ALJ/LTC/cac

ORIGINAL

Decision 89 05 070 MAY 26 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SCEcorp and its public utility subsidiary SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) and SAN DIEGO GAS & ELECTRIC COMPANY (U 902-M) for Authority to Merge SAN DIEGO GAS & ELECTRIC COMPANY into SOUTHERN CALIFORNIA EDISON COMPANY.	)	Application 88-12-035 (Filed December 16, 1989)

OPINION ON UCAN/TURN MOTION REGARDING APPLICANTS' SHARING OF PROPRIETARY INFORMATION

I. Summary

This order determines that more stringent safeguards are necessary to control the flow of commercially sensitive information (as that term is defined in this decision) between and among the applicants in connection with this merger application. To ensure that stricter controls are in place, we impose several requirements on the applicants.

First, we expect that they will adhere to the existing protective provisions of their November 30, 1988 Agreement and Plan of Reorganization.

Second, in connection with the transfer of commercially sensitive information, we require the implementation of a document control and document numbering system, the maintenance of a list of "reviewing persons" who have access to such information, the designation of individuals responsible for making appropriate certifications relative to the transferred materials, and the provision to this Commission of periodic inventories listing transferred documents.

Third, we order applicants not to transfer or disclose to each other commercially sensitive information unless such transfer

or disclosure is reasonably required in order to obtain the required regulatory approvals of the merger.

Finally, we require that the applicants take certain steps to inform all persons involved in merger-related information exchanges of the additional protections and procedures mandated in this decision.

II. Procedural Background

On January 25, 1989 UCAN and TURN filed a motion seeking to bar Southern California Edison Company (Edison) from unfettered access to proprietary information of San Diego Gas & Electric Company (SDG&E). UCAN and Turn referred to "reports from within SDG&E that such information transfers are occurring presently" and asserted that access to such proprietary information may compromise SDG&E's ability to compete with Edison pending or subsequent to this Commission's decision on the proposed merger. In addition, UCAN and TURN asserted that such access directly violates Public Utility (PU) Code § 854[1] and compromises SDG&E's ability to serve its customers.

At the first prehearing conference (PHC) held in this matter on February 3, 1989, the assigned administrative law judge (ALJ) heard preliminary responses to the motion and thereafter extended the time for filing responses to the motion in order to afford the applicants additional time to provide responsive affidavits from percipient witnesses addressing the following four areas:

> "First, the nature and extent of sharing of information, including, but not by way of limitation, access to books, contracts and records.

1 Unless otherwise specifed, all subsequent statutory references are to the Public Utilities Code.

> "Second, the nature and extent of Edison or SCEcorp and Edison's participation in SDG&E's planning, both short-range and long-range.
>
> "Third, the nature and extent of any sharing of records pertaining to the day-to-day operations between or among the applicants.
>
> "And fourth, a detailed analysis...of the nature and extent of any SCEcorp-Edison involvement in SDG&E's daily operations and management decisionmaking." (1 PHC Tr 29:22-30:7.)

The ALJ also requested the applicants brief the following two issues: "What are the legal restrictions that apply to companies that have agreed to merge but have not yet received all necessary regulatory approvals, and second, what measures can be required of applicants to provide protection of the individual utilities in case the merger is not approved and the applicants return to their pre-merger agreement status?" (1 PHC Tr 30:18-26.)

On February 16, 1989, the applicants filed their opposition to the UCAN/TURN motion, including declarations of John E. Bryson, Alan J. Fohrer, Edwin A. Guiles, and Jack E. Thomas. These declarations, submitted under penalty of perjury, were provided in compliance with the ALJ's PHC ruling, to address the four factual issues noted above.

On March 9, 1989, UCAN and TURN filed a response to applicants' opposition, and on March 10, 1989 the Division of Ratepayer Advocates (DRA) filed its comments regarding applicants' opposition to the motion.

III. The Agreement and Plan of Reorganization

The November 30, 1988 Agreement and Plan of Reorganization (Agreement) among SCEcorp (Edison's Parent), Edison, and SDG&E sets forth the parties' agreements on the information access issue. Section 7.1 of the merger agreement contains two subparts. Subpart (a) governs the obligations of SDG&E and its

subsidiaries to provide certain information to SCEcorp and Edison. Subpart (b) governs the obligations of SCEcorp and its subsidiaries to provide information to SDG&E. As focussed by the UCAN/TURN motion, the present controversy centers around the provisions of Section 7.1(a) which provides in relevant part as follows:

