

128 FERC ¶ 61,009
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Sudeen G. Kelly, and Philip D. Moeller.

San Diego Gas & Electric Company

Docket No. EL00-95-000

v.

Sellers of Energy and Ancillary Services
into Markets Operated by the California
Independent System Operator Corporation and the
California Power Exchange Corporation

Investigation of Practices of the California
Independent System Operator Corporation and the
California Power Exchange Corporation

Docket No. EL00-98-000

ORDER ON MOTIONS FOR DISQUALIFICATION AND
REQUEST TO TAKE OFFICIAL NOTICE

(Issued July 2, 2009)

1. In this order, the Commission considers the motions filed by the City of Santa Clara, California (Santa Clara) and the Northern California Power Agency (NCPA) (together, Movants) to disqualify the law firm of Sidley Austin LLP (Sidley) and its attorneys (together, Respondents) from representing Pacific Gas & Electric Company (PG&E) in the above-captioned proceedings. The Commission also considers Santa Clara's request that we take official notice of a California trial court order that held that Respondents were disqualified from representing PG&E in related litigation before that court. As discussed below, we deny the motions for disqualification and grant the request to take official notice.

I. Background

2. In 2000, energy prices paid by California utilities and other entities for wholesale electric power rose significantly. Pursuant to section 206 of the Federal Power Act,¹ the

¹ 16 U.S.C. § 824e (2006).

Commission initiated an investigation in 2000 as to whether wholesale electricity prices in California were just and reasonable.² This proceeding and several related proceedings involve numerous parties, thousands of pleadings, hundreds of Commission orders, dozens of settlements, numerous remands by the Court of Appeals for the Ninth Circuit, and very complex issues.

3. As recounted in Respondents' answer to Movants, PG&E has been represented by Mr. Stan Berman and his team during these proceedings. According to Respondents, while representing PG&E in these proceedings, Mr. Berman was a shareholder at Heller Ehrman LLP (Heller), a San Francisco-based law firm with an active regulatory practice before this Commission.³ Respondents state that Mr. Berman, who has worked out of Seattle, Washington, led a team of Heller attorneys, including attorneys based in Heller's Washington, D.C. office, in representing PG&E before the Commission in these proceedings.⁴ Respondents explain that Mr. Berman and another Heller shareholder, Ms. Marie Fiala, also represented PG&E in related state court litigation.⁵ In September 2008, a number of Heller's shareholders departed from that law firm.⁶ Soon thereafter, the remaining shareholders voted to dissolve Heller effective September 26, 2008.⁷

4. According to Respondents, as a result of Heller's dissolution, it was necessary for Mr. Berman, who continued to represent PG&E in these proceedings, to find a new place of employment.⁸ Mr. Berman explains that certain key elements were necessary in selecting a new firm, such as the ability for Mr. Berman to work out of Seattle, the presence of an office in the District of Columbia, and the accommodation of other Heller attorneys with whom Mr. Berman worked.⁹ Mr. Berman stated that he determined that Sidley would be a good fit for his needs, noting that Sidley met these requirements and,

² *San Diego Gas & Elec. Co.*, 92 FERC ¶ 61,172 (2000).

³ Respondents' Answer, Att. A., Decl. of Stan Berman, at ¶ 8.

⁴ *Id.*

⁵ Respondents' Answer at n.8.

⁶ *Id.* at Att. A, Decl. of Stan Berman, at ¶ 10.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

further, was not representing any entity in the above-captioned proceedings.¹⁰ Mr. Berman stated that he was advised that there may be a conflict with Santa Clara, for which Sidley provided legal advice in municipal bond financing transactions, but was informed that Sidley believed that appropriate waivers could be obtained from Santa Clara.¹¹

5. According to Respondents, after Mr. Berman's arrival at Sidley, Mr. Eric Tashman, a Sidley attorney who has represented Santa Clara with respect to municipal bond financing, discussed with Santa Clara's Director of Electric Utility the desirability of obtaining a waiver from Santa Clara such that Mr. Berman could continue to represent PG&E in these proceedings and in the related court litigation.¹² Santa Clara did not provide written consent.¹³

6. Respondents state that because waiver from Santa Clara was not forthcoming, Sidley and Mr. Berman decided that it would be appropriate to establish certain protocols to ensure that Sidley's representation of Santa Clara would not be compromised.¹⁴ Respondents explained that they decided to establish an "ethical wall" to prevent the dissemination of any confidential information regarding Santa Clara from Mr. Tashman and other attorneys representing Santa Clara with respect to municipal bond financing to Mr. Berman and his team.¹⁵ In addition, Respondents note that PG&E agreed that in circumstances where PG&E was directly adverse to Santa Clara, its own in-house counsel, and not Sidley, would represent the company.¹⁶

7. On November 12, 2008, Sidley filed a Notice of Modification of Appearances and Official Service List (Service List Notice), which explained that Mr. Berman and certain other attorneys were now associated with Sidley. The Service List Notice also stated that

¹⁰ *Id.* ¶ 12-13.

