

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

F I L E D

Clerk of the Superior Court

SEP 30 2004

By: S. WEAVER, Deputy

Coordination Proceeding)	JUDICIAL COUNCIL
Special Title (Rule 1550(b)))	COORDINATION PROCEEDINGS
)	NOS. 4221, 4224, 4226, and 4228
NATURAL GAS ANTI-TRUST CASES)	September 30, 2004
CASES I, II, III, & IV)	
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This Document Relates to:)	
SEMPRA DEFENDANTS' MOTION)	
FOR SUMMARY JUDGMENT OF THE)	
FIRST AMENDED MASTER COMPLAINT))	
REGARDING PARENT-SUBSIDIARY,)	
PREEMPTION, AND B&P 17200)	MINUTE ORDER
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INTRODUCTION

DURING THE FOUR-YEAR PENDENCY OF THIS LITIGATION PLAINTIFFS' THEORIES HAVE EVOLVED AS VOLUMINOUS DISCOVERY HAS OCCURRED AND AS CASE LAW HAS DEVELOPED. PLAINTIFFS' UNDOUBTEDLY WILL AMEND THE FAMC TO REFLECT THESE DEVELOPMENTS.

IN HEARING THESE MOTIONS, THE COURT HAS REPEATEDLY EMPHASIZED THAT THEY BE DETERMINED ON THE MOST COMPLETE RECORD POSSIBLE. THEREFORE, THE COURT HAS INVITED AND ALLOWED LATE FILINGS OF EXPERT REPORTS, DECLARATIONS AND ATTACHMENTS, AND SUPPLEMENTATION THEREOF. FURTHER LETTER BRIEFS FROM EACH SIDE ON PREEMPTION WERE RECEIVED AND CONSIDERED ONLY YESTERDAY.

THE COURT HAS CONSIDERED ONLY ADMISSIBLE EVIDENCE IN RULING ON THESE MOTIONS. ALL EVIDENTIARY OBJECTIONS TO THE SUPPLEMENTAL DECLARATIONS OF ATTORNEYS PAUL TRAINA AND BRIAN MCMAHON, AND ATTACHED EXHIBITS, AS WELL AS THE SUPPLEMENTAL EXPERT REPORT OF CATHERINE YAP, ARE OVERRULED.

THE COURT TAKES JUDICIAL NOTICE OF THE MATTERS REQUESTED BY EACH PARTY PURSUANT TO EV. CODE 451 AND 452.

I. THE PARENT-SUBSIDIARY MOTION

DEFENDANT SEEKS SUMMARY JUDGMENT FOR CORPORATE DEFENDANT SEMPRA ENERGY ARGUING SEMPRA DID NOT EXIST AT THE TIME OF THE NOW NOTORIOUS 1996 MEETING IN THE DESERT AND NEITHER ENGAGED IN ANTI-COMPETITIVE CONDUCT IN VIOLATION OF THE CARTWRIGHT ACT NOR UNFAIR BUSINESS PRACTICES UNDER B&P 17200.

PLAINTIFFS HAVE SET FORTH ADMISSIBLE EVIDENCE SUFFICIENT FOR A JURY TO CONCLUDE THAT SEMPRA JOINED THE CONSPIRACY AND COMMITTED ACTS IN FURTHERANCE OF THE CONSPIRACY CAUSING DAMAGES. TWO INSTANCES OF CONSPIRATORIAL CONDUCT OF SEMPRA AFTER THE MERGER OF SDG&E WITH SOCAL GAS INVOLVED ITS PARTICIPATION IN THE 1998 BIDDING PROCESS FOR GAS SUPPLY AT A ROSARITO POWER PLANT AND ITS ACTS OF MANIPULATING THE CALIFORNIA GAS MARKET IN 2000-2001. PLAINTIFFS HAVE PROVIDED ADMISSIBLE EVIDENCE THAT THE GAS ACQUISITION COMMITTEE, NOMINALLY A COMMITTEE OF SOCAL GAS, IS RESPONSIBLE FOR MAKING DECISIONS REGARDING GAS STORAGE, HUB SERVICES, GAS ACQUISITION, THE CALCULATION OF FUTURE GAS SUPPLY, EXAMINING THE IMPACT OF GAS PRICES ON CORE CUSTOMERS OF SOCAL GAS AND DISCUSSING REGULATORY MATTERS CONCERNING ALL OF THOSE ISSUES. (SEE DECEMBER 9, 1999 SEMPRA ENERGY RISK MANAGEMENT AND TRADING POLICIES AND PROCEDURES ATTACHED AS EXHIBIT 18 TO MCMAHON DECLARATION.) PLAINTIFFS HAVE PROVIDED EVIDENCE THAT SOME OF THE SENIOR EXECUTIVES ATTENDING THE PHOENIX MEETING – e.g. WARREN MITCHELL, LATIMER LORENZ, EDWIN GUILLES, AND STEVE MILLER – BECAME EXECUTIVES IN SEMPRA ENERGY. (SEE, DECLARATION OF PAUL A. TRAINA, SEPTEMBER 3, 2004 (“TRAINA DECL.”) AT PP. 6-22, 23-30-, AND 55-57.)