> "The Company and its subsidiaries shall afford to Parent and Edison and their respective accountants, counsel, financial advisors and other representatives (the "Parent Representatives") full access during normal business hours throughout the period prior to the Effective Time to all of their respective properties, books, contracts, commitments and records (including, but not limited to, Tax Returns) and, during such period, shall furnish promptly to Parent (i) a copy of each report, schedule and other document filed or received by any of them pursuant to the requirements of federal or state securities laws or filed by any of them with the SEC, CPUC, NRC or FERC and (ii) all other information concerning their respective businesses, properties and personnel as Parent or Edison may reasonably request; provided that the Company and its subsidiaries shall not be obligated to provide any information with respect to matters as to which the parties are in dispute; and, provided that no investigation pursuant to this Section 7.1(a) shall affect any representations or warranties made herein or in the Merger Agreement or the conditions to the obligations of the respective parties to consummate the Merger. Parent and its subsidiaries shall hold and shall use their best efforts to cause the Parent representatives to hold in strict confidence all documents and information concerning the company and its subsidiaries furnished to Parent in connection with the transactions contemplated by this Agreement and the Merger Agreement, except that Parent may disclose such information as may be necessary in connection with seeking the Parent Required Statutory Approvals and Parent Stockholders' Approval and Edison may disclose such information as may be necessary in connection with obtaining the Edison Stockholders' Approval and Parent and Edison may disclose any

information that either of them is required by law or judicial or administrative order to disclose. In the event that this Agreement is terminated in accordance with its terms, Parent and Edison shall promptly redeliver to the Company all written material provided by Company pursuant to this Section 7.1(a) and any other written material containing or reflecting any information in such material (whether prepared by Company or its subsidiaries or any of their respective advisors) and shall not retain any copies, extracts or other reproductions in whole or in part of such written material. All documents, memoranda, notes and other writing whatsoever prepared by Parent or Edison based on the information in such material shall be destroyed (and Parent and Edison shall use their best efforts to cause their advisors and their representatives to similarly destroy their respective documents, memoranda and notes), and such destruction (and best efforts) shall be certified in writing to the Company by an authorized officer supervising such destruction. . . ."

IV. The Nature and Extent of Information Shared

A. Information Sharing

According to Edison's Executive Vice-President John E. Bryson, exchanges of information have been taking place between SDG&E and Edison. These information exchanges began in mid-December 1988 for the purpose of facilitating Edison's merger related due diligence efforts. Bryson stated that during the second week of January 1989, the purpose of the information exchange shifted, as individuals with operating responsibility for major Edison departments began meeting with their SDG&E counterparts and with attorneys responsible for the presentation of applicants' merger case, to plan the integration of the two companies and to prepare the affirmative merger case. (Bryson Declaration, ¶ 2.)

Alan J. Fohrer, the head of Edison's merger task force, has personally supervised, or has been advised of, all information exchanges between Edison and SDG&E. According to Fohrer, Edison and SDG&E exchanged a wide range of information during the due diligence review and in the following month. This included information which is, or will become, public (i.e., cost of service data, resource plans, QF contracts) and nonpublic information (i.e., financial runs, including rate base, earnings, and taxes). According to Fohrer, the following information has also been exchanged or reviewed: purchase power contracts, fuel contracts, materials and supplies contracts, leases, labor contracts, bond indentures, franchise agreements, information on the number of personnel in each department, budgets for construction, fuel, operations and maintenance, information on personnel benefits and severance plans, shareholder lists, and load data. (Fohrer Declaration, ¶¶ 1, 3.)

Edwin A. Guiles, SDG&E's Director of Merger Transition, indicates that the following information was made available to Edison representatives: financial statements, contracts for materials and supplies, accounting records, tariffs, contingent liabilities, employee benefit plans, etc. The latter information was provided during the due diligence process. Subsequently, Fohrer states: "It became apparent that certain commercially sensitive information would need to be exchanged between the companies in order to identify the benefits and synergies of the merger." (Guiles Declaration, ¶ 5.) Among the information exchanged at this point were SDG&E's current resource plans, transmission and distribution planning studies, generation planning reports, etc. (Guiles Declaration, ¶ 8.)

B. The Nature and Extent of SCEcorp/Edison Participation in SDG&E's Planning

The nature and extent of SCEcorp/Edison participation in SDG&E's short-range and long-range planning activities was described by Edison's Fohrer as follows: "We have reviewed all of SDG&E's resource and construction plans, and SDG&E has reviewed all of our resource and construction plans. We have ongoing discussions with SDG&E about how to make the assumptions in the two companies' resource plans consistent." (Fohrer Declaration, ¶ 4.) SDG&E's Guiles also confirms that there have been reciprocal exchanges of information on such matters as current resource plans, transmission and distribution planning studies, and generation planning reports, but maintains that "SDG&E has not materially altered either its short- or long-term planning relative to the merger in such a way as to jeopardize its public utility responsibilities to reliably serve customers in a cost effective manner." (Guiles Declaration, ¶¶ 8, 10.)

