

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

Coordination Proceeding
Special Title (Rule 1550(b))

NATURAL GAS ANTI-TRUST CASES
CASES I, II, III, & IV

JUDICIAL COUNCIL
COORDINATION PROCEEDINGS
NOS. 4221-00000
SEPT 16, 2004

This Document Relates to:

**SEMPRA DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OF THE FIRST
AMENDED MASTER COMPLAINT
REGARDING CONSPIRACY IN
RESTRAINT OF TRADE AND
UNLAWFUL BUSINESS PRACTICES.**

MINUTE ORDER

THE COURT TAKES JUDICIAL NOTICE OF EACH ITEM REQUESTED BY ALL PARTIES, EXCEPT AS MAY HEREINAFTER BE STATED. THE COURT TAKES JUDICIAL NOTICE OF EX. K AS REQUESTED BY PLAINTIFFS, INSOFAR AS THE COURT NOTICES THAT AN INITIAL DECISION WAS RENDERED BY CHIEF ADMINISTRATIVE LAW JUDGE WAGNER ON 9/23/02, DOCKET NO. RPOO-241-006. HOWEVER, THIS COURT DOES NOT TAKE JUDICIAL NOTICE OF SUBSTANTIVE FINDINGS OR CONCLUSIONS MADE THEREIN. BECAUSE IT WAS NOT A FINAL ADMINISTRATIVE DECISION, IT HAS NO PRECEDENTIAL VALUE. PANHANDLE E. PIPE LINE CO. V. FERC 198 F.3D 266, 269-70 (D.C. CIR. 1999); SEE ALSO SANTA ANA HOSP. MED. CTR. V. BELSH 56 CA 4TH 819, 831 (1997).

THE COURT HAS DECIDED THIS MOTION ONLY ON THE BASIS OF ADMISSIBLE EVIDENCE. FOLLOWING THE COURT'S DIRECTION ON 7/22/04 THE PARTIES MET AND CONFERRED CONCERNING THEIR VOLUMINOUS EVIDENTIARY OBJECTIONS. THE EVIDENTIARY OBJECTIONS OF PLAINTIFFS HAVE BEEN WITHDRAWN AND MANY OF THE DEFENDANTS' ORIGINAL EVIDENTIARY OBJECTIONS HAVE BEEN WITHDRAWN. THE DEFENDANTS' REMAINING EVIDENTIARY OBJECTIONS CONCERN: (1) EXHIBITS TO THE DECLARATION OF ATTORNEY JOHN SHAEFFER #S 1,2,9,10,40,58,65,97,108,113,116, AND 122; (2) OBJECTIONS TO THE DECLARATION OF DR. ANDREW SAFIR (IN ITS ENTIRETY ON GROUNDS IT IS REPLETE WITH CONCLUSIONS AND UNSUPPORTED OPINIONS) AND SPECIFICALLY ON GROUNDS OF IMPROPER EXPERT OPINION BASED ON UNSUPPORTED FACTS (2:27-3:2;3:3-4;3:10-13;4:14-15;6:2-9;6:24-27;7:18-20;8:5-9;8:14-120;9:2-6;9:14-17;10:10-11;13:25-27;14:8-11;15:5-7;15:15-16; AND 15:21-23) AND IMPERMISSIBLE LEGAL CONCLUSIONS (1:13-2:2; 3:5-7; AND 12:17-20); AND (3) EXHIBITS

A, G, K, N, AND R, ATTACHED THERETO.

THE EVIDENTIARY OBJECTIONS OF DEFENDANTS ARE OVERRULED ON GROUNDS THE EXHIBITS IN QUESTION ARE AUTHENTICATED BY OTHER ADMISSIBLE EXHIBITS, AND EITHER ARE NOT HEARSAY OR FALL WITHIN AN EXCEPTION TO THE HEARSAY RULE (BUSINESS RECORDS, STATE OF MIND, PARTY ADMISSIONS, AND/OR PRIOR INCONSISTENT STATEMENTS).

DEFENDANTS' EVIDENTIARY OBJECTION TO EX. A, G, K, N, AND R TO THE DECLARATION OF ANDREW SAFIR, (A REVISED EXPERT REPORT; A FIRST DRAFT OF A DEVELOPMENT PROJECT PRESENTATION; THE NORTH BAJA/GASADUCTO BAJANORTE TARIFFS) ARE OVERRULED. AN EXPERT MAY RELY ON OTHERWISE INADMISSIBLE ITEMS IN REACHING OPINIONS PROVIDED THE ITEMS CREATE A REASONABLE BASIS FOR THE OPINION. IN RE LOCKHEED LITIGATION CASES 115 CAL.APP.4TH 558, 563 (2004).