SOME OF THE EXECUTIVES AND PARTICIPANTS AT THE PHOENIX MEETING WERE ALSO ACTIVELY INVOLVED IN SOCAL GAS COMPANY’S GAS ACQUISITION COMMITTEE. MOREOVER, THESE SAME PARTICIPANTS AT THE PHOENIX MEETING WERE AWARE IN 1996 THAT THROUGH THE GAS ACQUISITION COMMITTEE, SOCAL GAS HAD THE ABILITY TO MANIPULATE AND COULD PROFIT BY MANIPULATING THE STORAGE AND HUB SERVICES DURING A PERIOD OF CONSTRAINED GAS SUPPLY. PLAINTIFFS HAVE PROFFERED SUBSTANTIAL EVIDENCE THAT THE GAS ACQUISITION COMMITTEE DID IN FACT MANIPULATE GAS STORAGE AND HUB SERVICES DURING THE GAS CRISIS IN 2000-2001, THEREBY INCREASING GAS PRICES IN CALIFORNIA AND CREATING ENORMOUS PROFITS FOR SEMPRA. (SEE, TRAINA DECL. AT PP. 6-11; SEE ALSO, AUGUST 5, 2004 DECLARATION OF CATHERINE YAP (“YAP DECL.”) AT PP. 2-3, 8-16; SEE ALSO, AUGUST 13, 2004 PHASE I-A OPENING BRIEF OF SOUTHERN CALIFORNIA EDISON AT P. 15 ATTACHED AS EXH. 2 TO THE REQUEST FOR JUDICIAL NOTICE, SEPTEMBER 3, 2004 (“RJN”.) A REASONABLE JURY COULD DETERMINE FROM THE EVIDENCE THAT THE MANIPULATION AND RESULTING PROFITS WERE NOT CONFINED TO ACTS SOLELY ATTRIBUTABLE TO SOCAL GAS OR

SDG&E BUT WERE PART OF A CORPORATE STRATEGY TO PROFIT FROM THE RESULTING MERGER. PLAINTIFFS HAVE PRESENTED EVIDENCE SEMPra AND SOCAL GAS PROFITED—APPROXIMATELY \$160 MILLION IN NET GAINS—AS A DIRECT RESULT OF THEIR MANIPULATION OF STORAGE AND SALE OF GAS DURING 2000-2001. (SEE YAP DECL. AT PP. 8, 15, AND EXS. F AND O THERETO.) MATERIAL ISSUES OF FACT EXIST FROM WHICH A REASONABLE JUROR COULD CONCLUDE THAT SEMPra COMMITTED ACTS IN FURTHERANCE OF THE CONSPIRACY IN VIOLATION OF BOTH THE CARTWRIGHT ACT AND B&P 17200.

PLAINTIFFS HAVE PRESENTED EVIDENCE SEMPra HAS A UNITY OF INTEREST WITH ITS SUBSIDIARIES WHICH RENDER IT LIABLE FOR THE ACTS OF SDG&E AND SOCAL GAS. SEMPra'S MERGER CHRONOLOGY SHOWS THAT IN MARCH 1996, THE COMPANIES INITIATED TALKS CONCERNING "THE POSSIBILITY OF FORMING A JOINT VENTURE TO PURSUE MARKETING OPPORTUNITIES IN THE UNREGULATED SEGMENTS OF THE MARKETS FOR ENERGY PRODUCTS AND SERVICES." (BERRY EXH. F AT 58-59.) THE RESPECTIVE BOARDS WERE BRIEFED ON TERMS AND CONDITIONS OF BOTH "BUSINESS COMBINATION" AND A PROPOSED "ENERGY MARKETING JOINT VENTURE AGREEMENT" IN SEPTEMBER 1996 AND EARLY OCTOBER 1996. (BERRY EXH. F AT 58-59.) THIS ENERGY MARKETING JOINT VENTURE WAS ACTUALLY FORMED IN JANUARY 1997. (ID. AT 60). A "JOINT VENTURE BUSINESS PLAN" OF "ENOVA/PACIFIC ENTERPRISES MANAGEMENT SERVICES," DATED DECEMBER 18, 1996, FLESHES OUT THE MANY UNREGULATED BUSINESS LINES THAT ENOVA AND PACIFIC PLANNED TO ENTER DURING THE PERIOD IMMEDIATELY AFTER THE MERGER AGREEMENT WAS REACHED IN 1996. (MCMAHON SUPPLEMENTAL DECL., EXH. 1 AT P. 4). AMONG THE MANY BUSINESS LINES CONTEMPLATED FOR THIS JOINT VENTURE OF THE PARENTS OF SOCAL GAS AND SDG&E WERE STORAGE SERVICES AND "HUB" SERVICES, WHICH INVOLVE THE SALE OF SERVICES RELATED TO UTILITY FACILITIES OWNED BY SOCAL GAS, AND WHICH ARE ALLEGED TO HAVE BEEN MANIPULATED IN 2000-2001 AND TO HAVE BEEN SUBSTANTIAL CAUSES OF CALIFORNIA'S NATURAL GAS PRICE SPIKES. THE ORGANIZATION OF SUCH A JOINT VENTURE IN THE INTERIM PERIOD BEFORE SEMPra WENT INTO BUSINESS UNDER THE CONTROL OF THE UTILITY PARENT COMPANIES IS EVIDENCE THAT THE UTILITY PARENTS WERE NOT PASSIVE HOLDING COMPANIES BUT WERE INSTEAD OPERATING COMPANIES THAT COORDINATED THE ACTIVITIES OF THE UNREGULATED BUSINESSES CONDUCTED THROUGH THE "UNREGULATED" SUBSIDIARIES OF THE MERGED COMPANIES.

IN SUM, PLAINTIFFS HAVE PRESENTED SUFFICIENT EVIDENCE TO REQUIRE THAT A JURY DECIDE WHETHER SEMPra PARTICIPATED IN THE ALLEGED CONSPIRACY. ACCORDINGLY, SEMPra'S MOTION FOR SUMMARY JUDGMENT ON PARENT-SUBSIDIARY GROUNDS IS DENIED.