C. The Nature and Extent of Records Sharing Relative to Day-to-Day Operations

According to Edison's Fohrer, personnel from the two companies have exchanged information about how they do things but not specifically what they are doing on any particular day. (Fohrer Declaration, ¶ 5.) SDG&E's Guiles states that there has been no systematic exchange of operating records or information on a day-to-day basis. Although the November 30, 1988 Agreement (Article VI, Section 6.2(e)), contemplates regular and frequent conferences between the companies on operational matters, Guiles states that no formal reporting of current operating data is now taking place, nor is any such reporting contemplated. (Guiles Declaration, ¶ 11.)

D. The Nature and Extent of SCEcorp/Edison Involvement in the Day-to-Day Operations and Management of SDG&E

Edison's Bryson maintains that Edison has not exercised control over SDG&E as a result of the information exchanged, and that SDG&E continues to be run by its own officers, managers, and employees who make all of the operating decisions. (Bryson Declaration, ¶ 5.)

SDG&E's Guiles declares that with the exception of the planning activities noted previously (Guiles Declaration, ¶ 9), Edison has not played a role in SDG&E's day-to-day operations or decisionmaking. Guiles avers that since the merger was announced, SDG&E has pursued its normal course of business with only incidental "information items" supplied to Edison. (Guiles Declaration, ¶ 13.) According to Guiles, SDG&E has not sought Edison's consent before proceeding with any transaction, and he does not currently foresee any circumstances necessitating Edison's consent. Furthermore, Guiles states that he is unaware of a single circumstance of Edison intervention in SDG&E's day-to-day operations or management decisionmaking. (Guiles Declaration, ¶ 14.)

V. The UCAN/TURN Motion

A. Introduction

UCAN and TURN assert that, while Section 7.1 of the November 30, 1988 Agreement requires that SDG&E provide Edison with full access to all books, contracts, and records requested by SCEcorp, the Agreement is devoid of any provision identifying materials that are proprietary. Thus, TURN and UCAN believe that the Agreement will impair SDG&E's competitive abilities both during the pendency of this proceeding and afterwards if the Commission rejects the merger application. In UCAN/TURN's view, this would harm SDG&E and its ratepayers.

B. The Requested Relief

UCAN asserts that it is critical to define what constitutes proprietary information. In this proceeding, UCAN believes that such information includes at a minimum:

"1. Any power purchase transaction documents or information not incorporated into the record of a previous ECAC or GRC proceeding;

"2. Any transmission-related documents, contracts or information that has not been incorporated into the record of a previous ECAC or GRC proceeding;

"3. All goods and services purchasing contracts and related information that has not been incorporated into the record of a previous ECAC or GRC proceeding;

"4. Any unsupervised interviews by SCE employees of any SDG&E personnel." (UCAN/TURN Motion, p. 3.)

C. The Basis for the Requested Relief

UCAN and TURN assert that unfettered access by Edison to all of SDG&E's records and contracts constitutes indirect or de facto control of SDG&E which is prohibited by PU Code § 854, which provides:

"No person or corporation, whether or not organized under the laws of this state, shall, after the effective date of this section, acquire or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the Commission. Any such acquisition or control without such prior authorization shall be void and of no effect. No public utility organized and doing business under the laws of this state shall aid or abet any violation of this section."

UCAN and TURN maintain that § 854 was designed to require that the Commission review and approve a proposed utility merger

prior to either utility taking any actions that could directly compromise utility performance. Therefore, TURN and UCAN seek an order from the Commission identifying proprietary information and enjoining SDG&E from delivering such information to Edison prior to Commission approval of the merger application. Where Edison alleges that access to proprietary information is essential in forwarding its arguments, UCAN and TURN believe that the presiding ALJ should be directed to conduct an in camera review prior to granting access.

VI. Applicants' Opposition to UCAN/TURN Motion

A. Applicants' Assert that the Nature and Extent of the Information Exchange are Appropriate

Applicants maintain that the information exchanged has been necessary to gauge the fairness of the stock exchange and to determine and prove to this Commission the benefits of the merger. They note that the information being exchanged includes financial data, projections and budgets, contracts, leases, resource and generation plans, load forecasts, and generic personnel data, all of which have been exchanged subject to the safeguards typical of a protective agreement as set forth in Section 7.1 of the Agreement. (Applicants' Opposition, p. 4.) Applicants assert that without this exchange of information they would be unable to quantify the benefits of the proposed merger with any reasonable certainty as necessary to demonstrate such benefits to this Commission.

