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Decision 05-10-045 October 27, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas to California.	Rulemaking 04-01-025 (Filed January 22, 2004)

ORDER MODIFYING DECISION (D.) 04-09-022, AND DENYING REHEARING, AS MODIFIED

I. SUMMARY

In today's decision, we dispose of two applications for rehearing of D.04-09-022, one jointly filed by The Utility Reform Network's (TURN) and Ratepayers for Affordable Clean Energy's (RACE), and the other by RACE separately. For the reasons set forth below, we modify D.04-09-022, and deny rehearing of D.04-09-022, as modified.

II. BACKGROUND

On January 22, 2004, we issued Order Instituting Rulemaking (OIR), Rulemaking (R.) 04-01-025 (Gas OIR) to establish policies and rules to ensure reliable, long-term supplies of natural gas to California. We issued the Gas OIR in response to new reports, recent Federal Energy Regulatory Commission (FERC) orders, and ongoing changes in the natural gas market, which indicate that in the long-term there may not be sufficient natural gas supplies or infrastructure to meet California's needs. We realized that in order to ensure that California does not face a natural gas shortage in the future, we must make certain decisions now regarding California natural gas public utilities, which we regulate. We required California natural gas public utilities to respond to data requests and to submit proposals to us to address how California's long-term natural gas needs should be met with interstate and intrastate pipeline expansions, more flexible

storage operations, and access to proposed liquified natural gas (LNG) facilities. We also established two phases in this Gas OIR. The Scoping Memo determined what policy issues should be addressed immediately in Phase I, and what other issues may require a separate proceeding or be handled at a later date in Phase II.

On February 20, 2000, RACE filed a motion to intervene in this proceeding, which we granted. RACE filed a subsequent motion on March 9, 2004 to modify the schedule in this proceeding. RACE requested that we extend the deadline for interested parties to submit their comments by at least one month, that evidentiary hearing should be scheduled, and that the rulemaking should be modified by reversing Phase I and Phase II. We denied RACE's motion to modify the schedule on March 18, 2004. We noted that "RACE and other parties had sufficient opportunity in January and February to seek an extension of the comment period." (Administrative Law Judge (ALJ) Ruling Regarding Various Motions, March 18, 2004, p. 3.) Because of the untimeliness of RACE's request, and because Rules 14.1 and 14.2 of the Commission's Rules of Practice and Procedure give the Commission the authority to determine whether evidentiary hearings are needed in a rulemaking, the ALJ ruled that we had the discretion to find that evidentiary hearings were not needed in Phase I. (ALJ Ruling Regarding Various Motions, March 18, 2004, p. 3.)

On June 28, 2004, RACE filed an appeal challenging the categorization of Phase I of this proceeding as quasi-legislative rather than ratesetting. We denied RACE's appeal, finding that "[s]ince the Phase I decision will only address policy issues, and is not establishing rates for a specific company, the categorization of Phase I of this proceeding a quasi-legislative proceeding . . . is affirmed." (D.04-07-030 (Decision Denying Appeal of Categorization), p. 4 (slip op.).)

We issued D.04-09-022 (Phase I Decision) on September 10, 2004, adopting policies concerning the Phase I proposals of Southern California Gas Company (SoCalGas), San Diego Gas & Electric Company (SDG&E), Pacific Gas & Electric Company (PG&E), and Southwest Gas Company (Southwest). The policies adopted in

the Phase I Decision are part of the California's overall effort to implement and fulfill the Energy Action Plan's (EAP) goal.

TURN and RACE timely filed a joint application for rehearing of the Phase I Decision (Joint Application) on October 12, 2004. TURN and RACE make the following arguments in their joint application for rehearing: (1) the Commission committed legal error pursuant to Public Utilities Code section 454(a)[1] by setting rates without an evidentiary hearing; (2) the Commission acted in contravention to section 728 by setting rates without an evidentiary hearing; (3) the Phase I Decision violates section 1701.1, which prohibits establishing new rates in a quasi-legislative proceeding; (4) the Phase I Decision contravenes section 1708 by failing to provide adequate notice and opportunity to be heard; and (5) the Phase I Decision violates section 311(e) by making a substantive revision to a proposed decision without subjecting it to public review and comment.