II PREEMPTION The History

PLAINTIFFS FILED THEIR ORIGINAL COMPLAINT IN THIS ACTION IN SEPTEMBER 2000. THEREAFTER, DEFENDANTS AND EL PASO REMOVED THE ACTION AND SEVERAL RELATED ACTIONS TO FEDERAL COURT ON THE GROUNDS PLAINTIFFS' CLAIMS WERE PREEMPTED BY THE NATURAL GAS ACT 15 U.S.C. §717, ET SEQ. (NGA), THE NATURAL GAS POLICY ACT, 15 U.S.C. §3301, ET SEQ., (NGPA), AND THE FEDERAL POWER ACT, 16 U.S.C. §824, ET SEQ. (FPA). ON OCTOBER 25, 2001, JUDGE PRO OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA REMANDED THE CASE TO THE SUPERIOR COURT OF CALIFORNIA. IN RE CALIFORNIA RETAIL NATURAL GAS AND ELECTRICITY ANTITRUST LITIGATION, 170 F. SUPP. 2D 1052, 1060 (D. NEV. 2001.) IN RESPONSE TO THE CLAIMS OF FEDERAL PREEMPTION, JUDGE PRO HELD PLAINTIFFS' CLAIMS DID NOT "CHALLENGE CONDUCT WITHIN FERC'S EXCLUSIVE DOMAIN." ID. AT 1059 (EMPHASIS IN ORIGINAL). JUDGE PRO STATED PLAINTIFFS' COMPLAINT FOCUSED ON "DEFENDANTS' ALLEGEDLY CONSPIRATORIAL CONDUCT AS INDICATIVE OF ANTI-COMPETITIVE AND UNFAIR BEHAVIOR THAT IMPACTED THE SPOT MARKET FOR NATURAL GAS. FERC DOES NOT REGULATE THE "SPOT MARKET," AND FERC'S REGULATORY POWERS ARE NOT SO EXTENSIVE AS TO IMPLY PREEMPTION IN THE ENTIRE FIELD TO THE EXCLUSION OF ANTITRUST CLAIMS IN PARTICULAR." ID.

BECAUSE OF EMERGING DISCOVERY, NEW CASE LAW, AND AMENDEDMENTS TO THE COMPLAINT, WE HAVE CONSIDERED THE PREEMPTION ISSUE SEVERAL TIMES. FOLLOWING REMAND FROM THE FEDERAL COURT, DEFENDANTS FILED A DEMURRER HERE ON THE GROUNDS OF FEDERAL PREEMPTION AND THE FILED RATE DOCTRINE. ON OCTOBER 16, 2002, THIS COURT OVERRULED THE DEMURRER.

THESE CAUSES OF ACTION ARE NEITHER COMPLETELY PREEMPTED BY THE U.S. CONSTITUTION NOR ANY FEDERAL LAW. CONGRESS HAS NOT SHOWN AN INTENT TO PREEMPT THE FIELD AND STATE ANTITRUST AND UNFAIR COMPETITION CAUSES OF ACTION DO NOT CONFLICT WITH FEDERAL LAW. APPLICATION OF STATE ANTI-TRUST LAWS HAS BEEN NEITHER EXPRESSLY REPEALED NOR IMPLICITLY PREEMPTED. CALIFORNIA V. FEDERAL POWER COMMISSION, 369 U.S. 482, 485 (1962); OTTER TAIL POWER CO. V. UNITED STATES, 410 U.S. 366, 373-74 (1973). ADDITIONALLY THE FILED RATE DOCTRINE...IS NOT APPLICABLE BECAUSE THERE ARE NO TARIFFS CONCERNING THE SPOT MARKET FOR GAS. OCTOBER 16, 2002 RULING.

AFTER PLAINTIFFS AMENDED THE PLEADINGS AND FILED A MASTER COMPLAINT COVERING ALL RELATED PENDING ACTIONS BEFORE THE COURT, DEFENDANTS AGAIN DEMURRED BASED ON THE FEDERAL PREEMPTION AND FILED

RATE DOCTRINES. IN SUPPORT OF THEIR MOTION, DEFENDANTS CITED SEVERAL RECENTLY DECIDED CASES WHERE OTHER COURTS DISMISSED CLAIMS SEEKING RELIEF FOR MANIPULATION OF THE ELECTRICITY MARKET DURING THE ENERGY CRISIS BASED ON FEDERAL PREEMPTION AND THE FILED RATE DOCTRINE. DEFENDANTS ALSO CITED TO THE FERC ORDER ON PROPOSED FINDINGS ON REFUND LIABILITY (102 FERC 61, 317 (2003)) AS EVIDENCE THAT THE FERC IS ACTING IN THE AREA AND WILL ISSUE A REFUND TO CALIFORNIA FOR THE MANIPULATION OF THE ENERGY MARKET. ON MAY 28, 2003, THE COURT OVERRULED DEFENDANTS DEMURRER.

THE CASE AT BAR IS NOT ABOUT REGULATED RATES BUT RATHER THE UNREGULATED "SPOT MARKET" FOR NATURAL GAS AT THE CALIFORNIA BORDER AND SKYROCKETING PRICES FOR NATURAL GAS AND ELECTRICITY THEREFROM. THE CONSEQUENTIAL ELECTRIC PURCHASE DAMAGES RESULTING FROM THE NATURAL GAS CONSPIRACY ARE NOT ADDRESSED NOR WILL THEY BE REDRESSED IN ANY FERC WHOLESALE ELECTRICITY PROCEEDINGS. MAY 28, 2003 RULING.