The applicants also note the protections built into the November 30, 1988 Agreement at Section 7.1: the information must be held "in strict confidence" and used only for merger-related purposes. In the event the merger is not consummated, all information must be promptly returned to the originating company, and all notes, memoranda, or other documents containing any

information received from the other company must be destroyed; and that destruction must be certified in writing.

Furthermore, applicants assert that SDG&E is taking reasonable steps to protect materials it gauges to require protection including "commercially sensitive" information. Information provided by Tucson Electric Power Company (TEP) in connection with the proposed SDG&E/TEP merger and information concerning SDG&E/Edison "historical disputes" will not be provided at all. Information SDG&E deems "commercially sensitive" will be given to Edison only where it is needed for pursuit of the regulatory approvals, and then only on the express undertaking in Section 7.1 of the Agreement that the information will not be unnecessarily disseminated nor used for any non-merger related purpose. (Applicants' Opposition, p. 4; see also Guiles Declaration, ¶¶ 5, 6; Thomas Declaration, ¶ 6.)

B. Applicants Claim that their Exchange of Information Does Not Violate PU Code § 854

Applicants dispute UCAN and TURN's assertion that the sharing of information violates PU Code § 854. Applicants assert that the present application seeks the Commission's authorization under § 854. Additionally, they argue that there is no evidence that Edison has unfettered access to SDG&E information since the Agreement allows only "reasonable requests" for information and SDG&E is withholding certain categories of information. Applicants also dispute the notion that Edison is exercising control over SDG&E in violation of § 854, asserting that the Commission staff has greater access to SDG&E documents than Edison has in the present circumstance, but does not "control" the company. Finally, applicants assert that SDG&E continues to be run by its own officers and managers. (Bryson Declaration, ¶ 5; Guiles Declaration, ¶ 14; Thomas Declaration, ¶¶ 10-11.)

C. Applicants Believe the Exchange of Information Between SDG&E and Edison Has Already Identified Potential Cost Savings

Applicants believe they have already identified potential savings as a result of the information exchange. More specifically, they refer to the South Bay repowering, service to new Orange County customers, and Control Center computer upgrades.

Applicants assert that they are exploring the potential of deferring SDG&E's planned addition of a combustion turbine to an existing steam unit at the South Bay power plant which would add 110 megawatts of capacity. The applicants are exploring the possibility of deferring this project for several years since the merged company will have greater generating resources than SDG&E alone.

Applicants note that SDG&E planned to make capital expenditures to upgrade certain transmission and distribution facilities to serve new customer growth at the Edison/SDG&E service territory boundary in Orange County. These expenditures may be deferred or avoided by serving these customers from existing Edison facilities, and the two utilities are negotiating over this matter at present.

Control Center computer upgrades are planned for 1995 to meet SDG&E's anticipated needs for additional system management capability. Applicants assert that the planned upgrades may duplicate existing Edison facilities and because they are not needed for so far into the future, this year's engineering work has been deferred without impairing SDG&E's ability to complete the project if the merger is not consummated.

Applicants maintain that if they are precluded from exchanging information, the planning necessary to identify and implement opportunities such as the three noted above cannot take place. In applicants' view, this will result in loss of achievable

savings. It will also inhibit their ability to demonstrate the benefits of the merger.

VII. Responses to Applicants' Opposition to the Motion

A. The UCAN/TURN Response to Applicants' Opposition

In their March 9, 1989 response, UCAN and TURN challenge the adequacy of the existing information exchange protections. First, they note that applicants have not delineated the kinds of proprietary information presently being safeguarded. They also point out that their concerns about the potential abuses associated with unrestricted access to commercially sensitive information are not de minimis. They assert that Edison's access to SDG&E's cash flow and capital requirements, its load profiles, and purchase power forecasts gives Edison information that can make it a more effective competitor for that power.

UCAN and TURN are not seeking an embargo on all information exchanges between the applicants; they recognize the need for information transfer to prepare the case in chief. However, their desire is to ensure the maintenance of arms-length interactions between these competing utilities who are contractually obligated to merge. To UCAN and TURN the issue is not one of withholding all information, but rather of protecting commercially sensitive information from abuse.