SOUTHERN CALIFORNIA GAS COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, AND SEMPRA ENERGYS' (COLLECTIVELY CALLED SEMPRA DEFENDANTS, AND REFERENCED HEREINAFTER AS DS) MOTION FOR SUMMARY JUDGMENT THAT NO MATERIAL ISSUE OF FACT EXISTS WHETHER DEFENDANTS ENTERED INTO A CONSPIRACY TO RESTRAIN TRADE AND ENGAGE IN UNLAWFUL BUSINESS PRACTICES, IS DENIED PURSUANT TO CCP 437C(P)(2). MOVING DS HAVE THE INITIAL BURDEN TO SHOW BY ADMISSIBLE EVIDENCE THAT PLAINTIFFS (HEREINAFTER REFERENCED BY PS) CANNOT DEMONSTRATE AN ESSENTIAL ELEMENT OF THEIR C/A FOR VIOLATION OF THE CARTWRIGHT ACT AND B& P 17200. DS HAVE CARRIED THEIR INITIAL BURDEN OF PERSUASION AS SET FORTH IN AGUILAR V. ATLANTIC RICHFIELD CO. (2001) 25 CAL.4TH 826,843, BY THE SUBMISSION OF THE DECLARATIONS OF THE ELEVEN (11) PERSONS WHO ATTENDED THE 9/25/1996 PHOENIX MEETING. THEY ALL AVER NO CONSPIRACY TO RESTRAIN COMPETITION WAS ENTERED INTO, MUCH LESS DISCUSSED. (DS SEPARATE STATEMENT OF UNDISPUTED FACTS, UF #S 1 AND 2, DECLARATION OF AUSTIN SCHWING, ESQ, EX. 116 AND DEPOSITIONS OF L. STEWART AT 195:22-196:14; J. PETERSON AT 226:6-22; R. BAISH AT 289:9-16, 292:20-293:1, 293:16-294:5, 361:1-362:2, 387:16-388:3; A. CLARK, VOL I, AT 186:11-187:15, 185:9-186:8, 187:16-188:4; J. STRANGE AT 29:24-30, 30:11-31:1; 46:17-47:7; J. CUNNINGHAM AT 130:5-11, 128:16-129:1; W. MITCHELL AT 305:8-16; ED GUILLES AT 267:19-268:2; RANDOLPH WU AT 22:7-14; E. MUSE III AT 79:9-15; 81:10-82:2; R. CORDOVA AT 193:25-194:11P. SHELTON AT 112:25-113.6; 119:13-25; W. WISE AT 98:15-19).

PS HAVE CARRIED THEIR SHIFTED SECONDARY BURDEN TO PRESENT ADMISSIBLE EVIDENCE WHICH TENDS TO EXCLUDE, BY A PREPONDERANCE OF EVIDENCE, THE POSSIBILITY THAT THE DS ACTED INDEPENDENTLY RATHER THAN COLLUSIVELY. AGUILAR AT 852. PS RAISE NUMEROUS MATERIAL ISSUES OF FACT. FIRST, A MATERIAL ISSUE OF FACT WHETHER A CONSPIRACY WAS FORMED TO RESTRAIN TRADE ARISES FROM THE UNPRECEDENTED 9/25/96 MEETING OF ELEVEN (11) SENIOR EXECUTIVES OF HISTORIC COMPETITORS, WITHOUT LEGAL COUNSEL, WHO WISHED TO "GET TOGETHER AND SEE IF THERE WERE SOME MUTUALLY BENEFICIAL BUSINESS OPPORTUNITIES" THE TWO COMPANIES (EL PASO AND SOCALGAS) COULD PURSUE "IN THE FORM OF A JOINT

VENTURE OR SOMETHING". (DEPO OF AL CLARK AT 141:23-142:9; 151:7-14, SCHAEFFER DECLARATION AT 116; PS' SEPARATE STATEMENT OF UNDISPUTED MATERIAL FACTS, PARAGRAPHS 34-36). THE NOTES TAKEN BY AL CLARK OF EL PASO CONCERNING THE MEETING RAISE A REASONABLE INFERENCE THOSE PRESENT AT THE MEETING DISCUSSED DIVIDING CALIFORNIA INTO TWO (2) TEAMS, A NORTHERN AND SOUTHERN TERRITORY, FOR DISTRIBUTION OF NATURAL GAS AND ELECTRICITY AND PROTECTION OF SOCALGAS' HISTORIC MARKET POWER OVER INTRASTATE GAS DISTRIBUTION AND TO PRESERVE EL PASO'S HISTORIC DOMINANCE OF THE INTERSTATE TRANSPORTATION OF NATURAL GAS TO CALIFORNIA (SEE DS' SEPARATE STATEMENT AT UF 71).