SIX MONTHS LATER, DEFENDANTS AGAIN RENEWED THEIR DEMURRER BASED ON PREEMPTION AND THE FILED RATE DOCTRINE CITING NEW AUTHORITIES AS THEIR BASIS. IN AN OCTOBER 22, 2003 ORDER, THE COURT AGAIN OVERRULED DEFENDANTS DEMURRER AND ITS MOTION TO STRIKE. AFTER CONSIDERING THE NEW AUTHORITIES CITED, THE COURT DISTINGUISHED THE PENDING MATTER.

PLAINTIFFS ARE: (1) NOT SUING THEIR ELECTRIC ENERGY SUPPLIER SEEKING A RATE REDUCTION FROM THAT WHOLESALE SUPPLIER; (2) ARE NOT CHALLENGING ANY FERC FILED RATE OF THEIR ELECTRIC ENERGY SUPPLIER (THERE IS NO FILED RATE OF NATURAL GAS SPOT MARKET PRICES AND RETAIL ELECTRIC RATES ARE NOT FERC REGULATED); (3) AND ARE NOT CHALLENGING OR SEEKING DAMAGES FOR ANY RATE RELATED CONDUCT THAT HAS BEEN APPROVED OR THAT IS BEING REDRESSED IN ANY FERC PROCEEDING. INSTEAD, THEY ARE SEEKING DAMAGE RELIEF FOR NON-RATE RELATED ANTICOMPETITIVE CONSPIRATORIAL CONDUCT THAT FERC CANNOT ADJUDICATE. OCTOBER 22, 2003 RULING.

WHEN PLAINTIFFS AMENDED THEIR MASTER COMPLAINT TO ADD CERTAIN INDIVIDUAL PLAINTIFFS, DEFENDANTS AGAIN DEMURRED BASED ON FEDERAL PREEMPTION AND THE FILED RATE DOCTRINE. IN AN APRIL 27, 2004 ORDER, THE COURT OVERRULED DEFENDANTS' DEMURRER, HOLDING THE NEW AUTHORITY CITED BY THE DEFENDANTS WAS IRRELEVANT TO THE PENDING CASE. "THE CASE LAW CONFIRMS THERE IS NEITHER A FILED RATE NOR A FEDERAL PREEMPTION BAR TO CALIFORNIA ANTITRUST CLAIMS CHALLENGING NON-RATE ANTICOMPETITIVE CONDUCT." FURTHER, "THE FERC ORDERS CITED BY DEFENDANTS CONFIRM THAT FERC DOES NOT AND WILL NOT REGULATE SPOT

MARKET PRICES OR ADDRESS OR PROVIDE A REMEDY FOR DEFENDANTS' CONSPIRATORIAL CONDUCT." APRIL 27, 2004 MINUTE ORDER.

Summary Judgment Standard

A "PARTY MOVING FOR SUMMARY JUDGMENT BEARS THE BURDEN OF PERSUASION THAT THERE IS NO TRIABLE ISSUE OF MATERIAL FACT AND THAT THE PARTY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW." AGUILAR V. ATLANTIC RICHFIELD CO., 25 CAL. 4TH 826, 850 (2001). THE MOVING PARTY ALSO BEARS THE BURDEN OF MAKING A PRIMA FACIE SHOWING THERE ARE NO TRIABLE ISSUES OF MATERIAL FACT. ID. AT 850. WHERE, AS HERE, A SUMMARY JUDGMENT MOTION IS BASED ON AN AFFIRMATIVE DEFENSE, THE BURDEN ON THE MOVING DEFENDANT IS HEAVIER THAN MERELY SHOWING ONE OR MORE ELEMENTS OF THE PLAINTIFF'S CAUSE OF ACTION CANNOT BE ESTABLISHED. ANDERSON V. METALCLAD INSULATION CORP. 72 CAL. APP. 4TH 284, 289 (1999). "INSTEAD OF MERELY SUBMITTING EVIDENCE TO NEGATE A SINGLE ELEMENT OF THE PLAINTIFF'S CAUSE OF ACTION, OR OFFERING EVIDENCE SUCH AS VAGUE OR INSUFFICIENT DISCOVERY RESPONSES THAT THE PLAINTIFF DOES NOT HAVE EVIDENCE TO CREATE AN ISSUE OF FACT AS TO ONE OR MORE ELEMENTS OF HIS OR HER CASE, THE DEFENDANT HAS THE INITIAL BURDEN TO SHOW THAT UNDISPUTED FACTS SUPPORT EACH ELEMENT OF THE AFFIRMATIVE DEFENSE". UNTIL THE MOVING DEFENDANT MEETS ITS INITIAL BURDEN OF ESTABLISHING EVERY ELEMENT OF THE AFFIRMATIVE DEFENSE NECESSARY TO SUSTAIN A JUDGMENT IN ITS FAVOR, THE OPPOSING PLAINTIFF HAS NO OBLIGATION TO PRODUCE ANY EVIDENCE. CONSUMER CAUSE, INC. V. SMILECARE, 91 CAL. APP. 4TH 454, 473 (2001); HUYNH V. INGERSOLL-RAND, 16 CAL. APP. 4TH 825, 830 (1993).

