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)
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)

ADMINISTRATIVE LAW JUDGE'S RULING ON MOTION CONCERNING DISCOVERY COSTS

Southern California Edison (SCE), a respondent in this Commission-initiated investigation, served a subpoena duces tecum on Sempra Energy Trading Corp. (SET) seeking many types of documents pertaining to the issues being addressed in this proceeding. One category of documents sought under the subpoena are email records for certain SET employees for the period of March 1, 2000, through May 31, 2001. In response, SET has filed a motion to

require SCE to pay SET's costs incurred in searching and retrieving the pertinent email records (Motion of February 25, 2004). The motion is denied.

SET is not a party to this investigation. SET is, however, a subsidiary of Sempra Energy (Sempra), as well as an affiliate of other Sempra subsidiaries including San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas). Sempra, SDG&E, and SoCalGas are all named respondents in this investigation.

In its motion concerning costs, SET alleges that it may expend more than one million dollars in recovering and producing the emails responsive to SCE's subpoena duces tecem. SCE contests this figure, offering its own estimate of $270,000 for such document retrieval expenses.

SET argues that California Evidence Code section 1563 is applicable to SCE's subpoenaed document request. SET also argues that, pursuant to section 1563, these document-production costs should be paid at the time of actual delivery of the documents to SCE. SET also cites state and federal cases requiring discovery to proceed in a manner that minimizes costs for nonparties. SCE, for its part, seeks to distinguish these cases. SCE also argues that SET is not properly characterized as a nonparty since the company's "activities are expressly identified by the Commission as issues to be investigated in this proceeding." SCE Response at 5 (March 19, 2004) (citing Scoping Memo for Phase I of the proceeding).

Before addressing the motion, I reaffirm the ruling previously made by ALJ Thomas that, at least as of March 29, 2004, SET was obligated to commence the restoration, review, and processing of the requested emails pending a decision on the allocation of costs. I now turn to SET's motion for cost recovery.

Evidence Code § 1563

Evidence Code section 1563 indicates that "[a]ll reasonable costs incurred in a civil proceeding by any witness which is not a party with respect to the production of . . . business records . . . requested pursuant to a subpoena duces tecem may be charged against the party serving the subpoena duces tecem." SET makes the unwarranted assumption that this provision applies to all "adjudicatory bodies" including the Commission.[1]

By its own terms, the Evidence Code "applies in every action before the Supreme Court or a court of appeal or superior court" or other judicial proceedings. The text of section 1563(b) indicates that it applies to discovery in a "civil proceeding," a different venue from the Commission-initiated investigation underway here. Provisions of the Public Utilities Code that apply to hearings, investigations, and proceedings before the Commission also indicate that "the technical rules of evidence need not be applied." Pub. Util. Code § 1701(a). The Commission's own *Rules of Practice and Procedure* do not accomplish a wholesale incorporation of the Evidence Code. Indeed, only one specific mention of the California Evidence Code appears in the *Rules of Practice and Procedure* in a brief discussion of document certification (Rule 69). Rather than wholesale incorporation of the Evidence Code, Rule 64 indicates only that "[a]lthough technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved."

[1] In an email dated April 8, 2004, to this ALJ and the parties, SET indicated that Judge Thomas had recognized that Evidence Code section 1563 allows the withholding of documents until preparation costs have been paid. After reviewing the audio recording of the March 29, 2004, law and motion hearing, I have determined that Judge Thomas did not rule on the applicability of section 1582 to this proceeding.

SET has failed to demonstrate the applicability of Evidence Code section 1563 to this proceeding. For the above reasons, I conclude that section 1563 does not afford SET a legal basis for recovering the email recovery costs incurred in complying with the subpoena duces tecem served by SCE.

Discovery in a Commission-Initiated Investigation

While Evidence Code section 1563 may not be directly applicable to this proceeding, it does express the common sense, equitable notion that the costs of litigation between two or more disputing parties normally should not be transferred to uninvolved third parties. *Calcor Space Facility, Inc. v. Superior Court*, 53 Cal. App. 4th 216, 225 (4th Dist. 1997), discussed by the parties, indicates as much: "As between parties to litigation and nonparties, the burden of discovery should be placed on the latter only if the former do not possess the material sought to be discovered." This proceeding, however, is not civil litigation and SET is not the typical bystander to such litigation.

Commission-Initiated Investigation

Rather than a civil suit by one private party against another, the Commission itself initiated this proceeding under various provisions of the Public Utilities Code including sections 451, 701, 761, 798, and 2101-2113. The Order Instituting Investigation (OII), filed February 27, 2003, has as its principal focus the concern that "unregulated affiliates of the respondent utilities have substantial business activities within the utilities' service territories that may create conflicts between the utilities (and the utilities' ratepayers) and their unregulated affiliates." OII at 1. The OII also specifies that the investigation "will review the activities of SDG&E, SoCalGas, their holding company and unregulated affiliates to determine if they have complied with the Commission's prior decisions and rules." *Id.* at 6. Thus, the Commission initiated an

investigation of Sempra entities to examine the conduct and relationship among the regulated utilities and unregulated affiliates such as SET.

Special Scrutiny of Affiliate Transactions

In acquisitions and mergers, the California Legislature and the Commission have afforded special scrutiny to transactions between public utilities and affiliated corporations (some unregulated) that may result in anticompetitive practices detrimental to ratepayers. This special scrutiny of transactions with affiliated corporations is expressed by the Legislature in enacting Pub. Util. Code § 314(b) that authorizes "inspections of the accounts, books, papers, and documents of any business which is a subsidiary or affiliate of . . . an electrical, gas, or telephone corporation with respect to any transaction between the electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the electrical, gas, or telephone corporation." This is precisely the type of investigation underway in this proceeding, and SCE is an appropriate party seeking discovery that may produce admissible evidence on these affiliated transaction issues.

