission (January 27, 2005) is granted.

2. SET's Motion to the Full Commission to Reverse Administrative Law Judge's Rulings and Grant Motion for Costs, dated January 3, 2005, is denied.

3. This proceeding remains open.

This order is effective today.

Dated _____, at San Francisco, California.