Mailed 6/8/2000

Decision 00-06-019 June 8, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Sempra Communications (U 6282 C) for A Certificate of Public Convenience and Necessity In Order to Provide Competitive Local Exchange and Interexchange Services.	Application 00-02-020 (Filed February 11, 2000)

O P I N I O N

By this interim decision, we grant the joint motion filed on February 23, 2000, by Sempra Communications (SC) and the Commission's Office of Ratepayer Advocates (ORA)[1] requesting that SC be granted limited facilities-based local exchange authority. In granting the motion, we adopt the two conditions proposed therein which will allow ORA to monitor effectively the future activities of SC as described below.

1. Procedural Background

On or about October 1, 1999, SC filed a Petition in Investigation (I.) 95-04-044 for a Certificate of Public Convenience and Necessity (CPCN) to provide Competitive Local Exchange and Interexchange Services.

SC's petition is the second of its type in California, bearing significant similarities to Petition 117 filed by Southern California Edison Company (SCE or

[1] As part of their motion, the parties requested an order shortening time for responses. Since the deadline for responses under the Commission's rules has expired, the parties request for an order shortening time is moot.

Edison) in August 1998. Although Edison is a regulated energy company and SC is not, SC's planned utilization of the facilities owned by its regulated affiliates, Southern California Gas Company (SoCal Gas) and San Diego Gas & Electric Company (SDG&E), raises issues of affiliate transactions and the potential for cross-subsidies that were present in the Edison petition, but which are not typically raised by similar petitions filed by entities unaffiliated with regulated energy companies.

On or about November 18, 1999, ORA responded to SC's Petition by stating its general support for SC's Petition and urging prompt consideration of it. However, ORA also stated that there were various issues that required further evaluation before SC should be granted its CPCN. Those issues focused primarily upon: (i) future affiliate transactions between SC and its regulated affiliates SDG&E and/or SoCal Gas; (ii) whether the service quality of SDG&E and/or SoCal Gas would be negatively impacted by the activities of SC; and (iii) the specificity with which SC described its business plans in its Petition. On November 29, 1999, SC filed its reply to ORA's response and addressed the issues ORA had raised. Both prior to the filing of ORA's response and subsequent thereto, SC responded to a number of data requests propounded by ORA, both informal and formal, and participated in various telephone conferences to further address those concerns.

In Decision (D.) 99-12-048 (December 16, 1999), the Commission granted SC (among other petitioners identified therein) a CPCN as a competitive local carrier to offer resold local exchange services and interLATA and intraLATA authority on a statewide basis. We deferred granting full facilities-based local exchange authority pending resolution of certain environmental issues, but did grant limited facilities-based authority to those petitioners requesting such, with the exception of SC.

We stated in D.99-12-048 that the questions identified by ORA should be resolved before any facilities-based authority be granted to SC. We thus limited the granted authority to resale at that time and deferred the remainder of the petition to a subsequent decision.

By subsequent Administrative Law Judge (ALJ) ruling dated February 11, 2000, the Petition of SC was converted into a separate application and redocketed as Application (A.) 00-02-017. No parties protested the application.

SC and ORA then filed a joint motion on February 23, 2000 in A.00-02-017 asking that the Commission proceed to issue an interim decision on SC's application authorizing limited facilities-based local exchange authority for SC. No parties responded to the motion.

In the motion, ORA states that the questions it had previously raised during its review of the SC Petition have now been resolved as a result of SC's responses to ORA's formal and informal data requests and additional discussions between representatives of the two entities. In general, ORA seeks to verify that the transactions are consistent with the affiliate transaction rules, and to assess the impacts of those activities on the service quality and operations of SDG&E and SoCal Gas. To the extent ORA was concerned about the impact of possible transfer of assets from SDG&E or SoCal Gas to SC, ORA now believes that the review process provided by Public Utilities Code Section 851 will provide sufficient means to address any impacts implied by a transfer of assets. Finally, ORA has reviewed and is satisfied with SC's current business plans.