¹¹ *Id.*

¹² Respondents' Answer, Att. G, Decl. of Eric D. Tashman, at ¶ 11.

¹³ *See* Respondents' Answer at 10.

¹⁴ *Id.* at Att. A, Decl. of Stan Berman, at ¶ 13-14; *id.* at Att. E, Decl. of Theodore N. Miller, at ¶ 7-9.

¹⁵ Respondents' Answer at 10.

¹⁶ *Id.* at Att. A, Decl. of Stan Berman at ¶ 14; *id.* at Att. F, Decl. of Mark D. Patrizio, at ¶ 5.

Mr. Berman was withdrawing as counsel for PG&E with respect to PG&E's claims against Santa Clara, as well as the City of Pasadena (Pasadena). Instead, the Service List Notice explained that PG&E's in-house attorney would continue to serve as counsel of record in these dockets.

8. On November 20, 2008, Movants (as well as certain other California municipal entities)¹⁷ and PG&E filed a joint letter with the Commission, which stated that Movants (and the other municipal entities) believed that Sidley should be disqualified from representing PG&E in certain dockets, including the captioned proceedings (Joint Letter). The Joint Letter also noted that PG&E and Sidley disagreed that a disqualifying conflict existed.¹⁸ The Joint Letter further explained that a similar issue was being considered in Los Angeles Superior Court, that the matter was set for resolution in that court on December 4, 2008, that no motion to disqualify would be filed with the Commission until the state court had ruled on the motion before it, and that the failure to file such motion before the state court ruled on the matter would not be grounds for a claim of laches or otherwise cited as a failure to timely pursue available remedies.

II. The West Order

9. On December 24, 2008, Judge Carl J. West of the Superior Court of California, County of Los Angeles issued the "Court's Ruling and Order re: Motions to Disqualify Sidley Austin, LLP, Marie Fiala, and Stan Berman" (West Order).¹⁹ The West Order found that it was necessary to disqualify Sidley with respect to Santa Clara and Pasadena, because these municipalities were existing Sidley clients. The West Order stated that "it is apparent to the Court that PG&E has a direct and actual conflict with the City of Pasadena and the City of Santa Clara, since PG&E has sued both entities in the Electric Refund coordinated litigation at bar."²⁰ Citing Rule 3-310(C) of the California Rules of Professional Conduct (California Rules), the West Order explained that an attorney

¹⁷ The other municipal entities included Pasadena, Modesto Irrigation District (MID), and City of Glendale (Glendale).

¹⁸ See Joint Letter at 1.

¹⁹ *Pacific Gas & Elec. Co. v. Ariz. Elec. Power Coop., Inc., et al.*, Los Angeles Super. Court, Case No. BC369141, "Court's Ruling and Order re: Motions to Disqualify Sidley Austin, LLP, Marie Fiala, and Stan Berman" (Dec. 24, 2008).

²⁰ West Order, slip op. at 13.

cannot represent a client on one matter and simultaneously sue that client in an unrelated matter. Accordingly, the West Order found that the Sidley's disqualification was "automatic."²¹

10. The West Order further explained that it was "satisfied that the screening procedures imposed by Sidley Austin demonstrate there was no opportunity for confidential information about the City of Pasadena or the City of Santa Clara to be divulged to Fiala or Berman."²² Thus, the West Order stated that there was no basis to disqualify Ms. Fiala or Mr. Berman individually, provided they were no longer associated with Sidley.

11. The West Order concluded that other entities, including NCPA, Glendale, and MID, were not Sidley's clients. Notwithstanding this finding, the West Order found that "[i]n complex litigation of this nature, Sidley may not selectively prosecute claims against some, but not all, of the defendants" because it would "compromise its duty of loyalty to PG&E" and "cast a dark cloud on the integrity of the judicial process."²³ Accordingly, the West Order concluded that Sidley could not represent PG&E in any of the state court litigation, even if it was not directly against Santa Clara or Pasadena.