RACE filed a separate application for rehearing on October 12, 2004 (RACE Application). RACE claims that the Commission made the following factual findings and legal conclusions that are not supported by the record: (1) there is an imminent shortage of natural gas; (2) LNG will promote a diverse supply portfolio; (3) LNG has price benefits; (4) the supply of LNG is flexible; (5) LNG will not lead to market-power abuse; (6) LNG will not result in affiliate transaction abuse; (7) the supply of LNG is reliable; (8) LNG has low safety risks and will not result in environmental damage; and (9) this is a quasi-legislative proceeding. RACE also argues that Sempra Energy's (Sempra) eleventh hour lobbying against evidentiary hearings and for favorable treatment at Otay Mesa was improper.

Sempra Energy LNG, BHP Billiton LNG International Inc. (BHP Billiton), Sound Energy Solutions (SES), Coral Energy Resources, L.P. (Coral), SDG&E, SoCalGas, and Gas Transmission Northwest Corporation (Northwest) all filed responses to the applications for rehearing, which have been considered.

[1] Hereinafter, all references are to the Public Utilities Code, unless otherwise noted.

We have reviewed each and every issue raised in the applications for rehearing. For the reasons discussed below, we are of the opinion that D.04-09-022 should be modified, and that rehearing of D.04-09-022, as modified, should be denied.

III. DISCUSSION

A. TURN's and RACE's Joint Application

TURN and RACE claim that our determination to designate Otay Mesa as a joint receipt point and to set interim rates for that receipt point violates sections 454(a), 728, 1701.1, 1708, and 311(e).

1. Section 454(a)

TURN and RACE claim that the Phase I Decision contravenes section 454(a) by setting rates without evidentiary hearings. (Joint Application, pp. 14-15.) Although the Applicants admit that we did not authorize a rate change for any existing utility service in the Decision, they claim that the Commission "has authorized a *new service* (shipping as north into the SDG&E system and north into the SoCalGas system) and *established rates* for that service, in the process allowing one class of shippers (SoCalGas end use customers) not to pay the transportation charges applicable to other shippers (SDG&E end use customers) using that same service." (Joint Application, p. 16 (emphasis in original).)

Section 454(a) states:

> Except as provided in Section 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified. Whenever any electrical, gas, heat, telephone, water, or sewer system corporation files an application to change any rate, other than a change reflecting and passing through to customers only new costs to the corporation which do not result in changes in revenue allocation, for the services or commodities furnished by it, the corporation shall furnish to its customers affected by the proposed rate change notice of its application to the commission for approval of the new rate. This notice

> requirement does not apply to any rate change proposed by a corporation pursuant to an advice letter submitted to the commission in accordance with commission procedures for this means of submission.

(Pub. Util. Code, § 454(a).) Applicants argue that the Phase I Decision is distinct from *Southern California Edison v. Peevey* (*Edison v. Peevey*) (2003) 31 Cal.4th 781, which held that the Commission's action of continuing rates set during the rate freeze, which were existing approved rates, did not violate section 454. (Joint Application, p. 16.) The Court reasoned, in TURN and RACE's estimation, that "the settlement continued existing approved rates." (Joint Application, p. 16.) TURN and RACE contend that the setting of a new interim transportation rate does not fit the exception outlined in the *Edison v. Peevey* decision, but rather constitutes a "'change in existing classifications and practices, in that it authorizes a new transportation service at a new rate." (Joint Application, p. 16.)

Upon further reflection and in consideration of the question regarding our compliance with section 454(a) in the setting of an interim rate for gas flowing through the Otay Mesa joint receipt point, we have decided to modify the Phase I Decision to eliminate the setting of an interim rate for the Otay Mesa joint receipt point. We are currently addressing this issue in a separate proceeding, A.04-12-004, concerning SDG&E's and SoCalGas' proposals to integrate their gas transmission rates, establish firm access rights, and provide off-system gas transportation services. A decision resolving the issue of rates at the Otay Mesa joint receipt point will be forthcoming in that proceeding. Because the issue of what rates should apply to gas flowing through the Otay Mesa joint receipt point will be determined shortly in A.04-12-004, we will modify the Phase I Decision to remove the language setting interim rates for the Otay Mesa joint receipt point. In the meantime, should SDG&E and SoCalGas need to move gas through the Otay Mesa joint receipt point, they may file an application at the Commission to set interim rates pending the issuance of a decision in A.04-12-004.