Federal Preemption and the Filed Rate Doctrine

FEDERAL LAW MAY PREEMPT STATE LAW IN THREE DIFFERENT WAYS:

1. CONGRESS CAN EXPRESSLY STATE SUCH AN INTENT IN ENACTING LEGISLATION. JONES V. RATH PACKING CO., 430 U.S. 519, 525 (1977).
2. SUCH AN INTENT MAY BE INFERRED FROM THE PERVASIVENESS OF THE LEGISLATION SO "AS TO MAKE A REASONABLE INFERENCE THAT CONGRESS LEFT NO ROOM FOR THE STATE TO SUPPLEMENT IT." RICE V. SANTA FE ELEVATOR CORP., 331 U.S. 218, 230 (1947).
3. STATE LAW MAY DIRECTLY CONFLICT WITH FEDERAL LEGISLATION. SILKWOOD V. KERR-MCGEE CORP., 464 U.S. 238, 248, (1984).

RATHER THAN EXPRESSING AN INTENT TO PREEMPT ALL MATTERS RELATING TO THE TRANSPORTATION AND SALE OF NATURAL GAS, CONGRESS, IN ENACTING THE NGA "CAREFULLY DIVIDED UP REGULATORY POWER OVER THE NATURAL GAS INDUSTRY." NORTHWEST CENTRAL PIPELINE CORP. V. STATE CORP., 489 U.S. 493,

510 (1989). THE COURT HAS PREVIOUSLY RULED THAT THE PRESENT CARTWRIGHT ACT AND UNFAIR COMPETITION CLAIMS ARE NOT PREEMPTED DIRECTLY, IMPLIEDLY OR AS THE RESULT OF ANY CONFLICT WITH THE NGA OR FPA. CALIFORNIA V. FEDERAL POWER COMMISSION, 369 U.S. 482, 485 (1962)(NGA); OTTER TAIL POWER CO. V. UNITED STATES, 410 U.S. 366, 373-74 (1973)(FPA).

Recent cases concerning Federal Preemption and the Filed Rate Doctrine

NEITHER CALIFORNIA V. DYNEGY INC., 375 F. 3D 831 (9TH CIR. 2004), PUBLIC UTILITY DISTRICT NO. 1 OF GREY'S HARBOR COUNTY WASHINGTON V. IDACORP, INC., ___ F. 3d ___, 2005 WL 1774769 (9TH CIR. AUG. 10, 2004), ULTIMAX.COM, INC. V. PPL ENERGY PLUS, LLC, 378 F. 3d. 303 (3d CIR. 2004) NOR PUB. UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY V. DYNEGY POWER MARKETING, INC. 2004DJDR 11306 DEMONSTRATE THIS CASE IS PREEMPTED BY EITHER THE EXCLUSIVE JURISDICTION OF THE FERC OR THE FILED RATE DOCTRINE.

CALIFORNIA V. DYNEGY INC., SUPRA INVOLVED A FERC TARIFF COVERING THE CALIFORNIA INDEPENDENT SERVICE OPERATOR ("CAL ISO"). DYNEGY 375 F. 3d AT 835-836.

PURSUANT TO THE FPA, THE [IOS] MUST FILE SCHEDULES SHOWING ITS RATES AND CHARGES, AND THE PRACTICES AND REGULATIONS AFFECTING SUCH CHARGES. 16 U.S.C. §824d (c). THE FILING ENABLES FERC TO DETERMINE WHETHER THE ISO'S RULES AND REGULATIONS PERTAINING TO THOSE CHARGES ARE REASONABLE, AS REQUIRED BY THE FPA. ID. AT 839.

THE CASE AT BAR, INVOLVING UNREGULATED SPOT MARKET PRICES FOR NATURAL GAS, IS DISTINGUISHABLE. PUBLIC UTILITY DISTRICT NO. 1 OF GREY'S HARBOR "GRAY'S HARBOR" (SUPRA) AND ULTIMAX.COM, INC. SUPRA, ALSO BOTH INVOLVED SALES OF ELECTRICITY.

PUBLIC UTILITY DIST. NO. 1 OF SNOHOMISH COUNTY (SUPRA) ALSO INVOLVED INTERSTATE SALES OF WHOLESALE ELECTRICITY. IT DID NOT INVOLVE THE BORDER SALE OF NATURAL GAS ON THE SPOT MARKET.

THE RECENT FERC ORDER DATED 9-24-04 ENTITLED "ORDER DENYING REHEARING, CERTIFYING FUEL COST ALLOWANCE ISSUES, AND ACCEPTING IN PART COMPLIANCE FILINGS", (DOCKET NO. EL00-95-098, 108 FERC 61, 311) ALSO POINTS OUT THE FUNDAMENTAL DISTINCTION BETWEEN THE WHOLESALE ELECTRICITY MARKET THAT OPERATES PURSUANT TO A FERC FILED AND APPROVED TARIFF AND THIS CONSPIRACY CASE THAT ALLEGEDLY IMPACTED THE UNREGULATED SPOT MARKET PRICE FOR NATURAL GAS AT THE CALIFORNIA BORDER. THE FERC ORDER INDICATES A REFUND WILL NOT AND IS NOT INTENDED TO COMPENSATE CALIFORNIA ELECTRICITY CONSUMERS FOR "SCARCITY" EFFECTS IN THE NATURAL GAS MARKETS THAT DROVE ELECTRICITY PRICES.

DEFENDANTS HAVE NOT IDENTIFIED A FERC TARIFF, RATE FILING OR RATE SETTING REGULATION THAT CONTROLS THE SPOT MARKET PRICE OF NATURAL GAS

AT THE CALIFORNIA BORDER.