While applicants have acknowledged that commercially sensitive information has been transferred (Guiles Declaration), they have failed to discuss how they determined whether the exchange of commercially sensitive information is necessary or whether alternatives exist, or how the commercially sensitive information is edited. UCAN and TURN assert that applicants have been dilatory in communicating directives to their employees as to how commercially sensitive information should be protected. (UCAN Response, Attachment C.)

UCAN and TURN, who regard Section 7.1 of the Agreement as a "gentleman's agreement," argue that applicants offer no safeguards other than "trust us." They also believe that conventional contract remedies may be inadequate if the Agreement is breached. Finally, they assert that applicants are attempting to impose stricter protective arrangements on intervenors (many of whom are not competitors) than applicants have imposed on their own information exchanges. (UCAN/TURN Response, Attachment D.)

UCAN and TURN also challenge the asserted benefits of the information transfer, arguing that SDG&E's assertions that it intends to negotiate with Edison at arm's length to assure ratepayer indifference and protection of its planning in the event the merger is not consummated is totally incongruous. UCAN and TURN state that they "can only speculate at how arm's-length negotiations will occur after SCE has secured all of SDG&E's documents on the matter at issue. SCE is in a negotiating position that poker players only dream about." (UCAN/TURN Response, p. 7.) Further, UCAN and TURN maintain applicants do not need to share sensitive materials in order to identify potential merger-related savings.

UCAN and TURN ask the Commission to define "proprietary information" and to impose an information exchange agreement retroactive to the date the information exchanges began. UCAN and TURN envision that under this arrangement "like" information would be exchanged simultaneously between the applicants, in order to prevent one party or another from attaining unequal bargaining position. Further, UCAN and TURN urge the Commission to place its full power behind any violation of the merger agreement. Any prohibitions against abuse adopted by the Commission should be supported by the full force of the Commission's power to penalize where a violation has occurred.

In sum, UCAN and TURN request the Commission to place restrictions on the information exchange and monitor the transfer

of commercially sensitive information. In their view, the imposition of these additional safeguards would reduce the danger of additional pressures placed on employees to compromise the integrity of their employer via unfettered information exchange. UCAN and TURN assert that little precedent exists in this area, and that "proactivity is warranted in such a situation." (UCAN/TURN Response, p. 10.)

B. DRA's Comments

In its response filed March 10, 1989, DRA reports that it has found no legal authorities directly on point, but that there appears to be nothing intrinsically illegal about the information sharing. However, DRA does have concerns about information sharing which may impede competition, specifically that in the purchase power markets of the Northwest and Southwest. On the basis of the Guiles and Fohrer declarations, DRA believes that information has been exchanged which could have adverse effects on this competition.

DRA suggests that the Commission indicate to the applicants that it will entertain sanctions including an earnings penalty in the event the merger is not consummated and the exchanged information is later used improperly. Further, DRA maintains that the proprietary information provided Edison should be subject to conditions at least as strong as those Edison wishes to impose on intervenors in this case.

VIII. Discussion

A. Information Sharing is Occurring

Based on the pleadings and declarations before us, there is no doubt that the applicants have shared "nonpublic" or commercially sensitive information. (Fohrer Declaration ¶ 3.) While the November 30, 1988 Agreement contemplates that all three signatories will transfer and share certain information, subject to

the protections of that Agreement (Sections 7.1(a) and (b)), the UCAN/TURN Motion has focused on the potential harm associated with the unfettered transfer of commercially sensitive information by SDG&E to SCE Corp or Edison (the SDG&E information exchange).

Applicants aver that the SDG&E information exchange is limited in scope and adequately protected by their Agreement. Their averments are not repeated in detail here. It also appears that SDG&E has taken steps to inform its employees that certain materials not specifically mentioned, or excepted from disclosure, in the November 30th Agreement, either must not be exchanged (i.e., information protected by the TEP Termination and Settlement Agreement) or must be provided to Edison only after a demonstration of need for such material in the pursuit of regulatory approvals (i.e., "commercially sensitive" information). (Guiles Declaration, ¶ 5; UCAN/TURN Response, Appendix C.)

However, while it appears that some internal restrictions exist relative to the SDG&E information exchange, and that this is not a situation of "unfettered access" or "de facto merger," as UCAN and TURN initially feared, the actual terms of Section 7.1 are cause for concern. Section 7.1(a) itself appears to contain no restrictions on SCEcorp and/or Edison's ability to obtain full access, based on reasonable request, to SDG&E's properties, books, contracts, commitments, and records.[2] Under the Agreement, it appears that SCEcorp/Edison could insist on seeing almost any SDG&E materials, including all commercially sensitive information, regardless of its usefulness, or lack thereof, in obtaining regulatory approvals. Additionally, despite applicants' arguments that the information must be used only for merger-related purposes (Applicants' Opposition, p. 4), the terms of Section 7.1 do not

2 Similar "full access" provisions apply to information flows from SCEcorp/Edison to SDG&E, under Section 7.1(b) of the Agreement.

specifically state such a limitation. Therefore SDG&E's internal restrictions on the sharing of commercially sensitive information may be protections which SDG&E has no clear right to impose under the provisions of the November 30, 1988 Agreement.