III. Motions for Disqualification

A. Santa Clara's Motion

12. On April 10, 2009, Santa Clara filed a motion to disqualify Sidley and each of its attorneys from representing PG&E in these proceedings. Santa Clara argued that, while it did not file this motion lightly, "the present circumstances involve a clear violation of ethical rules that cannot be condoned."²⁴ Santa Clara explained that the Commission's authority to disqualify counsel arises from Rule 2102 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.2102 (2008), which provides that the Commission may disqualify a person appearing before it on grounds of "unethical or improper conduct."²⁵ Santa Clara contends that Sidley's representation of PG&E in these proceedings is in direct conflict with Santa Clara, another of Sidley's clients.

²¹ *Id.*

²² *Id.* at 16.

²³ *Id.* at 24.

²⁴ Santa Clara Motion at 1-2.

²⁵ *Id.* at 10.

13. Santa Clara asserts that the Commission must look to the professional rules of the State of California, because that is the location of the energy sales at the heart of these proceedings and because it is the forum state of Sidley's representation of Santa Clara. Santa Clara notes that its legal services contract with Sidley is governed by California law. Santa Clara also argues that under the American Bar Association Model Rules of Professional Conduct (ABA Model Rules) and the District of Columbia Rules of Professional Conduct (D.C. Rules), disqualification would also be necessary.

14. Santa Clara urges the Commission to follow the logic of the West Order, which explained that when lawyers engaged in ongoing litigation can switch firms without concern for the appearance of impropriety, "the entire judicial process suffers the consequence."²⁶ Santa Clara goes on to distinguish *Nevada Power Co. v. Duke Energy Trading and Marketing, L.L.C.*,²⁷ an Administrative Law Judge's order rejecting a motion to disqualify Sidley for an alleged conflict of interest in representing one client in proceedings before the Commission and an adverse client in unrelated proceedings. Santa Clara argues that *Nevada Power* involved a number of cases with different bilateral energy contracts at issue, while these proceedings involve "PG&E asserting identical legal claims against municipal sellers that all sold into the same markets."²⁸ According to Santa Clara, "PG&E is adverse to all municipal sellers."²⁹

15. Santa Clara contends that the proposed solution in the Service List Notice, in which PG&E's own in-house counsel would be the only attorney of record with respect to PG&E's claims against Santa Clara, was unworkable and would still violate the applicable rules of professional conduct. According to Santa Clara, this is because the conflict "fundamentally arises from PG&E taking positions directly adverse to Santa Clara in these proceedings," and allowing Sidley to make arguments on behalf of PG&E in these proceedings includes taking positions directly adverse to Santa Clara.³⁰ For example, Santa Clara explains that PG&E and Santa Clara have taken "diametrically

²⁶ *Id.* at 12 (citing West Order, slip op. at 24).

²⁷ *Nevada Power Co. v. Duke Energy Trading and Marketing, L.L.C.*, Docket No. EL02-26-000, *et al.*, "Order on Motion to Disqualify Counsel For Nevada Power Company" (July 8, 2002) (*Nevada Power*).

²⁸ Santa Clara Motion at 13.

²⁹ *Id.*

³⁰ *Id.* at 14.

conflicting positions” on matters at issue in these proceedings.³¹ Thus, according to Santa Clara, “it is untenable for Sidley to claim that it can effectively prosecute identical claims against some, but not all, governmental entities.”³²

16. Santa Clara asserts that under the California Rules, Respondents should be disqualified, noting that it was “beyond dispute” that it had an attorney-client relationship with Sidley.³³ Santa Clara explains that even if Sidley were to attempt to withdraw its representation of Santa Clara to avoid the conflict, it would run afoul of the “hot potato” rule, which prohibits a firm from withdrawing from a representation “where the purpose is to undertake a new representation adverse to the first client, even in an unrelated matter.”³⁴ Santa Clara also explains the nature of its relationship with Sidley, and contends that Sidley was aware that there would be a conflict should it represent PG&E in these proceedings. Santa Clara argues that the conflict is imputed to the entire Sidley firm under the California Rules; thus, each attorney at Sidley would be prohibited from representing PG&E. Santa Clara also references the West Order, which (as described above) found that disqualification of Sidley was automatic under Rule 3-310(C) of the California Rules.³⁵

³¹ *Id.* at 15.

³² *Id.* at 18.

³³ *Id.* at 19.