THE FERC'S EXCLUSIVE JURISDICTION DOES NOT REACH TO THE NON-RATE BASED CONSPIRACY AT ISSUE IN THIS CASE THAT ALLEGEDLY RESTRAINED NATURAL GAS CAPACITY INTO CALIFORNIA RESULTING IN A SPIKE IN THE SPOT MARKET PRICE FOR NATURAL GAS AT THE CALIFORNIA BORDER. COLUMBIA STEEL CASTING CO. V PORTLAND GENERAL ELECTRIC CO., 111 F. 3d 1427, 1446 (9TH CIR. 1997) (CONSPIRACY NOT TO COMPETE IN A MARKET NOT PREEMPTED OR BARRED BY FILED RATE DOCTRINE).

THE FERC'S REFUND ORDER REGARDING THE AMOUNT ELECTRICITY SELLERS MUST REFUND TO CALIFORNIA CONSUMERS IS CALCULATED BY THE DIFFERENCE BETWEEN WHAT THEY CHARGED CALIFORNIA CONSUMERS AND A "JUST AND REASONABLE" RATE ABSENT THE DYSFUNCTION IN THE ELECTRICITY MARKET.

THE FERC ULTIMATELY DECIDED TO CALCULATE THE NATURAL GAS COST INPUT BASED ON THE PRODUCTION AREA COST PLUS A REASONABLE TRANSPORTATION RATE TO THE CALIFORNIA BORDER. THIS "PROXY" FORMULA IS NOT FIXED, BUT IS SUBJECT TO AN EXCEPTION THAT ALLOWS THE ELECTRICITY WHOLESALERS TO REDUCE THEIR REFUND LIABILITY BY SHOWING THAT THEIR ACTUAL NATURAL GAS COSTS EXCEEDED THE PROXY BORDER GAS PRICE FORMULA EMPLOYED BY THE FERC. ENERGY SELLERS ARE ENTITLED TO A CREDIT TO THE EXTENT THEY PAID THE ANTICOMPETITIVE SPOT MARKET PRICE FOR NATURAL GAS AT THE CALIFORNIA BORDER AT ISSUE IN THIS CASE. THE EFFECT OF THIS CREDITING MECHANISM IS TO REDUCE THE REFUND AND LEAVE IN PLACE THE PASS-THROUGH OF THE ANTICOMPETITIVE NATURAL GAS PRICE TO THE PLAINTIFFS IN THIS ACTION. THE FERC REFUND ORDER DOES NOT ADDRESS OR REMEDY THE HARM CAUSED BY DEFENDANTS ALLEGED ANTICOMPETITIVE CONDUCT THAT IMPACTED THE SPOT MARKET PRICE OF NATURAL GAS AT THE CALIFORNIA BORDER. BY ALLOWING ELECTRICITY SELLERS TO BE MADE WHOLE FOR THEIR ACTUAL COST OF NATURAL GAS EVEN THOUGH THEY MAY HAVE PASSED THIS COST ON TO ELECTRICITY CONSUMERS, THE FERC REFUND ORDER DOES NOT ADDRESS OR REMEDY THE HARM WHICH MAY HAVE BEEN CAUSED BY DEFENDANTS ANTICOMPETITIVE CONDUCT THAT IMPACTED THE SPOT MARKET PRICE OF NATURAL GAS AT THE CALIFORNIA BORDER.

THIS DISTINCTION BETWEEN ANTICOMPETITIVE CONDUCT WITHIN AN ELECTRICITY MARKET OPERATING PURSUANT TO A FERC FILED AND APPROVED TARIFF AND A CAUSE OF ACTION ARISING FROM WRONGFUL CONDUCT COMMITTED OUTSIDE A JURISDICTION THAT HAS AN ATTENUATED IMPACT ON THE MARKET IS RECOGNIZED IN DYNEGY. UNDER DYNEGY, THE QUESTION RELEVANT TO FPA EXCUSIVITY IS WHETHER A PLAINTIFFS' CONSEQUENTIAL DAMAGE CLAIM IS A SUIT TO "ENFORCE OR EXPAND" RULES, REGULATIONS OR ORDERS OF THE FERC UNDER THE FPA. 375 F. 3d AT 843. IN DISTINGUISHING PAN AMERICAN PETROLEUM CORP. V. SUPERIOR COURT OF DELAWARE, 366 US 656 (1960), WHICH UPHELD STATE COURT JURISDICTION OVER A CONTRACT CLAIM THAT RELATED TO A TARIFF CONTRACT FILED WITH THE FERC, DYNEGY NOTED THAT

PAN AMERICAN STANDS FOR THE PROPOSITION THAT CLAIMS “FALLING OUTSIDE THE SCOPE OF THE EXCLUSIVE JURISDICTION PROVISION ARE NOT SUBJECT TO IT.” 375 F. 3d AT 843. IN ORDERING THE ELECTRICITY REFUND THE FERC FOUND THAT “THE ELECTRIC MARKET STRUCTURE AND MARKET RULES FOR WHOLESALE ELECTRICITY IN CALIFORNIA THAT WERE THE SUBJECT OF A FERC FILED AND APPROVED TARIFF WERE SERIOUSLY FLAWED AND THAT THESE STRUCTURES AND RULES, IN CONJUNCTION WITH AN IMBALANCE OF SUPPLY AND DEMAND IN CALIFORNIA, HAD CAUSED, AND WOULD CONTINUE TO HAVE THE POTENTIAL TO CAUSE, UNJUST AND UNREASONABLE RATES FOR SHORT-TERM ENERGY, (ORDER PROPOSING REMEDIES FOR CALIFORNIA WHOLESALE ELECTRIC MARKETS, 93 FERC PP. 61, 121 AT 5 (NOVEMBER 1, 2000)). THE FERC REFUND ORDER SEEKS TO MITIGATE THE ELECTRICITY MARKET DYSFUNCTION, AND NOT THE ANTICOMPETITIVE CONDUCT RELATING TO NATURAL GAS AT ISSUE IN THIS CASE.