While SC has satisfied ORA's present concerns with SC's petition, SC and ORA agree it is appropriate that ORA continue to monitor for a period of time the activities of SC to ensure that there are no inappropriate cross-subsidies between SC and its regulated energy affiliates SDG&E and SoCal Gas. In order

to assure that appropriate monitoring can occur, SC and ORA have agreed that the following two conditions should be included in the Commission's interim order granting SC limited facilities-based local exchange authority:

1. Forty-five (45) days after the end of each quarterly calendar period, SC will file, on a confidential basis pursuant to California Public Utilities Code Section 583 if necessary, a report with ORA identifying for the previous calendar quarter the nature and substance of all significant transactions undertaken between SC and either SDG&E or SoCal Gas. The report will follow generally the format of the reports required by Rulemaking 92-08-008, modified to a limited extent in D.93-02-019 (Re: Reporting Requirements for Electric, Gas, and Telephone Utilities Regarding Their Affiliate Transactions, 48 CPUC 2nd 163 ("Affiliate Transaction Order")). The Affiliate Transaction Order requires utilities to file annual reports detailing the significant business and financial interactions of utilities with their subsidiaries, affiliates, and controlling corporations. SDG&E and SoCal Gas will continue to comply with their existing obligations under the Affiliate Transactions Order. Unless otherwise agreed upon by SC and ORA, or ordered by the Commission, this reporting requirement for SC will terminate upon conclusion of the first audit addressed in item 2, below.

2. No earlier than one (1) year from the date an interim decision is issued granting to SC limited facilities-based local exchange authority, ORA may conduct an audit of transactions between SC and either or both SDG&E and SoCal Gas, with ORA staff or, at ORA's discretion, an independent auditor. "Independent Auditor" is defined as an auditor without a financial interest in SC or its affiliates. SC will promptly reimburse ORA's reasonable costs to employ an independent auditor to conduct such an audit. The independent auditor will be selected jointly by ORA and SC. Future audits of the same nature will not be conducted any more frequently than every three (3) years thereafter.

With the inclusion of these conditions, ORA supports the granting of limited facilities-based authority to SC.

2. Applicability of Affiliate Transaction Rules in D.97-12-088

The Joint Motion references the older rulemaking docket but, however, does not mention the more recently adopted affiliate transaction rules set forth in D.97-12-088 as modified by, inter alia, D.98-08-035. Rule II.B of the affiliate transaction rules adopted therein states:

> "For purposes of a combined gas and electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity, unless specifically exempted below. For purposes of an electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity."

An ALJ's ruling was issued on April 19, 2000, soliciting comments as to whether the affiliate transaction rules set forth in D.97-12-088, as modified by, inter alia, D.98-08-035, should be interpreted as applying to transactions between SC and its utility affiliates (i.e., SDG&E and SoCal Gas). If those affiliate transaction rules were to apply in this instance, the ruling noted that the proposed language in the Joint Motion might need to be amended accordingly, or other conditions might be appropriate as a condition of granting the CPCN request.

Comments in response to the ALJ ruling were filed by SC, ORA, and Pacific Gas & Electric (PG&E) on May 4, 2000. SC and PG&E argue that SC should not be subject to the energy affiliate transaction rules for similar reasons.

SC argues that the purpose of the affiliate transaction rules is to address energy utility transactions with affiliates who provide energy-related products or services. It is not the intent of SC to provide such products or services.

Therefore, SC argues that it should not be subject to the energy affiliate transaction rules.

SC argues that even under the "Joint Petitioners Coalition" expansive definition of energy-related services the proposed activities of SC would not be subject to the energy affiliate transaction rules. In the OIR/OII proceeding, the Joint Petitioners Coalition advocated for broad coverage of the energy affiliate transaction rules. Among the activities the Joint Petitioners Coalition cited as being energy-related were "...the manufacturing of earthquake shut-off valves, providing internet and computer repair services, heating, ventilation and air conditioning maintenance and installation, power quality, energy management, energy auditing, and in-home security systems." (D.97-12-088, *mimeo* at 13, 14.)

