Decision 04-02-058 February 26, 2004

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Rulemaking to implement the provisions of Public Utilities Code § 761.3 enacted by Chapter 19 of the 2001-02 Second Extraordinary Legislative Session. | Rulemaking 02-11-039 (Filed November 21, 2002) |

## ORDER REGARDING SEMPRA ENERGY AS A RESPONDENT

On November 21, 2002, the Commission opened this proceeding and named eight respondents. On September 4, 2003, the Commission named 16 additional respondents. (Decision (D.) 03-09-002.)[1] Among the additional respondents was an entity identified as Sempra represented by David Follett.

On September 15, 2003, Sempra Energy Resources (SER) and Sempra Energy Elk Hills Power Corp. (SEEHP) filed and served a motion for modification or clarification of D.03-09-002. By Ruling dated September 23, 2003, the motion was granted by clarifying and correcting the named respondent from Sempra to Sempra Energy, represented by Follett.

On October 14, 2003, Follett filed and served a motion for Sempra Energy asking for reconsideration of the Ruling dated September 23, 2003. Sempra Energy asks that the Commission clarify that it is not an appropriate respondent,

[1] Also, on October 2, 2003, the Commission deleted two respondents. (D.03-10-012.) On November 13, 2003, the Commission deleted a respondent and added a respondent. (D.03-11-009.)

and remove Sempra Energy from the list of named respondents. No responses have been received. The motion is denied.

## Discussion

This proceeding is opened for the purpose of implementing Pub.Util. Code § 761.3.[2] Facilities covered by this law include, with limited exceptions, all electric generation facilities "owned by an electrical corporation or located in" California.[3] (§ 761.3(a).) An electrical corporation includes "every corporation or person owning, controlling, operating, or managing any electric plant for compensation within" California, with some exceptions.[4] (§218(a).) Respondents are public utilities, electrical corporations, and owners and operators of divested plant in California subject to § 761.3. (*See* D.03-09-002, *mimeo.*, pages 2 - 3.)

The Ruling dated September 23, 2003 relied on the company's statement that Sempra Energy "is a holding company that through various subsidiaries and

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[2] All statutory references are to the Public Utilities Code unless specified otherwise.

[3] Exceptions include (a) nuclear-powered plants, (b) qualifying facilities, (c) generation installed exclusively to serve a customer's own load, (d) facilities owned by a local publicly owned electric utility, (e) public agency electric facilities that generate electricity incidental to the provision of water or wastewater treatment, and (f) facilities owned by a city and county operating as a public utility. (§ 761.3(d) and (h).)

[4] Exceptions include (a) where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others, (b) a corporation or person employing cogeneration technology or a non-conventional power source for limited purposes, (c) a corporation or person employing landfill gas technology for limited purposes, (d) a corporation or person employing digester gas technology for limited purposes, or (e) a corporation or person employing cogeneration technology or non-conventional power sources that physically produced electricity prior to January 1, 1989, and furnished that electricity to immediately adjacent real property for use thereon prior to January 1, 1989. (§ 218(a) – (e).) These exceptions are generally already within the exceptions covered by § 761.3(d) and (h).

affiliates, provides a wide spectrum of electric…products and services to a diverse range of customers…in California…" (SER and SEEHP Motion dated September 15, 2003, pages 3-4.) As a result, the Ruling concluded that "Sempra Energy is understood to be an electrical corporation that owns, controls, operates, or manages electric plant for compensation within California through various subsidiaries and affiliates." (Ruling dated September 23, 2003, page 4.)

The latest motion states that "Sempra Energy does not own, control, operate, or manage an electric generation facility." (Motion dated October 14,2003, page 6.[5]) Based on this representation, the Assigned Administrative Law Judge (ALJ) filed a draft decision finding that: "Sempra Energy does not own, control, operate or manage any electric plant for compensation within California or located in California, either directly or indirectly through any subsidiaries, affiliates or related corporate entities." The draft decision concluded that Sempra Energy should not be a respondent.

In comments on the draft decision, Sempra Energy recommends deletion of the phrase "either directly or indirectly through any subsidiaries, affiliates or related entities." Sempra Energy asserts that otherwise the decision "could be mistakenly read to imply that the Sempra Energy Motion represented to the Commission that Sempra Energy has no subsidiaries, affiliates or related

[5] All pleadings are filed in compliance with Rule 1 of the Commission's Rules of Practice and Procedure (Rules), which says in relevant part: "Any person who signs a pleading…or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to…never mislead the Commission or its staff by an artifice or false statement of fact or law." We rely on the truthfulness of all statements in the pleading filed by Follet for Sempra Energy.

corporate entities that own, control, operate or manage an electric generation facility." (Comments dated December 9, 2003, page 3.)

We are not persuaded that the motion should be granted. Respondents are named, among other reasons, so that they may be notified of this proceeding, participate, comment, provide the Commission with the benefit of their expertise and views, and be made aware of possible forthcoming duties and obligations.