A closely related concern is the need to ensure that adequate protections are in place to assure the integrity of commercially sensitive information exchanged by the applicants as they prepare their merger case. DRA agrees that applicants cannot consummate a merger without the exchange of information, and UCAN and TURN affirm that they do not seek an embargo on all information sharing, but merely the imposition of meaningful protections.

We are unaware of any particular legal prohibitions barring the sharing of information by two regulated utilities who are attempting to merge. UCAN /TURN's citations to § 854 do not provide a definitive answer, and the moving parties concede that "little precedent exists to support or obstruct the remedies" they seek. (UCAN/TURN Response, p. 10.) Both Applicants and DRA cite Lewis-Wesco & Co. v. Alcoholic Bev. Control Appeals Bd. (1982) 136 Cal. App. 3d 829 for the proposition that the antitrust laws prevent the sharing of information for price fixing purposes. In that case, however, the Court of Appeal found that a statute requiring the filing of certain price information with the Department of Alcoholic Beverage Control and mandating industry compliance with the posted price list, violated the Sherman Antitrust Act (15 U.S.C. Section 1 et seq.) restraint of trade prohibitions. The facts presented here, with their focus on pre-merger planning and case preparation, are markedly different. Similarly applicants note that the additional legal authorities cited at pp. 5 - 6 of their Opposition, are not useful in resolving the issue before us, and having reviewed those authorities, we agree with Applicants' assessment.

However the ultimate issue presented to us for resolution is whether we should intervene in the information sharing process

at this point to impose additional safeguards. Applicants state that such intervention would constitute "micromanagement" and should be avoided; UCAN/TURN and DRA argue the opposite.

B. Existing Safeguards Are Inadequate

Although the present dispute centers on the transmittal of information by SDG&E to SCEcorp and Edison, review of the November 30th Agreement shows that all signatories are obligated to provide full access to their respective properties, books, contracts, commitments and records, subject to two provisos. (Agreement, Sections 7.1(a) and (b).) As noted previously, this agreement could be characterized as allowing a fairly free flow of information between and among the signatories, subject only to the requirement that documents and related written materials are returned or destroyed (subject to certification) if the Agreement is terminated in accordance with its terms.

More significantly, however, it appears that while SDG&E has accommodated SCEcorp/Edison requests for information, except in the case of information about "historical disputes" between the two utilities and certain information provided by TEP, SCEcorp/Edison access to commercially sensitive information under the Agreement is unrestricted. Thus SDG&E's instructions to its employees to use discretion in identifying such materials and to provide them only if there is a demonstrated need for their provision in the regulatory process (Guiles Declaration, ¶ 5; UCAN/TURN Response, Appendix C), may not satisfy SDG&E's obligation to provide "full access" under Section 7.1(a). This appears to be a basic flaw in the Agreement itself.

Furthermore, applicants have provided no information indicating that they have implemented any actual physical controls to carry out the provisions of Sections 7.1(a) and (b). More specifically, there is no indication that they have in place any tracking mechanisms to ensure that documents and materials subject to Sections 7.1(a) and (b) can be identified and returned or

destroyed in accordance with the terms of the Agreement if those steps become necessary.

C. The Commission Must be Concerned about Possible Adverse Impacts of Unrestricted Information Sharing

Despite applicants' claims that the sharing of information in the pre-merger environment has already resulted in the identification and quantification of ratepayer benefits and savings, there is some question whether applicants have established any linkage between the particular savings claimed in their Opposition pleading and the materials exchanged to date. (UCAN/TURN Response, p. 7.) Moreover, this Commission is not unmindful of the possibility that such sharing may have adverse impacts on the competitive positions of both utilities if the merger does not take place. For example, there is a legitimate concern that unrestricted access by both utilities to commercially sensitive information such as purchase power forecasts and load profiles may adversely impact their respective competitive positions for purchased power if the merger is not consummated. If the ultimate result is an increase in the cost of service borne by ratepayers, this Commission has a legitimate concern, sufficient to intervene at this point to attempt to prevent such a possibility.