WHILE CONGRESS IN 1988 AMENDED THE FPA AND EXPRESSLY GRANTED THE FERC AUTHORITY TO GRANT THE REFUNDS WHEN IT DETERMINES THAT AN ELECTRICITY RATE IS UNJUST AND UNREASONABLE, CONGRESS DID NOT SIMILARLY EXPAND THE FERC’S JURISDICTION UNDER THE NGA. 16 U.S.C. §824e(b) (SEE ORDER PROPOSING REMEDIES FOR CALIFORNIA WHOLESALE ELECTRIC MARKETS, 93 FERC PP. 61, 121 AT APPENDIX E DISCUSSING LIMITED NATURE OF FERC’S REFUND AUTHORITY AND THE BAR AGAINST RETROACTIVE RATE SETTING).

THE FERC LACKS THE JURISDICTION TO AWARD A REFUND OR ANY REPARATIONS FOR UNJUST OR UNREASONABLE NATURAL GAS RATES. FEDERAL POWER COMMISSION V. HOPE NATURAL GAS CO., 320 U.S. 591, 681 (1944) (IT IS CONCEDED THAT UNDER THE ACT THE COMMISSION HAS NO POWER TO MAKE REPARATIONS.”); UNITED GAS V. CALLERY PROPERTIES, 382 U.S. 223, 229 (1965) (COMMISSION HAS NO POWER TO MAKE REPARATION ORDERS).

III B&P 17200 Disgorgement of profits

CONTROLLING STATUTORY AND JUDICIAL AUTHORITY ALLOW DISGORGEMENT OF PROFITS AS A REMEDY IN A UCL CLASS ACTION. CAL. CODE COV. PROC. §384; KRAUS V. TRINITY MANAGEMENT SERVICES, 23 CAL. 4TH 116, 129-134 (2000); CORBETT V. SUPERIOR COURT, 101 CAL. APP. 4TH 649, 671 (2002). SINCE 1993, THE REMEDY OF DISGORGEMENT INTO A FLUID RECOVERY FUND FOR CLASS ACTIONS HAS BEEN EXPRESSLY AUTHORIZED BY CCP §384. CALIFORNIA COURTS ALSO HAVE APPROVED OF FLUID RECOVERY FUNDS COMPRISED OF A DISGORGEMENT OF ILL-GOTTEN GAINS AS AN EQUITABLE REMEDY FOR THE PURPOSE OF BENEFITING THE INJURED PARTIES AS WELL AS DETERRING THE PERPETRATOR FROM COMMITTING THE SAME UNLAWFUL ACTS AGAIN. CALIFORNIA V. LEVI STRAUSS & CO., 41 CAL. 3d 460, 472 (1986). INDEED, THE REMEDY OF FLUID RECOVERY FOR A CLASS ACTION SERVES SEVERAL IMPORTANT PURPOSES, PARTICULARLY IN AN ACTION ARISING UNDER THE UCL. BECAUSE

“EACH CLASS MEMBER CANNOT BE COMPENSATED EXACTLY FOR THE DAMAGE HE OR SHE SUFFERED, THE BEST ALTERNATIVE IS TO PAY DAMAGES IN A WAY THAT BENEFITS AS MANY OF THE CLASS MEMBERS AS POSSIBLE AND IN THE APPROXIMATE PROPORTION THAT EACH MEMBER HAS BEEN DAMAGED, EVEN THOUGH, MOST PROBABLY, SOME INJURED CLASS MEMBERS WILL RECEIVE NO COMPENSATION AND SOME PEOPLE NOT IN THE CLASS WILL BENEFIT FROM THE DISTRIBUTION. . .” **BRUNO V. SUPERIOR COURT**, 127 CAL. APP. 3d 120, 123-24 (1981).

CONTRARY TO THE DEFENDANTS’ ARGUMENT, PERMITTING PLAINTIFFS TO SEEK A FLUID RECOVERY FUND IN THEIR CLASS ACTION DOES NOT MODIFY SUBSTANTIVE LAW. **KOREA SUPPLY CO. V. LOCKHEED MARTIN CO.**, 29 CAL. 4TH 1134 (2003). BY ITS OWN TERMS, APPLIES ONLY TO INDIVIDUAL UCL ACTIONS AND DOES NOT MODIFY SUBSTANTIVE LAW ALLOWING PLAINTIFFS TO SEEK A REMEDY OF DISGORGEMENT OF PROFITS IN A FLUID RECOVERY FUND. INDEED, THE COURT IN **KOREA SUPPLY** QUOTED FAVORABLY FROM **KRAUS**: “FURTHER, IN **KRAUS** WE NOTED THAT THE LEGISLATURE HAS AUTHORIZED DISGORGEMENT INTO A FLUID RECOVERY FUND IN CLASS ACTIONS.” **KRAUS V. TRINITY MANAGEMENT SERVICES**, 23 CAL. 4TH 116, 137. 29 CAL. 4TH AT 1148 N.6. CCP§ 384 EXPRESSLY AUTHORIZES SUCH A REMEDY FOR CLASS ACTIONS – WITHOUT REGARD TO THE UNDERLYING LAW THAT SERVES AS THE BASIS FOR RECOVERY. SINCE THE REMEDIES AVAILABLE UNDER THE ULC ARE “CUMULATIVE TO EACH OTHER AND TO THE REMEDIES OR PENALTIES AVAILABLE UNDER ALL OTHER LAWS OF THIS STATE” (SEE B&P §17205), THEY CLEARLY EMCOMPASS THE REMEDY OF DISGORGEMENT INTO A FLUID RECOVERY FUND CCP § 384, AS APPROVED IN **KRAUS**.