³⁴ *Id.* at 19 and n.50 (citing *Truck Ins. Exchange v. Firemans Ins. Co.*, 6 Cal. App. 4th 1050, 1059 (1992)).

³⁵ Rule 3-310(C) of the California Rules states:

A member shall not, without the informed written consent of each client: (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

17. Further, Santa Clara argues that disqualification would be required under Rule 1.7 of the D.C. Rules, which governs conflicts of interest.³⁶ Santa Clara cites to cases applying the D.C. Rules to support its contention that under those rules, Sidley would be disqualified from representing PG&E.³⁷ Santa Clara notes that the comments accompanying Rule 1.7 makes clear that a firm of lawyers is effectively one lawyer for purposes of the rule. Santa Clara next contends that Sidley is disqualified from representing PG&E under Rule 1.7(a) of the ABA Model Rules. According to Santa Clara, the ABA Model Rules “invariably mandate disqualification because the Refund Proceedings amount to a zero-sum game. PG&E’s success in these proceedings is inherently tied to the detriment of Santa Clara.”³⁸

18. Finally, Santa Clara states that while this motion is addressed at Docket Nos. EL00-95 and EL00-98, it reserves the right to address conflicts in other proceedings.

B. NCPA’s Motion

19. NCPA also filed a motion to disqualify on April 10, 2009. In its motion, NCPA describes its relationship with Sidley, noting that it had selected Sidley to serve as counsel for its underwriter in certain municipal bond financing transactions (including an

³⁶ Rule 1.7. of the D.C. Rules states:

[Except as otherwise provided,] a lawyer shall not represent a client with respect to a matter if: (1) That matter involves a specific party or parties, and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter, even though that client is unrepresented or represented by a different lawyer; (2) Such representation will be or is likely to be adversely affected by representation of another client; (3) Representation of another client will be or is likely to be adversely affected by such representation; (4) The lawyer’s professional judgment on behalf of the client will be or reasonably may be adversely affected by the lawyer’s responsibilities to or interests in a third party or the lawyer’s own financial, business, property, or personal interests.

³⁷ Santa Clara Motion at 28-29 (citing *Lewis v. Nat’l Football League*, 146 F.R.D. 5 (D.D.C. 1992); *In re Ponds*, 888 A.2d 234 (D.C. 2005)).

³⁸ *Id.* at 32 (citing *North Star Hotels Corp. v. Mid-City Hotel Assocs.*, 118 F.R.D. 109 (D. Minn. 1987)).

in-progress transaction). NCPA states that Sidley has served as its underwriter's counsel in approximately 34 transactions over the past 27 years. According to NCPA, in order to provide complete information with respect to its official statements for its bond offerings, it has discussed confidential information with the Sidley attorneys serving as underwriter's counsel, including information related to these proceedings.³⁹

20. According to the motion, NCPA notified Sidley that it could not turn over confidential information to underwriter's counsel employed by the same firm that was suing NCPA here and in related litigation. Because its discussions with Sidley proved fruitless, NCPA states that it was required to find new underwriter's counsel in the midst of two ongoing bond financing transactions. Notwithstanding this action, NCPA asserts that this does not cure the conflict since Sidley has already obtained confidential information related to these proceedings from NCPA.

21. NCPA argues that, under the D.C. Rules and related case law, it is a former client of Sidley and, consequently, Sidley cannot represent a client against NCPA in a matter that is substantially related to the matter in which it represented NCPA. NCPA contends that under the D.C. Rules, although Sidley represented the underwriter in financing transactions, it also represented NCPA. According to NCPA, courts have recognized that attorneys owe duties with those they have a client relationship, whether formal or not. NCPA points out that if there were not a client relationship between underwriter's counsel and the issuer, then there would be nothing to prevent underwriter's counsel from selling that confidential information to a third party.

22. NCPA further argues that, regardless of whether a formal attorney-client relationship was formed between Sidley and itself, NCPA's confidential communications must be protected. In support, NCPA cites to the *Restatement (Third) of the Law Governing Lawyers*, which provides that underwriter's counsel takes on duties of confidentiality with respect to sensitive (and otherwise non-public) information obtained from the issuer.⁴⁰ NCPA explains that there has been increasing amount of discussion in

³⁹ NCPA included the affidavit of Mr. Michael F. Dean, its General Counsel, who stated that NCPA provided information regarding these proceedings to Sidley.