2. Section 728

TURN and RACE also claim that the Phase I Decision violates section 728 by setting a new interim rate for transportation service without evidentiary hearings. (Joint Application, p. 17.) Because we modify the Phase I Decision to eliminate the setting of an interim rate, Applicants' section 728 argument is moot, and thus, needs no further consideration.

3. Section 1701.1

TURN and RACE allege that the Phase I Decision violates section 1701.1 because the Commission's last-minute change to the proposed decision (PD) authorized a new transportation service for gas flowing north from Mexico to SoCalGas' service territory and it established a new rate for this natural gas transportation service. (Joint Application, p. 1.) TURN and RACE claim that "**the Commission itself admits that setting rates based on the 'joint' receipt point designation is a ratesetting matter.**" (Joint Application, p. 9 (emphasis in original).) The Applicants' claim that the authorization of such a new service and the setting of rates for a utility service in a quasi-legislative proceeding violate the requirements of section 1701.1. Because we remove the language setting interim rates for the Otay Mesa joint receipt point from the Phase I Decision, we will only address Applicants' section 1701.1 as it applies to the establishment of the Otay Mesa joint receipt point.

TURN and RACE rely on language in section 1701.1 defining the three categories of Commission proceedings to support their argument:

> (c) (1) Quasi-legislative cases, for purposes of this article, are cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry.
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> (2) Adjudication cases, for purposes of this article, are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in Section 1702.

> (3) Ratesetting cases, for purposes of this article, are cases in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.

(Pub. Util. Code, § 1701.1.)[2] TURN and RACE, however, do not refer to the language in section 1701.1 preceding the above-quoted language, which provides, in relevant part: "[t]he commission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing." The commission shall determine whether the matter requires a quasi-legislative, an adjudication, or a ratesetting hearing." (Pub. Util. Code, § 1701.1(a).) Thus, section 1701.1 clearly states that the Commission has the discretion to determine how to categorize a proceeding as long as it is consistent with the statutory standards.

Phase I was properly categorized as a "quasi-legislative" proceeding because we addressed matters of policy the Phase I Decision. As we stated in the Gas OIR, the Phase I Decision addressed general guidelines for LNG to enter California through Otay Mesa. We made a policy decision, based on record evidence, that Otay Mesa should be a

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[2] Rule 5 of the Commission's Rules of Practice and Procedure (Rule 5) further defines the scope of a quasi-legislative proceeding, as well as a ratesetting and an adjudicatory proceeding:

> (a) "Category," "categorization," or "categorized" refers to the procedure whereby a proceeding is determined for purposes of this Article to be an adjudicatory, ratesetting, or quasi-legislative proceeding. "Appeal of categorization" means a request for rehearing of the determination of the category of a proceeding.
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> (b) "Adjudicatory" proceedings are: (1) enforcement investigations into possible violations of any provision of statutory law or order or rule of the Commission; and (2) complaints against regulated entities, including those complaints that challenge the accuracy of a bill, but excluding those complaints that challenge the reasonableness of rates or charges, past, present, or future.
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> (c) "Ratesetting" proceedings are proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities). "Ratesetting" proceedings include complaints that challenge the reasonableness of rates or charges, past, present, or future. For purposes of this Article, other proceedings may be categorized as ratesetting, as described in Rule 6.1(c).
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> (d) "Quasi-legislative" proceedings are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry.

(Rule 5 of Commission's Rules of Practice and Procedure, Code of Regs. tit. 20, § 5.)

joint receipt point on the SoCalGas and SDG&E systems to "provide LNG developers with assurance that efficient access to the SDG&E and SoCalGas markets will be available . . . ." (D.04-09-022, pp. 54, 66-68.) We acted in accord with section 1701.1 because the establishment of a joint receipt point at Otay Mesa was made as a part our policy to promote LNG development.

For the aforementioned reasons, Applicants' section 1701.1 arguments fail.