For its part, the Commission has acted specifically and repeatedly to prevent anticompetitive transactions between Sempra and its affiliates. The Commission's close regulation of affiliated corporations and their transactions has allowed the Sempra entities to obtain exemptions under the federal Public Utility Holding Company Act of 1934, 15 U.S.C. § 79 *et seq.* (1997) (PUHCA).

Sempra was created by a merger of two public utility holding companies, Pacific Enterprises (parent company of SoCalGas and other subsidiaries) and Enova (parent company of SDG&E and other subsidiaries). *See In re Pacific Enterprises,* 79 CPUC 2d 343 (1998) (Sempra was named "Mineral Energy

Company" at the time). To consummate the merger, the companies had to secure the consent of the Federal Energy Regulatory Commission (FERC) (under the Federal Power Act), the California Corporation Commission (under section 854 concerning mergers and acquisitions), the U.S. Securities and Exchange Commission (SEC) (under PUHCA), and other regulatory agencies. The SEC's approval was perhaps the most important of these regulatory clearances. Under the proposed merger, Sempra would emerge as a holding company with indirect ownership of two public utilities, potentially violating PUHCA. The SEC granted Sempra an exemption from many PUHCA requirements based in part on a determination that California would provide "effective state regulation."[2]

In its own approval of the merger, the Commission repeatedly sought to provide the "effective state regulation" upon which the SEC based the

[2] Under the Public Utilities Holding Company Act, a public utility holding company must be limited to a single integrated utility system located in a single operating area. 15 U.S.C. § 79k(b). PUHCA allows an exemption under section 79c when the holding company and each of its major public utility subsidiaries operates predominately intrastate. Also, the proposed merger must produce substantial economies of scale, local management, efficient management, and effective regulation. *Id.* § 79k(b)(1). The Securities Exchange Commission exempted the merger from most provisions of PUHCA based on the findings reached by the California Public Utilities Commission in the section 854 proceeding. As the SEC indicated, "It is a fundamental purpose of the [PUHC] Act to facilitate state regulation. Moreover, the exemption . . . appears to be premised on Congress' assumption that a holding company whose interests are essentially intrastate is susceptible of effective state regulation." *Sempra Energy*, 1998 SEC LEXIS 1310, *26-27 (June 26, 1998) (citing sections 1(b)(3) and (5) [15 U.S.C. §§ 79a(b)(3)+5] of the Act as "identifying as abuses of the holding company to obstruct state regulation and the lack of effective public regulation . . ."). I take notice of the SEC's decision under Rule 73, Rules of Practice and Procedure, and Evidence Code § 452(c).

exemption. This effort toward effective regulation of a predominately intrastate holding company can be seen in the Commission's initial approval in 1995 of the reorganization plan, initiated by SDG&E itself, that resulted in Enova and its subsidiaries including SDG&E. As one of the conditions of this approval, the Commission imposed the following obligation on Enova and its subsidiaries:

> The officers and employees of Parent and its subsidiaries shall be available to appear and testify in Commission proceedings as necessary or required. The Commission shall have access to all books and records of SDG&E, Parent, *and any affiliate* pursuant to PU Code Section 314. Objections concerning requests for production pursuant to PU Code Section 314 made by Commission staff or agents are to be resolved pursuant to ALJ Resolution 164 . . . . *SDG&E is placed on notice that the Commission will interpret Section 314 broadly as it applies to transactions between SDG&E and the holding company or its affiliates and subsidiaries* in fulfilling its regulatory responsibilities carried out by the Commission, its staff and its authorized agents. Requests for production pursuant to Section 314 made by Commission staff or agents are deemed presumptively valid, material and relevant.

In re San Diego Gas and Electric, 62 CPUC 2d 626, 650 (1995) (emphasis added).

In approving the 1998 merger that created Sempra and its subsidiaries, the Commission imposed virtually the same conditions as set forth above on Sempra, SDG&E, SoCalGas, and any affiliate. *In re Pacific Enterprises*, 79 CPUC 2d 343, 446 (1998).

Thus, in approving the reorganizations and mergers that resulted in Sempra's current corporate configuration, the Commission imposed perpetual transparency on the parent, subsidiaries, and affiliates to ensure that the conditions of the merger continue to be satisfied and anticompetitive transactions among these entities do not occur. This proceeding has been initiated to determine whether the Sempra entities have complied with relevant statutes and

Commission decisions pertaining to the holding company and the transactions among the affiliated corporations. This regulatory oversight also fulfills PUHCA's expectation of effective state regulation of holding companies granted an exemption under the act. Discovery aimed at obtaining admissible evidence concerning these issues is a necessary component of this proceeding and assists the Commission in satisfying its regulatory obligations. Because the Sempra entities, including SET, have an ongoing obligation to provide information sufficient to demonstrate compliance with prior Commission decisions and orders concerning the mergers, they must provide this information at their own expense.

Conclusion

SET's motion concerning costs is DENIED. SET shall recover and deliver the subpoenaed emails to SCE without cost to SCE.

IT IS SO RULED.

Dated April 15, 2004, at San Francisco, California.

/s/ JOHN E. THORSON
John E. Thorson
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Administrative Law Judge's Ruling on Motion Concerning Discovery Costs on all parties of record in this proceeding or their attorneys of record.

Dated April 15, 2004, at San Francisco, California.

/s/ TERESITA C. GALLARDO
Teresita C. Gallardo

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.