⁴⁰ NCPA also cites to a United States Supreme Court decision, *Dirks v. SEC*, 463 U.S. 646 (1983), for the proposition that the role of an underwriter includes the recognition that the underwriter has a fiduciary relationship with the issuer and a duty of confidentiality.

the municipal bond financing community concerning the practice of issuers often selecting the same underwriter's counsel for a number of transactions, including the blurring of roles and the lack of clarity as to whether the issuer is the real client.⁴¹

23. NCPA cites to a District of Columbia court decision stating that “even if an attorney-client relationship did not exist, a party has a right to expect that a lawyer whom he sought to employ will protect confidences and secrets imparted,” and that if the party demonstrated that confidential information had been provided to that attorney, then disqualification was warranted.⁴² Here, NCPA claims, it has provided confidential information to Sidley that can benefit PG&E in these proceedings.

24. Finally, NCPA argues that the West Order was incorrect in finding that NCPA was not a client of Sidley, explaining that it did not believe that Judge West was aware of all of the relevant facts regarding the nature of the information provided to Sidley by NCPA.⁴³ NCPA attached the affidavit of Ms. Donna Stevener, its Assistant General Manager for Finance and Administrative Services and Chief Financial Officer, to describe the type of information that NCPA provided to its underwriter's counsel.⁴⁴

⁴¹ NCPA Motion at 14-15 (citing American Bar Association, *Disclosure Roles of Counsel in State and Local Government Securities Offerings* at 18-20 (2d ed. 1994); Municipal Securities Rulemaking Board, *Issuer Selection of Underwriters' Counsel*, 19 MSRB Reports (Feb.1999)).

⁴² NCPA Motion at 16 (citing *Derrickson v. Derrickson*, 541 A.2d 149, 153-54 (D.C. 1988)). In addition to this decision, NCPA also references decisions from the Texas Supreme Court and the Seventh Circuit Court of Appeals in support of its contention that a party should be able to expect that confidential information that it provided to a lawyer would be kept confidential, even if a formal attorney-client relationship was not formed. *Id.* at 16-17 (citing *Nat'l Med. Enterprises, Inc. v. Godbey*, 924 S.W.2d 123 (Tex. 1996); *Analytica, Inc. v. NPD Research, Inc.*, 708 F.2d 1263 (7th Cir. 1983)).

⁴³ Because it had concluded that Sidley and NCPA did not have an attorney client relationship, the West Order stated that Sidley did not owe a fiduciary duty to NCPA with respect to any confidential information that NCPA provided to Sidley.

⁴⁴ See NCPA Motion at Att. 1.

IV. Respondents' Answer

25. On April 28, 2009, as modified on May 12, 2009, Respondents filed an answer to the two motions to disqualify. Respondents argue that the relevant Commission precedent instructs that those seeking to disqualify a person from appearing before the Commission must demonstrate that the continued representation will taint the proceedings, and that there would be at least a reasonable possibility that the rights of the moving party will be prejudiced by the practitioner's continued representation of the new client. Moreover, according to Respondents, the Commission must carefully balance the movant's interests against the interests of others.

26. Respondents contend that it is not appropriate in this proceeding to use the California Rules as the relevant rules of professional conduct. Respondents argue that it is irrelevant that the energy sales at issue in these proceedings generally took place in California.

27. According to Respondents, under Commission precedent and the applicable rules of professional conduct the motions to disqualify must be dismissed. Respondents claim that "[t]here is no plausible risk of any harm to NCPA or Santa Clara" if Sidley continues to represent PG&E.⁴⁵ With respect to NCPA, Respondents argue that NCPA has never been a client of Sidley. Respondents contend that Sidley's representation of underwriters involved in NCPA's municipal bond finance transactions did not create an attorney-client relationship between Sidley and NCPA,⁴⁶ and that NCPA had no reasonable expectation that information it communicated to the underwriter and the underwriter's counsel would be treated confidentially.⁴⁷ With respect to Santa Clara, Respondents state that Sidley has not represented Santa Clara in proceedings before the Commission.

28. Moreover, Respondents argue that Sidley established in a timely manner an effective ethical wall that screens Mr. Berman and his team off from those attorneys involved in the municipal finance practice.⁴⁸ Respondents note that the West Order

⁴⁵ Respondents' Answer at 21.

⁴⁶ See Respondents' Answer at 27. Respondents include the Declaration of Eric Tashman to explain the role of underwriter's counsel in bond financings. See *id.* at Att. G.

⁴⁷ See *id.* at 27.