4. Section 1708

TURN and RACE contend that the Phase I Decision violates section 1708 by altering a prior order or decision without providing parties with notice and opportunity to be heard. Section 1708 provides:

> [t]he commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

(Pub. Util. Code, § 1708.) Applicants claim that we violated section 1708 by establishing Otay Mesa as a joint receipt point and setting interim rates for that joint receipt point, thereby amending the Scoping Memo and the Decision Denying Appeal of Categorization (D.04-07-030), without providing parties an opportunity to give notice and comment. (Joint Application, p. 18.) Because we eliminate the establishment of interim rates in the Phase I Decision, we only address Applicants' section 1708 argument as it applies to the establishment of the Otay Mesa joint receipt point. Applicants' argument is without merit.

Section 1708 provides for due process before the Commission can change a previous order. The due process requirement is to provide notice and an opportunity to be heard. In short, section 1708 ensures that the Commission and parties to Commission proceedings are fair to each other. In this proceeding, the proposed decision (PD) and an Alternate PD (Alternate) were circulated, and numerous parties commented on both drafts. While the issue of the Otay Mesa joint receipt point was not addressed in the PD

or the Alternate, it was raised by several parties in their opening and reply comments to the PD and Alternate.[3] Parties also raised the issue of a joint receipt point at Otay Mesa in their opening proposals, and comments to those proposals.[4] Thus, the parties had notice and opportunity to be heard on the joint receipt point issue.

For these reasons, Applicants' section 1708 argument fails.

5. Section 311(e)

Applicants' final argument is that the establishment of the joint receipt point at Otay Mesa, and the setting of rates for that joint receipt point violates section 311(e) because the Commission failed to obtain public comment on material revisions to the PD. (Joint Application, p. 3.)

Section 311(e) provides, in relevant part:

> Any item appearing on the commission's public agenda as an alternate item to a proposed decision or to a decision subject to subdivision (g) shall be served upon all parties to the proceeding without undue delay and shall be subject to public review and comment before it may be voted upon. For purposes of this subdivision "alternate" means either a substantive revision to a proposed decision that materially changes the resolution of a contested issue or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.

[3] Several parties proposed that Otay Mesa should be designated a joint receipt point on the SoCalGas system. (*See* Southern California Generation Coalition (SCGC) Reply Comments on the PD, August 16, 2004, pp. 4-5; Reply Comments of Sempra on the PD, August 16, 2004, p. 1; Reply Comments of Coral on the PD, August 16, 2004, pp. 2-3; and Reply Comments of Chevron USA, Inc. on the PD, August 16, 2004, pp. 6-7.) Some parties also opposed the designation of Otay Mesa as a delivery point on the SoCalGas system. (*See* BHP Billiton Reply Comments on the PD, August 16, 2004, pp. 1-2; Southern California Edison Reply Comments on the PD, August 16, 2004, pp.2-3; SES Reply Comments on the PD, August 16, 2004, pp. 1-3; Office of Ratepayer Advocates Reply Comments on the PD, August 16, 2004, pp. 1-2; Reply of Duke Energy North American and Duke Energy Marketing America to Comments on the PD, August, 16, 2004, pp. 1- 5; and Northwest Reply Comments on the PD, August 16, 2004, pp. 2-4 (supporting establishing a receipt point at Otay Mesa into the SDG&E system, but not at SoCalGas as well).

[4] *See* Phase I proposal of SoCalGas and SDG&E, pp. 56-57, 93-97; Opening Comments of BHP Billiton's to Phase I proposals, pp. 16-17 (March 23, 2004); Opening Comments of Coral to Phase 1 proposals, pp. 32-36 (March 23, 2004); Sempra comments to Phase 1 proposals.

(Pub. Util. Code, § 311(e).[5] Because we modify the Phase I Decision to eliminate the language setting interim rates for the Otay Mesa joint receipt point, we will only address Applicants' section 311(e) argument concerning the establishment of the Otay Mesa joint receipt point.

TURN's and RACE's contention that we acted in violation of section 311(e) is erroneous. Rule 77.6 of the Commission's Rules of Practice and Procedure, which applies to "Review of and Comment on Alternates to Proposed Decision" states, in relevant part:

> (a) For purposes of this rule, "alternate" means a substantive revision by a Commissioner to a proposed decision not prepared by that Commissioner, which revision either:
>
> > (1) materially changes the resolution of a contested issue, or
> >
> > (2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.
>
> A substantive revision to a proposed decision is not an "alternate" if the revision does no more than make changes suggested in prior comments on the proposed decision, or in a prior alternate to the proposed decision.