While SC may "use" electricity or gas in order to operate certain equipment necessary to provide telecommunication services, and might "use" certain electric or gas facilities such as power poles on which to hang optical fiber, SC argues that such "uses" do not represent the necessary nexus between SC and energy-related products and services requiring application of the energy affiliate transaction rules. SC contends that, rather, the rules only apply to affiliates that provide a product that uses gas or electricity or a service that relates to the use of gas or electricity.

ORA disagrees, arguing that the New Affiliate Rules should apply to SC. Whereas the affiliate rules adopted in D.93-02-019 can be characterized as emphasizing reporting of significant transactions, the New Affiliate Rules go beyond reporting requirements and focus on restrictions on how the energy utility and its affiliates conduct business together. ORA contends that in today's business environment, wherein energy and communications – or, conceivably, other – companies are sharing assets and jointly marketing products, there need not be similarity in products and services among affiliates to justify application

of the New Affiliate Rules. ORA believes the kinds of problems that the New Affiliate Rules are meant to prevent or mitigate can surface with any affiliate of an energy utility regardless of whether the affiliate offers an energy-related product or service. ORA views Section II (Applicability) of the New Affiliate Rules as extending very broadly, allowing for interpretations of applicability to evolve as the nature of energy utility and affiliate transactions evolve.

ORA further notes that SoCal Gas' Advice Letter (AL) 2860 filed on October 25, 1999, pursuant to Rule VI.B of the New Affiliate Rules, only listed SC as "not covered" by the New Affiliate Rules, but did not request an exemption for SC. ORA believes it should have so requested.[2] In any case, the Commission has yet to issue a resolution on AL 2860.

ORA recommends that the Commission allow parties to this application (and those responding to the Ruling) opportunity to reply to Sempra Communications' (and Sempra Energy's) arguments of why SC should or should not be exempted from the New Affiliate Rules. This would mimic the process afforded by an advice letter filing pursuant to Rules VI.B, wherein the applicant would identify a newly created affiliate andoffer its rationale for exemption (pursuant to Resolution E-3548), and interested parties could respond. Alternatively, ORA proposes that Sempra Energy be required to file an advice letter pursuant to Rule II.G of the New Affiliate Rules.

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[2] In Resolution E-3548, dated November 5, 1998, the Commission determined that a simple listing of affiliates not covered by the New Affiliate Rules was inadequate. Finding 34 states: "SDG&E should revise its affiliate list to include an explanation of what products and services each affiliate provides, why this entitles the company to be either included or excluded from the ambit of these Rules, and include these explanations with its revised compliance plan."

Although it is ORA's opinion that the New Affiliate Rules apply to SC, ORA does not see a need to alter the conditions it jointly proposed with SC in the February 23, 2000, Joint Motion. Those conditions were designed to allow ORA and the Commission to better monitor interactions between SC and its utility affiliates.

The California Cable Television Association (CCTA), on behalf of its member cable corporations, filed comments on the Draft Decision mailed on May 19, 2000.[3] CCTA claims that because SC makes use of the same infrastructure as its energy utility affiliates, including rights-of-way, and because CCTA's members also use those rights of way, CCTA's members will be directly affected by the terms governing SC's CPCN authorization.

Specifically, CCTA claims that SDG&E, as a regulated energy affiliate of SC, continues to refuse access to its transmission poles to Daniels Cablevision, (Daniels) unless and until Daniels agrees to enter into a twenty year contract for the attachment of Daniels' fiber optic plant to SDG&E's existing transmission facilities. In addition, SDG&E requires payment of approximately $1 million over and above what CCTA claims is the statutory attachment rate adopted by the Commission in the Rights-of-Way Decision for all attachments (D.98-10-058.) CCTA claims that the Draft Decision does nothing to address the denial of access to rights-of-way, and the concomitant barrier to entry created by SDG&E, by demanding exorbitant fees for access to rights-of-way from Sempra's competitors. Based on this alleged anticompetitive behavior of SDG&E regarding access to its rights-of-way, CCTA argues that competitive issues

[3] CCTA concurrently filed a motion to intervene in this proceeding which no party contested. CCTA's motion to intervene is granted.

associated with access to support structures and rights-of-way must be addressed before SC's request for facilities-based authority be granted.