D. More Stringent Safeguards are Needed

UCAN/TURN and DRA have argued that utility sharing of commercially sensitive information should be subject to at least the same protections the applicants seek to impose on intervenors in this proceeding. At this point in the proceeding, however, we have not seen a final version of a protective order designed by the applicants for this purpose. Nonetheless the concept of a level playing field has merit, though we see no benefit in adopting UCAN/TURN's suggestion that an "Information Exchange Agreement" requiring "like kind" exchanges. Such an arrangement has the

potential for prompting excessive and unnecessary disclosure of sensitive information.

We also decline to adopt a precise definition of "proprietary" or "commercially sensitive" information. Our preference is to include within the "umbrella" of proprietary or commercially sensitive information, those documents and materials that the applicants would not release to intervenors in the proceeding without benefit of a protective agreement, or would not provide to the Commission or its staff without requesting special safeguards.

In order to ensure that stricter controls are in place we will impose the following requirements:

1. The applicants must continue to abide by Sections 7.1(a) and (b) of the November 30th Agreement. This means that SDG&E will continue to withhold production of documents which fall within the Section 7.1(a) provisos.

2. In the area of "commercially sensitive" information, defined at a minimum, to include that material the applicants would not (1) release to intervenors without benefit of a protective agreement, or (2) provide to the Commission or its staff members without requesting that special precautions or safeguards be taken, applicants shall:

   a. Implement a document control and document numbering system which requires that each document transmitted be logged in and assigned a number. This procedure should be designed to facilitate document identification and inventory, thereby promoting more effective oversight of document distribution and retrieval.

   b. Maintain a list of "reviewing Persons", i.e., those individuals who have permission to see the transmitted documents in question.

c. Designate those persons for both SDG&E and SCEcorp/Edison who will certify that all documents subject to the November 30th Agreement (Sections 7.1(a) and (b)) and to this decision, have been returned or destroyed, in the event the merger does not take place.

d. Provide to the assigned ALJs, every three months beginning July 1, 1989, an inventory of commercially sensitive or proprietary documents and/or materials transmitted or shared between and/or among the applicants during the preceding three months. The July 1, 1989 Inventory will list all documents so transmitted or shared to date. If the merger is not consummated, the Commission will require a detailed accounting of the documents included in these inventories from the applicants, independent of the certifications noted in Paragraph c above.

3. No commercially sensitive documents or data shall be exchanged between the applicants unless such disclosure is reasonably required in order to obtain necessary regulatory approvals of the merger.

4. SCEcorp/Edison and SDG&E shall distribute copies of this order to all persons involved in document control , records management, and/or the exchange of information between applicants, and shall take all necessary steps to ensure that these persons are aware of the Commission's order relative to information exchange.

These basic protections are minimum steps, but they are designed to ensure that the flow of information from SDG&E to SCEcorp/Edison and vice versa is adequately monitored by this Commission, so that appropriate actions may be taken in the event the merger does not occur.

Findings of Fact

1. UCAN and TURN have filed a motion seeking to bar Edison from unfettered access to proprietary information of SDG&E on the basis that such access directly violates PU Code § 854. UCAN and TURN seek imposition of a definition of "proprietary information" and restrictions on the information exchange.

2. The November 30, 1988 Agreement and Plan of Reorganization among applicants contemplates that all three signatories will provide full access to their properties, books, contracts, commitments and records, subject to two provisos. The Agreement further specifies that the parties shall use their best efforts to hold any transferred documents and information furnished in connection with the merger in strict confidence. If the Agreement is terminated transferred documents must be returned and related materials destroyed, subject to certification.

3. Subsequent to the filing of the UCAN/TURN Motion, applicants provided four declarations under penalty of perjury from corporate officials who described the nature and extent of (a) information sharing between applicants, (b) SCEcorp/Edison participation in SDG&E's planning, (c) records sharing relative to day-to-day operations, and (d) SCEcorp/Edison involvement in the day-to-day operations and management of SDG&E.

4. Applicants' declarations indicate that commercially sensitive information, including information about SDG&E's current resource plans, transmission and distribution planning studies, and generation planning reports, has been transferred from SDG&E to SCEcorp/Edison in connection with pre-merger planning.

5. Applicants claim that SDG&E is taking adequate steps to protect information it regards as "commercially sensitive," in that it is not sharing with SCEcorp/Edison information provided by TEP in connection with the proposed SDG&E/TEP merger, is not providing any information about "historical disputes," and is providing "commercially sensitive" information subject to the protections of

Section 7.1(a) of the Agreement, and only as needed in pursuit of necessary regulatory approvals.