(Rule 77.6 of the Commission Rules of Practice and Procedure, Code of Regs. tit. 20, § 77.6.) As previously noted, our determination to establish Otay Mesa as a joint receipt point in the Phase I Decision was made in response to comments to the PD. Parties also raised this issue in their opening Phase I proposals and comments to the Phase I

[5] Section 311(d) states: "Consistent with the procedures contained in Sections 1701.1, 1701.2, 1701.3, and 1701.4, the assigned commissioner or the administrative law judge shall prepare and file an opinion setting forth recommendations, findings, and conclusions. The opinion of the assigned commissioner or the administrative law judge is the proposed decision and a part of the public record in the proceeding. The proposed decision of the assigned commissioner or the administrative law judge shall be filed with the commission and served upon all parties to the action or proceeding without undue delay, not later than 90 days after the matter has been submitted for decision. The commission shall issue its decision not sooner than 30 days following filing and service of the proposed decision by the assigned commissioner or the administrative law judge, except that the 30-day period may be reduced or waived by the commission in an unforeseen emergency situation or upon the stipulation of all parties to the proceeding or as otherwise provided by law. The commission may, in issuing its decision, adopt, modify, or set aside the proposed decision or any part of the decision. Where the modification is of a decision in an adjudicatory hearing it shall be based upon the evidence in the record. Every finding, opinion, and order made in the proposed decision and approved or confirmed by the commission shall, upon that approval or confirmation, be the finding, opinion, and order of the commission." (Pub. Util. Code, § 311(e).)

proposals. The establishment of a joint receipt point at Otay Mesa is not a substantive revision because it does no more than make a change suggested in comments to the PD. Therefore, the addition of the Otay Mesa joint receipt point to the Phase I Decision in response to comments to the PD is not in contravention to section 311(e).

Moreover, Rule 77.6 was issued in rulemaking, R.99-02-001, to determine how to implement new statutory requirements regarding public review and comment for specified Commission decisions in response to SB 779. We issued D.00-01-053 in that rulemaking, which adopted new and amended rules. In D.00-01-053, we decided to adopt a definition of "alternate," as provided in section 311(e), that was based on our historical usage of this term. We determined that "[u]nder that [historical] usage, 'decision' or "proposed decision" refers to an agenda item offered and supported by the presiding officer for the relevant proceeding, and 'alternate' refers to substantially different version of the agenda item, offered by someone else in preference to the agenda item supported by the presiding officer." (D.00-01-053, p. 8.) TURN, one of the Applicants here, agreed with our conclusion, stating:

> Everyone involved in the legislative process that resulted in SB 779 knew the Commission's longstanding definition of "alternate" and the term was used in that traditional context. If the legislature had meant to change that longstanding definition, it would have done so explicitly, but it did not.

(D.00-01-053, p. 7 [citations omitted].) It is clear that our interpretation of section 311(e) is both reasonable and consistent with the language and the intent of the statute.

For the aforementioned reasons, Applicants' argument that we acted in violation of section 311(e) is without merit.

B. RACE's Application for Rehearing

RACE raised several grounds in its application for rehearing on which it claims the Phase I Decision is deficient, but does not provide anything beyond mere assertion of these arguments. RACE contends that there is no record evidence in the proceeding to support the following findings and conclusions in the Phase I Decision: (1) there is an imminent shortage of natural gas; (2) LNG will promote a diverse supply

portfolio; (3) LNG has price benefits; (4) the supply of LNG is flexible; (5) LNG will not lead to market-power abuse; (6) LNG will not result in affiliate transaction abuse; (7) the supply of LNG is reliable; and (8) LNG has low safety risks. RACE also argues that Sempra eleventh hour lobbying against evidentiary hearings and for favorable treatment at Otay Mesa was improper.