3. Discussion

The sole reason why SC's original request for limited facilities-based authority was deferred was due to ORA's concerns that further inquiry was needed concerning the issues referenced above. Now that ORA and SC have reached agreement on the conditions to be incorporated in granting the requested limited facilities-based authority, there is no remaining reason to delay granting the motion. No other party has filed a protest to SC's application. Based upon review of comments filed in response to the ALJ ruling, we conclude that the New Affiliate Rules do not apply to a telecommunications utility affiliate such as SC. Although the New Affiliate Rules were written to be applied broadly in scope, the relevant market for purposes of evaluating the applicability of the rules was defined to cover the provision of a product or service that uses gas or electricity. The scope was broadly defined to include various energy-related services, but was not defined to include services in completely different industries such as telecommunications. While SC requires energy as an input to its telecommunications operations, virtually every business requires energy inputs in some fashion or another.

In its comments, ORA does not try to argue that SC is engaging in an energy-related service as defined in the New Affilate Rules. Rather, ORA argues that no similarity in products or services is necessary to justify application of the New Affiliate Rules, as long as affiliates are sharing assets and jointly marketing products. There is no language in the Applicability Section of the Rules to support ORA's claim that affiliates engaging in completely separate industries

that do not offer energy-related services come under the defined scope of the rules.

A separate question raised by ORA's comments is whether the previous proceeding that adopted the New Affiliate Rules adequately anticipated the sort of interactions that may occur between affiliates separately engaged in energy-utility-related and telecommunications services. To the extent the New Affiliate Rules might not adequately address these sorts of relationships, ORA was provided the opportunity by the ALJ ruling to offer recommendations as to what additional conditions should apply in the granting of a CPCN to SC. Yet, in its comments, ORA did not see any need to alter the conditions that were previously proposed in the Joint Motion.

In any event, we find no justification impose additional conditions on SC relating to any particular forms of joint marketing in which it may engage with its energy utility affiliates. In D.98-03-073, the Commission has already imposed conditions on Sempra Energy and all of its affiliates and subsidiaries to guard against cross-subsidization and preferential self-dealing. No additional conditions have been shown to be necessary for SC.

We are concerned, however, about the condition proposed in the Joint Motion that applies confidentiality protection under Public Utilities Code Section 583, "if necessary," to the reported transactions between SC and its regulated energy utility affiliates. In particular, this provision of the agreement should not be used to withhold from public access any contracts that deal with access to utility-controlled support structures and rights-of-way. In D.98-10-058, as modified by D.00-03-055 and D.00-04-061, the Commission adopted rules to which SDG&E is subject, requiring nondiscriminatory access to all competitive local carriers and cable television companies to the poles, ducts, conduits, and rights-of-way of electric utilities. SDG&E is prohibited from giving preferential

access to SC in the use of, or fees paid for attachment to its poles, ducts, conduits, or rights of way. In addition, Appendix A to D.98-10-058 requires all subject utilities which enter into an agreement with a telecommunications carrier (such as SC) to provide access to their support structures to file with the Commission the executed contract showing various information on relevant fees and costs. Each utility "... shall file such contracts with the Commission pursuant to General Order 96, available for full public inspection, and extended on a non-discriminatory basis to all other similarly situated telecommunications carriers or cable TV companies." (Emphasis added) This requirement thus applies to contracts between SC and its energy utility affiliates.