⁴⁸ Mr. Tashman explains in his Declaration that Sidley established an ethical wall to prevent him from having any communications with Mr. Berman and his team regarding his work for Santa Clara and for NCPA's underwriters. Further, another

(continued...)

found the ethical wall to be effective. Respondents also explain that PG&E agreed that in cases where it would be directly adverse to Santa Clara in these proceedings, it would be represented by in-house counsel. Respondents include the Declaration of Professor Charles Wolfram, an authority on professional conduct rules, who asserts that the *Restatement of Law Governing Lawyers* permits the use of reasonable limitations on the scope of a representation in order to avoid some conflicts, so long as the representation is not rendered inadequate by those limitations.⁴⁹

29. Respondents also point out that these proceedings are complex and important, “particularly from the standpoint of millions of citizens of California whose interests are represented here by PG&E and other California parties.”⁵⁰ Accordingly, Respondents contend that it serves the interests of the Commission and of justice for PG&E to be represented by its chosen counsel.

30. Respondents question whether Santa Clara is a current client of Sidley, noting that the firm had not performed work for Santa Clara since October 2008 and “under the circumstances, there appears to be little prospect that the firm will do any additional work for Santa Clara.”⁵¹ Therefore, Respondents contend that “Sidley’s representation of Santa Clara appears to have concluded in the ordinary course, and Santa Clara should be regarded, for all practical purposes, as a former client.”⁵²

attorney in the municipal finance practice group, Ms. Connie Tsai, submitted a declaration stating that she has complied with the screening procedures. *See* Respondents’ Answer at Att. G., ¶ 12; Att. H, ¶ 3. Mr. Berman and Ms. Fiala also state in their declarations that they have not received any confidential information regarding Santa Clara from the municipal finance lawyers. *See id.* at Att. A, ¶ 13; Att. B, ¶ 3.

⁴⁹ Respondents’ Answer, Att. I, Decl. of Charles Wolfram, at ¶ 15.

⁵⁰ Respondents’ Answer at 25. Respondents also include the Declaration of Ms. Elizabeth M. McQuillan of the California Public Utilities Commission, describing the harm to California ratepayers should Mr. Berman be prohibited from representing PG&E in these proceedings.

⁵¹ *Id.* at 39.

⁵² *Id.*

V. Request for Official Notice

31. Concurrently with its motion to disqualify, Santa Clara filed a request for official notice in these proceedings. Santa Clara asks that the Commission accept for the record several documents related to the West Order, which is described above. These records include the West Order itself, as well as the pleadings and attached exhibits filed by the parties before Judge West.

32. Respondents filed an answer stating that they do not object to the Commission taking official notice of the West Order and related documents.⁵³

VI. Discussion**A. Request for Official Notice**

33. Santa Clara's request for official notice is unopposed. We grant Santa Clara's request and we take official notice of the West Order and the related documents.

B. Motions to Disqualify**1. Relevant Rules and Precedent**

34. We look to our Rules of Practice and Procedure as the starting point for our inquiry. Rule 385.2102(a), 18 C.F.R. § 385.2102(a) (2008), in particular, sets forth the general standard that we apply in considering matters of attorney disqualification. That rule states: "After a hearing the Commission may disqualify and deny, temporarily or permanently, the privilege of appearing or practicing before it in any way to a person who is found . . . [t]o have engaged in unethical or improper professional conduct"⁵⁴ We note that the language of the rule is permissive. It does not require that the Commission grant a motion to disqualify even if the Commission finds that the practitioner engaged in "unethical or improper professional conduct."

35. While we have often referred such matters to an Administrative Law Judge for an evidentiary hearing, in this case we exercise our discretion to make a summary

⁵³ See *Answer of Sidley Austin LLP and Stan Berman to Request for Official Notice of Santa Clara*, Docket Nos. EL00-95-000 and EL00-98-000 (April 28, 2009).

⁵⁴ 18 C.F.R. § 385.2102(a) (2008).

determination based on the record before us.⁵⁵ It is particularly appropriate to decide the merits of the motions on the existing record in this case because Movants and Respondents have collectively submitted more than 1,000 pages of materials, including the motions and responses themselves, as well as testimony of several individuals, numerous exhibits, and the West Order and related documents (which also include a significant amount of factual information and legal argument presented by the parties). Further, we find that making a merits determination based on the existing record will help ensure that these nearly decade-long proceedings will not be unnecessarily delayed.