1. RACE's Application is Procedurally Deficient

RACE's Application fails on procedural grounds. RACE alleges that the Phase I Decision contains several findings and conclusions but does not rely on record evidence to support those finding and conclusions. RACE specifically disagrees with our policy view that the importation of LNG is necessary to maintain and ensure a reliable and reasonable natural gas supply. In the Phase I Decision, we adopted a policy of open access and established terms and conditions to enable new supplies, including LNG supplies, to gain access to the utilities' systems. (D.04-09-022, p. 86 [Finding of Fact 37].) The Phase I Decision did not endorse or approve any LNG project,[6] but rather addressed policies "that need to be in place to allow potential sources of LNG to access the utilities' gas systems." (D.04-09-022, p. 86 [Finding of Fact 35].)

RACE's Application does not meet the requirements of Rule 86.1 of the Commission's Rules of Practice and Procedure (Rule 86.1), which provides:

> Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous. Applicants are cautioned that vague assertions as to the record or the law, without citation, may be accorded little attention. The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission.

(Rule 86.1 of the Commission Rules of Practice & Procedure, Code of Regs., tit. 20, §86.1; *see also* Pub. Util. Code, §1732.) While RACE claims that the Phase I Decision

[6] Rather, we held that "[t]he issue of whether individual LNG projects should be built in California, or in Mexico, is or will be addressed in the applicable regulatory proceedings examining each individual project." (D.04-09-022, p. 86, Finding of Fact 36.)

contains findings and conclusions that were not supported by record evidence, RACE does not cite to the Phase I Decision's findings and conclusions that it argues are deficient. Furthermore, RACE's arguments appear to be based on policy differences, not legal error. Because RACE has failed to specifically set forth the grounds for legal error in the Decision as required by Rule 86.1, RACE's Application must fail.[7]

However, even if RACE's Application set forth the specifically the grounds on which it finds the Phase I Decision erroneous, RACE's arguments still fail.

2. The Record Supports the Commission's LNG Determination

RACE claims that there is no evidence to support the Phase I Decision's conclusion that there is "a looming threat to domestic supplies of natural gas and that LNG should be developed to provide a 'supply diversity' hedge to declining domestic supplies." (RACE Application, p. 3.) RACE's arguments are erroneous. As noted in the Phase I Decision, we issued the Gas OIR "in response to new reports, recent FERC orders, and ongoing changes in the natural gas market, which indicate that in the long-term, there may not be sufficient natural gas supplies and/or infrastructure to meet the future requirements of all California residential and business consumers." (D.04-09-022, p. 5.) Under Article XII, section 6 of the California Constitution, and sections 451, 701, and 761, we have the power and the obligation to "actively supervise and regulate natural gas public utilities in California and to do all things which are necessary to ensure adequate and reliable public utility service to California ratepayers at just and reasonable rates." (R.04-01-025 [Gas OIR], p. 9.)

We relied on a body of evidence demonstrating that we needed to address California's long-term natural gas needs in issuing the Gas OIR. In its 2003 Integrated Energy Policy Report (IEPR), the California Energy Commission (CEC) found that California should "[e]ncourage the construction of liquefied natural gas facilities and infrastructure and coordinate permit review with all entities to facilitate their

[7] In addition RACE's claim that Sempra's "eleventh hour" lobby against evidentiary hearings and for favorable treatment at Otay Mesa does not constitute an allegation of legal error.

development on the West Coast." (CEC's IEPR, p. viii; *see also* p. 29; R.04-01-025, pp. 2, 5.)[8] The CEC's IEPR projects that natural gas demand in California will increase over the next ten years, and that California's access to natural gas supplies is affected, to a large extent, by the robust growing in natural gas demand in Nevada, Arizona, and the Pacific Northwest. (CEC's IEPR, p. 24; *see also* R.04-01-025, p.5.)

We held a joint workshop with the CEC on December 9-10, 2003 entitled "Natural Gas Market Outlook 2006-20016" examining long-term natural gas supply issues. (D.04-09-022, p. 7; R.04-01-025, p. 2.) At this workshop, numerous parties testified and provided evidence supporting the fact that LNG is important to the California Market. (D.04-09-022, p. 7; R.04-01-025, p. 2.) Most speakers at the workshop confirmed that California needed to increase energy efficiency and natural gas infrastructure to meet its long-term natural gas needs. (D.04-09-022, p. 7; R.04-01-025, p. 2.)