In view of these requirements, any proposed contracts entered into between SC and its affiliates relating to access to rights-of-way and support structures, as outlined above, must be a matter of public record. If such contracts were treated confidentially, and withheld from public access, we are concerned that public assurance that such contracts did, in fact, reflect nondiscriminatory provisions could be compromised.

We also note that the Joint Motion limits access to the confidential quarterly report to ORA. We conclude, however, that a copy of the report should concurrently be provided to the Director of the Commission's Telecommunications Division (TD). The TD, in its capacity of providing advisory and technical support functions to the Commission, needs access to the quarterly affiliate transactions report as well as ORA. The TD staff is subject to the same confidentiality provisions of Section 583 as is ORA.

Therefore, we shall adopt modifying language to that proposed in the Joint Motion to clarify that the confidentiality provisions cited in Paragraph 1 of the proposed terms and conditions shall not apply to contracts for access to rights of way and support structures of the energy-related affiliates. We shall

also require that a copy of the affiliate report be concurrently provided to the TD Director. Accordingly, the joint motion is granted subject to the modifications noted above.

We acknowledge the issue raised by CCTA concerning the reasonableness of the terms and charges that SDG&E seeks to impose on Daniels Cablevision for attachment of fiber optic facilities to SDG&E's transmission lines. We conclude, however, that the proper forum to address these issues is through a complaint filing, but not through a CPCN process such as this.

SC shall be granted limited facilities-based authority in accordance with the same terms, conditions, and restrictions applied to those CLCs granted similar authority in D.99-12-048. Limited facilities-based local exchange authority is described in D.99-12-048 as "...utilizing...unbundled network elements and equipment installed solely within or on existing buildings and structures within the service territories as noted in Appendix B..." *(D.99-12-048, mimeo. at 14.)*

4. Comments on Draft Decision

The original version of this draft decision was prepared as an uncontested matter in which the interim decision granted the relief requested. Accordingly, pursuant to Public Utilities Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment was previously waived. The original draft decision was subsequently revised in response to parties' comments regarding the issues raised in the ALJ ruling dated April 19, 2000. As a result of the revisions to the original draft decision, a revised draft decision added additional conditions beyond those proposed by the parties as a basis for granting the relief requested. In the interests of providing parties an opportunity to comment on the additional conditions, the revised draft decision was mailed

on May 19, 2000, to parties for comment, both in this proceeding as well as parties of record in Rulemaking 97-04-011/Investigation (I.) 97-04-012 regarding the rulemaking for affiliate transaction rules for energy utilities. One round of comments were filed on May 30, 2000. We have taken the comments into account, as appropriate, in finalizing this order.

Findings of Fact

1. SC filed a petition in I.95-04-044 in the third quarter of 1999 seeking a CPCN to provide competitive local exchange services in the territories of various California incumbent local exchange carriers.

2. ORA filed a response to the petition of SC, raising various issues concerning SC's planned utilization of facilities owned by its regulated energy utility affiliates.

3. In D.99-12-048, the Commission found that SC met the requirements for a limited facilities-based CPCN except for the outstanding issues identified by ORA.

4. As described in the joint motion subsequently filed by ORA and SC, both parties have agreed upon the manner in which ORA can monitor effectively SC's future affiliate relationships with SDG&E and SoCal Gas.

5. No other party has protested the SC application.

Conclusions of Law

1. SC meets the requirements of financial ability and technical expertise for facilities-based local exchange service as previously determined in D.99-12-048.

2. Public convenience and necessity require competitive local exchange facilities-based services as proposed to be offered by SC.

3. As a condition of granting the joint motion of SC and ORA, SC should be made subject to the same requirements, exemptions, and sanctions as were prescribed for CLCs in D.99-12-048.

4. The joint motion of SC and ORA should be granted, including the two conditions proposed therein subject to the modifications in Conclusion of Law 6.