PLAINTIFFS DO NOT SEEK RESTITUTION BUT RATHER DISGORGEMENT OF PROFITS INTO A FLUID RECOVERY FUND. QUANTIFYING THE AMOUNT SOUGHT AT THIS POINT IS NOT ONLY PREMATURE, BUT ALSO UNNECESSARY AS A MATTER OF LAW.

Injunctive Relief

UNDER B&P § 17203, AN INJUNCTION IS PROPER FOR DEFENDANTS’ PAST CONDUCT ALONE, SINCE AN INJUNCTION MAY BE HAD AGAINST ANY PERSON WHO “ENGAGES, HAS ENGAGED, OR PROPOSES TO ENGAGE IN UNFAIR COMPETITION . . .” **DAY V. AT&T CORP.**, 63 CAL. APP. 4TH 325, 337 (1998). PLAINTIFFS DO NOT, THEREFORE, NEED TO DEMONSTRATE THAT THERE IS A LIKELIHOOD OF DEFENDANTS ENGAGING IN FUTURE UNFAIR COMPETITION.

Civil Penalties claimed by the Cities of Los Angeles and Long Beach

B&P §17206 ALLOWS PUBLIC ENTITIES TO OBTAIN CIVIL PENALTIES UNDER THE UCL IF SUCH ACTIONS ARE PROPERLY AUTHORIZED BY RELEVANT AUTHROITIES. IN THIS CASE, LONG BEACH CITY ATTORNEY ROBERT E. SHANNON AND LOS ANGELES CITY ATTORNEY ROCKARD DELGADILLO HAVE EACH SOUGHT SUCH CIVIL PENALTIES IN A SEPARATE CAUSE OF ACTION BROUGHT BY THEM

AGAINST DEFENDANTS. (SEE FAMC, FOURTH CAUSE OF ACTION). DEFENDANTS, HOWEVER, ARGUE THAT THESE INDIVIDUALS ARE NOT AUTHORIZED TO SEEK SUCH CIVIL PENALTIES.

THE PLEADINGS IN THIS CASE PROVE OTHERWISE. PLAINTIFFS' FAMC STATES THE CITY ATTORNEYS OF BOTH CITIES - - NOT PRIVATE PLAINTIFFS - - ARE BRINGING CLAIMS FOR CIVIL PENALTIES AGAINST DEFENDANTS. FAMC PP. 14-28. BOTH CITY ATTORNEYS ARE LISTED ON THE CAPTIONS OF THE COMPLAINT AND IN THE PLEADINGS IN THIS MATTER. THEY ARE, THEREFORE, "DIRECTLY PROSECUTING" THE PORTIONS OF THESE ACTIONS SEEKING CIVIL PENALTIES. UNLIKE IN STOP YOUTH ADDICTION, INC. V. LUCKY STORES, INC. 17 CAL. 4TH 554, 575 N.10 (1998), PLAINTIFFS HERE ARE NOT ATTEMPTING TO "RECAST" A PRIVATE ACTION INTO A PUBLIC ACTION.

THE CITY ATTORNEY OF LOS ANGELES IS ENTITLED TO BRING AN ACTION UNDER B&P §17206 ON HIS OWN AUTHORITY. AS AUTHORIZED BY B&P §17206, THE CITY ATTORNEY OF LONG BEACH HAS ALSO OBTAINED THE REQUIRED PERMISSION TO DO SO FROM THE DISTRICT ATTORNEY OF LOS ANGELES. (SEE EXHIBIT A TO DECLARATION OF M. BRIAN MCMAHON FILED CONCURRENTLY HEREWITH (FEBRUARY 21, 2001 LETTER FROM STEVE COOLEY, LOS ANGELES COUNTY DISTRICT ATTORNEY TO ROBERT E. SHANNON, CITY OF LONG BEACH)). THE COURT THEREFORE FINDS THESE PUBLIC ENTITIES ARE PERMITTED TO BRING CLAIMS FOR CIVIL PENALITES PURSUANT TO B&P § 17206.

Conclusion

FOR THE REASONS DISCUSSED ABOVE, PLAINTIFFS' UCL CLAIMS ARE NOT PRECLUDED AS A MATTER OF LAW. UNDER CALIFORNIA STATUTORY AND JUDICIAL AUTHORITY, PLAINTIFFS ARE ENTITLED TO PURSUE A REMEDY IN THE FORM OF A DISGORGEMENT OF PROFITS FLUID RECOVERY, PLAINTIFFS SEEK A QUANTIFIABLE RECOVERY, IT IS PREMATURE TO RULE ON THE AVAILABILITY OF A PERMANENT INJUNCTION, AND THE CITY OF LOS ANGELES AND CITY OF LONG BEACH ARE LEGALLY ENTITLED TO PURSUE CIVIL PENALTIES. ACCORDINGLY, THE MOTION FOR SUMMARY JUDGMENT IS DENIED.

SEPTEMBER 30, 2004

~~A. Richard Haden~~

J. Richard Haden
Judge of the Superior Court