6. Other than the proviso of Section 7.1 limiting the obligation of applicants to share information about "historical disputes," the November 30, 1988 Agreement does not restrict the requirement to provide full access to records; there is no limitation to the "full access" requirement for commercially sensitive documents and materials.

7. Although SDG&E has certain internal guidelines for its employees instructing them to provide commercially sensitive information to SCEcorp/Edison only as needed for pursuit of required regulatory approvals, these guidelines may not be enforceable by SDG&E when viewed against the "full access" provisions of Section 7.1 of the Agreement.

8. Contrary to UCAN and TURN's claims, it may be necessary for SCEcorp/Edison and SDG&E to share certain commercially sensitive information in order to prepare to demonstrate the benefits of the proposed merger as they seek the requisite regulatory approvals.

9. The unrestricted sharing of commercially sensitive information by both applicants, including information about current resource plans, transmission and distribution planning studies, and generation planning reports , may have adverse impacts on the competitive positions of both utilities if the merger does not occur, to the possible detriment of ratepayers.

10. Applicants have provided no information indicating that they have implemented any actual physical controls to carry out the protective provisions of Section 7.1; there is no indication that they have in place any tracking mechanisms to ensure that documents and materials subject to Sections 7.1 can be identified and returned, or destroyed in accordance with the terms of the Agreement, if those steps become necessary.

11. Additional safeguards, including document identification and tracking procedures, would enable applicants to monitor and control the exchange of commercially sensitive information more effectively, so that the use of this information is adequately restricted or controlled.

12. For purposes of the present controversy there is no need to adopt a precise definition of "proprietary or commercially sensitive information"; rather it is sufficient to include within those terms documents and materials that the applicants would not release to intervenors in the proceeding without benefit of a protective agreement, or would not provide to the Commission or its staff without requesting special safeguards.

Conclusions of Law

1. There do not appear to be any legal restrictions on the types of information sharing presently identified in this proceeding, and based on the declarations submitted by applicants, no violation of PU Code § 854 is apparent.

2. Additional safeguards should be implemented to govern the transfer of commercially sensitive information between the applicants, in the interests of protecting ratepayers from the adverse impacts of unrestricted information sharing identified above.

3. Because the provisions of the Agreement do not specifically address the status of commercially sensitive materials, applicants should be instructed not to share commercially sensitive information unless such disclosure is required in order to obtain necessary regulatory approvals of the merger.

ORDER

IT IS ORDERED that:

1. Applicants shall continue to abide by Sections 7.1(a) and (b) of the November 30th Agreement. This means, among other requirements, that SDG&E shall continue to withhold production of documents which fall within the Section 7.1(a) "historical disputes" proviso.

2. When transferring or disclosing to each other "commercially sensitive" information, defined at a minimum, to include that material the applicants would not (1) release to intervenors without benefit of a protective agreement, or (2) provide to the Commission or its staff members without requesting that special precautions or safeguards be taken, each applicant shall:

   a. Implement a document control and document numbering system which requires that each document transmitted be logged in and assigned a number. This procedure shall be designed to facilitate document identification and inventory, thereby promoting more effective oversight of document distribution and retrieval.

   b. Maintain a list of "reviewing persons", i.e., those individuals who have permission to see the transmitted documents in question.

   c. Designate those persons for both SDG&E and SCEcorp/Edison who will certify that all documents subject to the November 30th Agreement (Sections 7.1 (a) and (b)) and to this decision, have been returned or destroyed, in the event the merger does not take place.

   d. Provide to the assigned ALJs, every three months beginning July 1, 1989, an inventory of commercially sensitive or proprietary documents and/or materials transmitted or shared between applicants SCEcorp/Edison

and SDG&E during the preceding three months. The July 1, 1989 Inventory shall list all documents so transmitted or shared to date. If the merger is not consummated, the Commission will require a detailed accounting of the documents included in these inventories from the applicants, independent of the certifications noted in Paragraph c above.

3. No commercially sensitive documents or data shall be exchanged between SCEcorp/Edison and SDG&E unless such disclosure is reasonably required in order to obtain necessary regulatory approvals of the merger.

4. SCEcorp/Edison and SDG&E shall distribute copies of this order to all persons involved in document control, records management, and/or the exchange of information between applicants, and shall take all necessary steps to ensure that these persons are aware of the Commission's order relative to information exchange.

5. The UCAN/TURN Motion dated January 25, 1989 is granted to the extent consistent with the preceding Findings of Fact, Conclusions of Law and Ordering Paragraphs, and to the extent inconsistent with the above, the Motion is denied.

This order is effective today.

Dated MAY 26 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY.

Victor Weisser, Executive Director