36. In *Tenngasco Gas Supply Co. v. Southland Royalty Co.*,⁵⁶ we set forth the factors the decisional authority should consider in determining whether an attorney should be disqualified for an alleged conflict:

The focus of the judge's consideration should be on whether allowing the attorney to participate in this case would pose a substantial risk of tainting this proceeding. Among the issues to be examined are whether a substantial relationship exists between this case and the matters involved in the attorney's prior representation of Gulf; whether a substantial relationship exists between this case and matters handled by other Gulf in-house counsel at the time the challenged attorney was employed by Gulf; and whether, if they

⁵⁵ The Commission generally has discretion whether or not to require trial-type hearings. See, e.g., *Environmental Action and Consumer Federation of Amer. v. FERC*, 996 F.2d 401, 413 (D.C. Cir. 1993) ("FERC . . . is required to hold hearings only when the disputed issues may not be resolved through an examination of written submissions."); see also *Nevada Power Co., et al. v. Enron Power Marketing, Inc., et al.*, 125 FERC ¶ 61,312, at P 29 and n.67 (2008) ("while the FPA and case law require that the Commission provide the parties with a meaningful opportunity for a hearing, the Commission is required to reach decisions on the basis of an oral, trial-type evidentiary record only if the material facts in dispute cannot be resolved on the basis of the written record, i.e., where the written submissions do not provide an adequate basis for resolving disputes about material facts.").

⁵⁶ 36 FERC ¶ 61,157 (1986) (*Tenngasco*). *Tenngasco* involved the question of whether to disqualify an attorney who had previously worked as an in-house counsel for Gulf Oil Company (Gulf) and who subsequently was employed by another entity with interests adverse to Gulf in a proceeding before the Commission. The question arose as to whether the attorney had had access to confidential information while employed by Gulf.

would be disqualified from representing an interest adverse to Gulf's . . . in this case, that disqualification should be imputed to the challenged attorney.⁵⁷

37. In addition, we have held that it is appropriate to look not only at the interests of the entity asserting that there is a conflict but also other factors such as the interest of a party to be represented by the counsel of its choice and “[t]he need for expedition and efficiency in disposing of this litigation.”⁵⁸ In evaluating whether a practitioner should be disqualified, therefore, we must consider issues of fairness and efficiency in addition to examining whether the proceeding would be tainted by the continued representation.

2. Whether Respondents Should be Disqualified

38. We will deny the motions for disqualification. As we have explained above, the Commission's Rules of Practice and Procedure provide us with discretion in concluding whether a practitioner should be disqualified for allegedly unethical conduct. In particular, we must balance the interests of Movants with other interests, including the public interest and the interest of PG&E in retaining the counsel of its choice for this proceeding, which has been ongoing for nearly a decade.⁵⁹

39. As an initial matter, we find that these proceedings would not be tainted if Respondents continued to represent PG&E in these matters. Our conclusion is based on several specific factors presented here. First, Sidley's representation of PG&E and Santa

⁵⁷ *Tennasco*, 36 FERC ¶ 61,157 at 61,394 (internal footnotes omitted). *See also Woodstone Lakes Development, L.L.C. v. Southern Energy NY-Gen, L.L.C.*, 95 FERC ¶ 61,152, at 61,498 (2001) (“In making this [disqualification] determination, the Commission generally considers whether the person's continued participation poses a substantial risk of tainting the proceeding.”) (*Woodstone*).

⁵⁸ *Louisiana Power & Light Co.*, 16 FERC ¶ 61,250, at 61,543 (1981) (*Louisiana Power*) (“in determining whether to grant the motion to disqualify we must consider interests besides Louisiana's. These interests include Winnfield's interest in being represented by the counsel of its choice in this proceeding. The need for expedition and efficiency in disposing of this litigation must also be considered. Thus, as the Fifth Circuit has said, before Mr. Brand can be disqualified we must also find that the likelihood of public suspicion arising from any possible unfairness in this proceeding outweighs the social interests which will be served by [the] lawyer's continued participation in [this] particular case.”) (internal footnotes and citations omitted).

⁵⁹ *See, e.g., Louisiana Power*, 16 FERC ¶ 61,250 at 61,543.