We also found that there is an additional problem that production and proven reserves may be declining in most of the producing basins in the United States. (R.04-01-025, p. 7.) We took note of the fact that Canada's National Energy Board (NEB) and the United States Department of Energy's Energy Information Administration (EIA) had issued recent reports that "raise significant concerns about the sufficiency of long-term supplies of natural gas developed or produced in North America to meet long-term demand forecasts for North America." (R.04-01-025, p. 7.) Thus, both the NEB and the EIA have found that LNG will be necessary in order to have a reliable supply of gas in the future. (R.04-01-025, pp. 7-8.)

After carefully reviewing detailed evidence that the State's long-term natural gas supply may not be sufficient or reliable, and after holding a workshop jointly with the CEC in December, 2003 to discuss long-term natural gas needs in California, we decided, as a matter of policy, to pursue long-term strategies to upgrade and expand natural gas infrastructure and importation, including planning for importation of LNG. This

[8] The CEC's 2003 IEPR may be found at the following web address: http://www.energy.ca.gov/2003_energypolicy/index.html

determination is consistent with past Commission policy, and with our traditional practice of following the principal of supply and demand. We found that it is undisputable that the price of natural gas is going up, and reasoned that if California has a greater supply, then the price of natural gas will lower. We had ample evidence before we issued the Gas OIR to establish policies to ensure a long-term, reliable supply of gas to California. At the time we issued the Gas OIR, the need for new gas supplies in the State, and the ability of LNG to partially fill that need had already been established. (R.04-01-025, pp. 1-8.) Because the need for LNG had been well established, further hearings to determine need were not warranted.

3. RACE's Application is Untimely and Lacks Evidence to Support its Arguments

If RACE wanted to question the presumption that there will be an unreliable gas supply in the future, then RACE should have filed an application for rehearing of the Gas OIR.[9] There is a long lag time for LNG projects, and to grant RACE's request for evidentiary hearings would unnecessarily set back this process for lengthy period of time, making the lag time for LNG projects even longer.[10]

Also, RACE did not proffer evidence to support its arguments.[11] Rather, it repeatedly made claims that evidentiary hearings may support its arguments. (*See e.g.*, RACE Application, p. 3 [stating, "[f]or instance, RACE would have presented evidence from a wide variety of sources . . .]."") Many of RACE's arguments seem to hinge on its presumption that the Phase I Decision authorized utilities to contract for supplies of LNG on behalf of their core customers. RACE's presumption is erroneous. The Phase I Decision clearly did not authorize utilities to enter into these types of contracts, and also ruled that LNG contracts must be submitted to us for prior approval. (D.04-09-022, pp.

[9] Otherwise, RACE's argument constitutes an impermissible collateral attack. (Pub. Util. Code, §1709.)

[10] In the Gas OIR, we stated that "[w]e must make a number of decision related to these issues this year, due to the long lead time to construct LNG facilities and due to certain deadlines in 2004 involving existing intestate pipeline capacity contracts and open seasons for new pipelines, including pipelines related to LNG projects." (R.04-01-025, p. 3.)

[11] RACE's late-filed exhibits did not provide any further enlightenment on these issues.

6, 86 [Finding of Fact 34] (determining that "[i]t is reasonable to review core supply contracts for the direct purchase of LNG or regasified LNG through the advice letter or application processes only").)

RACE's other arguments similarly lack merit. For example, its claim that we are not cognizant of the threat of affiliate-transaction abuse that LNG poses is misplaced. (RACE Application, p. 14.) The Phase I Decision did not make any determinations concerning affiliate transaction abuse. While some issues RACE raised concerning affiliate transaction abuse may warrant further consideration, this is not the appropriate forum to address these concerns. RACE should raise these issues when utilities bring their specific applications for authorization to purchase regasified LNG for their core customers before the Commission. The other concerns that RACE raises in its application for rehearing[12] are all issues that were either addressed prior to the Commission's issuing the OIR, or are issues that we will address in later phases of this proceeding or in specific applications.