5. The affiliate transaction rules set forth in D.97-12-088, as modified by, inter alia, D.98-08-035, do not apply to transactions between SC and its regulated energy utility affiliates (i.e., SDG&E and SoCal Gas) since SC does not offer "energy-related" products or services as currently defined by those rules

6. The Joint Motion should be modified as follows:

   a. to clarify that contracts between SC and its regulated energy-utility affiliates involving access to rights of way or support structures shall not treated confidentially, but shall be made publicly available in a manner consistent with Rule VI.C. of the "Commission-Adopted Rules Governing Access To Rights-of-Way and Support Structures of Incumbent Telephone and Electric Utilities" attached as Appendix A to D.98-10-058; and

   b. to add a provision that a copy of the affiliate transactions report shall concurrently be provided to the Director of the Commission's Telecommunications Division (TD).

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity shall be granted to Sempra Communications (SC) to provide competitive local exchange telecommunications services utilizing unbundled network elements and equipment installed solely within or on existing buildings and structures within the service territories of Pacific Bell and GTE California Incorporated, Roseville

Telephone Company, and Citizens Telephone Company, contingent on compliance with the terms for facilities-based authority identified in Decision (D.) 99-12-048. Authorization for expanded facilities-based authority involving construction work will require conformance with California Environmental Quality Act requirements pursuant to comments on the Negative Declaration.

2. SC shall comply with the ordering paragraphs in D.99-12-048, subject to the same exemptions as set forth in those ordering paragraphs, and shall comply with the conditions in Attachment A.

3. The motion to intervene of the California Cable Television Association is granted.

This order is effective today.

Dated June 8, 2000, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
CARL W. WOOD
Commissioners

ATTACHMENT A

As a condition of being granted the Certificate of Public Convenience and Necessity authority pursuant to this interim order, Sempra Communications (SC) shall comply with these requirements:

1. Forty-five (45) days after the end of each quarterly calendar period, SC will file, on a confidential basis pursuant to California Public Utilities Code Section 583 if necessary, a report with Office of Ratepayer Advocates (ORA) identifying for the previous calendar quarter the nature and substance of all significant transactions undertaken between SC and either San Diego Gas & Electric (SDG&E) or Southern California Gas Company (SoCal Gas).

   Contracts between SC and its regulated energy-utility affiliates involving access to rights of way or support structures as covered under D.98-10-058, (as modified by D.00-03-055 and D.00-04-061) shall, but shall be publicly filed with the Commission in a manner consistent with Rule VI.C. of the "Commission-Adopted Rules Governing Access To Rights-of-Way and Support Structures of Incumbent Telephone and Electric Utilities" attached as Appendix A to D.98-10-058." A copy of the affiliate transactions report shall concurrently be provided to the Director of the Commission's Telecommunications Division (TD). The report will follow generally the format of the reports required by Rulemaking 92-08-008, modified to a limited extent in Decision 93-02-019 (Re: Reporting Requirements for Electric, Gas, and Telephone Utilities Regarding Their Affiliate Transactions, 48 CPUC2d 163 ("Affiliate Transactions Order")). The Affiliate Transactions Order requires utilities to file annual reports detailing the significant business and financial interactions of utilities with their subsidiaries, affiliates, and controlling corporations. SDG&E and SoCal Gas will continue to comply with their existing obligations under the Affiliate Transactions Order. Unless otherwise agreed upon by SC and ORA, or ordered by the Commission, this reporting requirement for SC will terminate upon conclusion of the first audit addressed in item 2, below.

2. No earlier than one (1) year from the date an interim decision is issued granting to SC limited facilities-based local exchange authority, ORA may conduct an audit of transactions between SC and either or both SDG&E and SoCal Gas, with ORA staff or, at ORA's discretion, an independent auditor. "Independent auditor" is defined as an auditor without a financial interest in SC or its affiliates. SC will promptly reimburse ORA's reasonable costs to employ an independent auditor to conduct such an audit. The independent auditor will be selected jointly by ORA and SC. Future audits of the same nature will not be conducted any more frequently than every three (3) years thereafter.

(END OF ATTACHMENT A)