Clara are in entirely separate contexts. As noted above, Sidley's representation of Santa Clara is limited to its role as a counselor in municipal bond financing transactions. Sidley's representation of PG&E is thus unrelated to its representation of Santa Clara.⁶⁰ Second, Respondents established effective procedures, such as implementing "ethical walls" designed to ensure that any confidential information obtained by Sidley's municipal finance attorneys will not be shared with Mr. Berman and his team. The West Order found these walls to be effective.⁶¹ We agree with the West Order and Respondents the evidence shows that no confidential information was shared between Sidley attorneys representing Santa Clara in municipal bond financing transactions and Mr. Berman and his team representing PG&E in these proceedings.⁶² Third, Respondents and PG&E agreed that, in circumstances where PG&E will be directly opposed to Santa Clara, PG&E's in-house counsel would be the counsel of record. We find these measures are sufficient in removing the potential for, and the appearance of, unethical conduct resulting from Respondents' representation of PG&E in these proceedings. Although Movants argue that these measures are ineffective to cure a violation of the rules of professional conduct, we find that they are effective for purposes of our analysis under Rule 2102.

40. In addition to considering whether proceedings before the Commission have been tainted by the challenged representation, our precedent provides that we will evaluate other interests, including PG&E's interest in choosing its own counsel and the interest of the public.⁶³ As discussed below, we find that, in this proceeding, these competing interests outweigh the interests of Movants, particularly in light of our finding that the proceedings will not be tainted if Sidley continued to represent PG&E.

41. In an affidavit attached to Respondents' answer, PG&E has explained the hardships it will endure should we disqualify Respondents.⁶⁴ Specifically, it would either have to retain new counsel or wait until Mr. Berman and his team found a different law firm. Hardship by itself may not be enough to outweigh Movants' interests in all cases.

⁶⁰ The same is true of Sidley's representation of NCPA's underwriters.

⁶¹ See West Order, slip op. at 16.

⁶² Further, the evidence shows that Mr. Berman and his team have not received confidential information regarding NCPA from Sidley attorneys representing NCPA's underwriters in bond financing transactions. See P 28, *supra*.

⁶³ See, e.g., *Louisiana Power*, 16 FERC ¶ 61,250 at 61,543.

⁶⁴ See Respondents' Answer, Att. F, Decl. of Mark D. Patrizio, at ¶ 5-8.

However, under the particular facts of this case, we conclude that hardship to PG&E is a factor that should be given significant weight. As noted above, PG&E retained Mr. Berman's legal services nearly a decade ago to represent it in these proceedings. As we stated at the outset, this case is quite complex, involving numerous parties, a number of complex issues, thousands of pleadings, hundreds of Commission orders, and several related appellate court decisions. In other words, this is not the typical case that comes before the Commission. For PG&E, at this late stage, to either retain new counsel to represent it or wait until Mr. Berman and his team find another law firm would present a significant burden to PG&E in representing its interests before this Commission.

42. Moreover, we will consider the public interest. As noted earlier, these proceedings began nearly a decade ago. Assuming for purposes of this analysis that Santa Clara and NCPA are clients of Sidley, absent evidence that Mr. Berman and his team obtained confidential information regarding Santa Clara or NCPA relating to these proceedings or unless the proceedings were otherwise tainted by the representation, we are reluctant to delay these proceedings further. Moreover, we agree with Ms. Elizabeth M. McQuillen of the California Public Utilities Commission, whose declaration was included in Respondents' Answer and who argues that Mr. Berman's disqualification from this case would harm ratepayers given his institutional knowledge regarding these proceedings.⁶⁵

43. Finally, while the state court rules in the West Order that Sidley's disqualification was "automatic" under the California Rules,⁶⁶ those rules are not determinative here, since the Commission's regulations allow consideration of the broader factors described above. Our denial of disqualification is warranted by these broader factors, recognizing that rules applicable elsewhere might yield a different outcome.

44. In sum, we conclude that these proceedings have not been tainted by Respondents' representation of PG&E. We further find that the competing interests are significant, and they outweigh Movants' interests under these circumstances.⁶⁷ For these reasons, we

⁶⁵ See *id.* at Att. D, Decl. of Elizabeth M. McQuillen, at ¶ 7-8.

⁶⁶ See P 9, *supra*.

⁶⁷ Respondents also argue that Movants' requests are untimely. See Respondents' Answer at 2. Because we are denying the motions on independent grounds, we do not address this issue.

deny the motions to disqualify. Mr. Berman and his team may continue to represent PG&E in these proceedings before the Commission even if they remain at Sidley.⁶⁸

The Commission orders:

(A) Santa Clara's request for official notice is hereby granted, as discussed in the body of this order.

(B) Santa Clara's and NCPA's motions to disqualify are hereby denied, as discussed in the body of this order.

By the Commission. Commissioner Spitzer is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

⁶⁸ We note that this determination applies only to Respondents' representation of PG&E before the Commission in these proceedings.