4. Energy Action Plan

RACE makes the additional argument that the Phase I Decision is contrary to the Energy Action Plan (EAP). (RACE Application, p. 4.) RACE contends that the Decision "ignores the actions to promote energy efficiency and the development of renewable energy resources and it out of step with the . . . [EAP's] preference for efficiency and renewables." (RACE Application, pp. 8-9.) Furthermore, RACE argues that we have ignored the EAP's "sage advice that effective energy planning be integrated." (RACE Application, p. 9 (emphasis in original).) RACE contends that "[b]ecause the Commission is considering these issues [energy efficiency planning] 'separately,' there is inadequate opportunity for efficiency, renewables, and demand-side resources to be taken into account in this proceeding." (RACE Application, p. 9.)

[12] Such as the record's deficiencies on matters concerning whether LNG promotes a diverse supply portfolio, whether LNG has price benefits, is flexible, will lead to market power abuse, is reliable, and has low safety risks.

The EAP, which was adopted by the Consumer Power and Conservation Financing Authority (CPA), the CEC, and the Commission, highlights the need for the development of new natural gas supplies for California. RACE is correct in asserting that the EAP emphasizes the promotion of energy efficiency and the development of renewable energy resources. These are issues of great concern to us, as evidenced by the fact that we issued a separate rulemaking, R.01-08-028, where we are "addressing natural gas energy efficiency programs and . . . exploring how to increase demand reduction efforts, including increasing funding for natural gas energy efficiency programs." (D.04-09-022, p. 6.) RACE's contention that we have ignored the EAP's "sage advice" to integrate energy planning is erroneous. The EAP provides that:

> The result must be a set of interrelated actions that complement each other, provide risk protection, and eliminate the costs and conflicts that would occur if each agency pursued isolated, uncoordinated objectives. Each agency will need to implement the action plan in its individual proceedings but in concert with each other.

(EAP, p. 3 (emphasis added).) It is clear that the EAP does not require the Commission to address all aspects of energy planning in one proceeding. To do so would be impracticable and inefficient, and therefore contrary to the goals of the EAP. Indeed, we are acting in accordance of the EAP's goals. While we are examining energy efficiency and renewable energy resources in a separate proceeding from this one, we coordinate between the two proceedings and other related proceedings concerning natural gas issues. RACE's logic flounders because we are committed to promoting energy efficiency and renewable energy resources, as evidenced in R.01-08-028. RACE also fails to take into account the fact that we also need to address the State's long-term natural gas needs in other ways, as the CEC's IEPR makes clear.

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IV. CONCLUSION

For the reasons stated above, we modify D.04-09-022 to remove the language in the decision setting interim rates for the Otay Mesa joint receipt point. Accordingly, we deny TURN and RACE's Joint Application and RACE's Application of D.04-09-022, as modified.

Therefore **IT IS ORDERED** that:

1. D.04-09-022 is modified as follows:

   a. The following language on page 4 of D.04-09-022 is amended:

      > "SDG&E and SoCalGas are authorized to establish the Otay Mesa receipt point as a joint receipt point into both of their systems."

   b. The following language on page 63 of D.04-09-022 is amended:

      > "Additionally, we will grant the request of various parties to make Otay Mesa a common receipt point for both the SoCalGas and SDG&E gas systems. It is important for the Commission to send the signal to potential LNG suppliers that the gas they provide will have access to the California utilities' systems. Accordingly, we authorize SDG&E and SoCalGas to establish Otay Mesa as a joint receipt point into their systems at the earliest practical date."

   c. The language removed from page 63 of D.04-09-022 is replaced by the following language:

      > "Because of the ratemaking issues that are implicated by establishing interim rates for a joint receipt point at Otay Mesa, we defer consideration of this issue to A.04-12-004."

   d. Findings of Fact 40 is deleted.

   e. Conclusions of Law 13 is amended as follows:

      > "Otay Mesa should be designated a common receipt point for both the SDG&E and SoCalGas systems."

   f. Ordering Paragraph 7a is modified as follows:

      > "Otay Mesa shall be designated a common receipt point for both SoCalGas and SDG&E."

2. Rehearing of D.04-09-022, as modified, is denied.

This order is effective today.

Dated October 27, 2005, at San Francisco, California.

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

Commissioner John A. Bohn recused himself from this agenda item and was not part of the quorum in its consideration.