SECOND, FOLLOWING THE MEETING, SOCALGAS STOPPED COMPETING ON THE SAMALAYUCA PROJECT IN 1996, EVEN THOUGH THEY HAD BEEN VYING FOR SAME, AND EVEN THOUGH THEY ARGUABLY HAD A COMPETITIVE ADVANTAGE OVER EL PASO.

THIRD, EL PASO STOPPED COMPETING ON A NORTHERN MEXICO PIPELINE TO ROSARITO EVEN THOUGH SOCALGAS ARGUABLY HAD A COMPETITIVE ADVANTAGE OVER SOCALGAS (SEE DEPO OF RANDY WU AT 54:10-55:1; SCHAEFFER DECL. EX. 116).

FOURTH, THE EL PASO DEFENDANTS AND THE SEMPRA DEFENDANTS DID NOT CONTEST EACH OTHERS MERGERS.

FIFTH, EL PASO SOLD ALTAMONT TO NOVA IN 1997, FOR MINIMAL CONSIDERATION. NOVA DECIDED TO FOREGO THE PROJECT BY FAILING TO RENEW THE CANADIAN NATIONAL ENERGY BOARD (NEB) CERTIFICATE FOR THE WILDHORSE PIPELINE, A CRITICAL COMPONENT OF THE ALTAMONT PROJECT (SEE SAFIR DECL. AT PARA 3-4).

SIXTH, SOCALGAS AND EL PASO MET IN JUNE 2000 TO CREATE A PLAN (A) TO WITHHOLD INTERSTATE CAPACITY AND TO MANIPULATE STORAGE. (SEE SCHAEFFER DECL. EX. 88, THE 3/9/98 BUSINESS GROUP UPDATE, ENERGY DISTRIBUTION SERVICES ["THE NET EFFECT OF THIS DEAL IS A POTENTIAL INCREASE IN THE BORDER PRICE PREMIUM"]; DS' UF 597,598, 618; SCHAEFFER DECL. EX. 67; AND SHAEFFER EX. 65, THE BRATTLE GROUP STUDY OF EPME'S EXERCISE OF MARKET POWER. SEE ALSO THE NOTES OF AL CLARK FROM THE 9/25/96 PHOENIX MEETING; AND THE 7/2/04 DECLARATION OF DR. ANDREW SAFIR, PASSIM, AND ATTACHED EX.A, HIS REVISED EXPERT REPORT). AN EXPERT ECONOMIST CAN OPINE ON WHETHER A MARKET IS CONDUCIVE TO COLLUSION. (SEE DR. ANDREW SAFIR'S EXPERT ECONOMIST DECLARATION AND REPORT, AND SUPPLEMENTAL DECLARATION). AN EXPERT ECONOMIST CAN DESCRIBE THE CONDITIONS IN THE RELEVANT MARKETS THAT MADE COLLUSION RATIONAL, THE OPPORTUNITIES FOR COLLUSION, THE ECONOMIC

IRRATIONALITY OF DEFENDANTS' BEHAVIOR, AND THE EVIDENCE POINTING TO COLLUSION. RE/MAX INT'L V. REALTY ONE, INC. 173 F.3D 995, 1003, 1010-11 (6TH CIR. 1999). EXPERT TESTIMONY IS ALSO ADMISSIBLE ON THE STRUCTURE OF

THE INDUSTRY AND PRICING AND BIDDING BEHAVIORS MORE CONSISTENT WITH COLLUSION THAN WITH INDIVIDUAL ACTION. PETRUZZI'S IGA SUPERMARKETS, INC. V. DARLING-DELAWARE CO., INC. 998 F.2D AT 1240. (SEE EXPERT REPORT OF JOHN F. BROWN, FORMER NATURAL GAS INDUSTRY EXECUTIVE).

SEPTEMBER 16, 2004

J. RICHARD HADEN

J. Richard Haden
Judge of the Superior Court