We are unaware of any significant obligation or burden placed on any entity by being named a respondent. This is not the time and place to engage in detailed litigation regarding the facts and law that control respondent status. Rather, specific jurisdictional questions may be resolved elsewhere as needed (*e.g.*, a proceeding where the stakes are material). We are not persuaded by the facts and argument presented by Sempra Energy to conclude otherwise for Sempra Energy here. Limited resources of parties and the Commission should be devoted to getting the § 761.3 program in place, and engaging in initial implementation and enforcement, not detailed and expensive litigation of respondent status when the burden, if any, of such status is minimal and not unreasonable.

A named respondent may be released based on clear evidence that it is a member of a specifically excluded group (*e.g.*, § 761.3 provides exclusions for some nuclear powerplants, qualifying facilities, publicly owned facilities). Sempra Energy does not seek to be removed as respondent on the basis of membership in a specifically excluded group.

According to Sempra Energy, it does not directly own, control, operate or manage any electric plant for compensation within California or located in California. Rather, Sempra Energy owns, controls, operates or manages subsidiaries or affiliates that in turn own, control, operate or manage electric

plant for compensation within California or located in California. A corporation or company that owns, controls, operates or manages another corporation or company that owns, controls, operates or manages electric plant for compensation within California or located in California is generally a covered entity for purposes of § 761.3. In short, a corporate owner of an owner is an owner. Sempra Energy does not provide sufficiently compelling facts or arguments to conclude otherwise.

Sempra Energy also argues that § 761.3 does not extend to "indirect" ownership, control, operation or management. In support, Sempra Energy notes other code sections that specifically address Commission authority when the ownership is either direct or indirect (*e.g.*, §§ 366.5(b)(1)(B), 390(c), 851, 854). Sempra Energy concludes that the Legislature would have included in § 761.3 specific Commission authority over a corporation even when the relationship is indirect if that was the intent.

We are not persuaded. The issue here is not whether the corporate relationship is direct or indirect. Rather, it is the degree of ownership, control, operation and management. There is a continuum of ownership, control, operation and management in the corporate structures of companies in the United States, including electric corporations, and electric generation facilities owned by an electrical corporation or located in California. The Commission has responsibility along that continuum, and we decline to adopt Sempra Energy's view that we should use direct or indirect as the criterion.

Many respondents have stated that they reserve the right to challenge the Commission naming them as respondents at the appropriate time and place. They accept deferring the issue until later, and state that they intend to actively participate and help the Commission with the complex task presented by § 761.3.

This approach is reasonable. We have specifically endorsed it with regard to two respondents. (D.03-12-023.) The approach remains reasonable, and should similarly be adopted here.

Moreover, we point out that every corporation and person must comply with § 761.3 to the extent the law applies, whether or not named a respondent. That is, to the extent § 761.3 ultimately applies to a facility, it applies to Sempra Energy, its affiliates, and subsidiaries to the extent they are subject to § 761.3 to the same degree that it applies to any other entity covered by § 761.3, whether or not the entity is a named respondent. Similarly, it does not apply to a facility not subject to § 763.1 whether or not named as respondent.

Thus, for all these reasons, we are not persuaded by Sempra Energy to grant its motion.

## Comments on Draft Decision

On December 4, 2003, the draft decision of ALJ Mattson was filed and served on parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed and served on December 9, 2003, by Sempra Energy. On December 22, 2003, the revised draft decision of ALJ Mattson was filed and served. Comments were filed and served on January 6, 2004 by Sempra Energy. No reply comments were filed.

## Assignment of Proceeding

Carl W. Wood is the Assigned Commissioner. Burton W. Mattson is the assigned ALJ regarding this portion of the proceeding.

## Findings of Fact

1. On October 14, 2003, Sempra Energy filed and served a motion and no responses have been received.

2. On December 9, 2003, Sempra Energy filed comments on a draft decision in which Sempra Energy recommends deleting a phrase regarding whether or not Sempra Energy owns, controls, operates or manages an electric plant for compensation either directly or indirectly through subsidiaries, affiliates or related entities.

3. The obligation or burden, if any, placed on an entity by being named a respondent is minimal and not unreasonable.

4. Sempra Energy does not seek exclusion from respondent status based on its owning, controlling, operating or managing specifically excluded facilities (*e.g.*, nuclear powerplants, qualifying facilities).

5. Sempra Energy owns, controls, operates or manages subsidiaries or affiliates that in turn own, control, operate or manage electric plant for compensation within California or located in California.

## Conclusions of Law

1. The motion of Sempra Energy dated October 14, 2003 should be denied.

2. This order should be effective immediately in order to clarify respondent status and the service list without delay.

**IT IS ORDERED** that the October 14, 2003 motion of Sempra Energy to be removed as a respondent is denied. The proceeding remains open.

This order is effective today.

Dated February 26, 2004, at San Francisco, California.

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ MICHAEL R. PEEVEY
Commissioner

I dissent.

/s/ SUSAN P. KENNEDY
Commissioner