March 4, 1986

REPORT TO THE DEPUTY
MAYOR AND CITY COUNCIL

Re: Recent Supreme Court Decisions: San Diego Gas & Electric Co. v. Public Utilities Commission, Pacific Gas & Electric Co. v. Public Utilities Commission, City of Renton v. Playtime Theatres, Inc., and Fisher v. City of Berkeley

A ruling that San Diego ratepayers be refunded $45,060,000 has been upheld by the U. S. Supreme Court. The Court, on February 24, dismissed the appeal of San Diego Gas & Electric Co. (SDG&E) from a California Public Utilities Commission (CPUC) order directing SDG&E to refund to ratepayers money it had collected in rates to pay for fuel oil it never received. The CPUC decision was the result of active participation by the San Diego City Attorney's office, representing the City and its citizens who are SDG&E ratepayers.

Three other Supreme Court decisions also handed down last week affect the City and the outcomes of two of them were also affected by action taken by the City Attorney's office. All four will be discussed in this Report.

SDG&E CASE

In the 1970s SDG&E relied primarily on oil as fuel for its electric generation plants. To meet its forecasted needs, SDG&E entered long-term supply contracts with two companies, one of which was Tesoro-Alaskan Petroleum Corporation (Tesoro). In 1979, SDG&E entered an agreement with Tesoro, entitled the "Restated Agreement," which modified the existing contract. Under the Restated Agreement, SDG&E was to receive more oil, over a longer period of time, than under the original contract.

Once a year, the CPUC reviews the reasonableness of SDG&E's fuel related expenses. Only reasonable expenses, reasonably incurred, are recoverable in rates from ratepayers. If an

expense is unreasonable, a "disallowance" is ordered; the ratepayers are refunded the disallowed amount; and SDG&E's shareholders bear the burden of the unreasonable action.

During the annual reasonableness review in 1983, The City of San Diego, represented by the City Attorney's Office, discovered that the 1979 Restated Agreement had never been reviewed for reasonableness. The City, therefore, filed a motion that the agreement be reviewed during that proceeding and requested that SDG&E provide a witness on the Restated Agreement. Despite

SDG&E's opposition, the Commission agreed and hearings were held on that issue. In Decision 84-02-005, issued on February 1, 1984, the Commission adopted the City's position and held that the Restated Agreement was unreasonable primarily because: 1) SDG&E had failed, despite a documented poor track record, to use adequate forecasting methods regarding the availability and price of natural gas; and 2) SDG&E was attempting to avoid a penalty for rejecting natural gas. The Commission ordered further hearings on the amount of any disallowance.

Hearings were held on the disallowance in 1984. The City also took an active part in those proceedings. In Decision 84-12-026, issued on December 5, 1984, the Commission ruled that the $45,060,000 that SDG&E paid not to receive oil should be the amount disallowed and refunded to the ratepayers. SDG&E filed an application for hearing in the California Supreme Court, which the City opposed. The Court denied the petition on September 24, 1985. SDG&E then filed an appeal in the United States Supreme Court. The City and PUC staff filed motions to dismiss the appeal on various grounds. On February 24, 1986, the Court dismissed the appeal for lack of a substantial federal question. That action represents a final determination of the case.

Former Deputy City Attorney Steven McKinley represented the City in the reasonableness phase of the proceedings. Deputy City Attorney Leslie J. Girard handled the disallowance and appellate phases of the case.

OTHER CASES

In other recent Supreme Court action, the Court ruled that (1) a public utility cannot be forced to include in its bill mailings messages from groups opposing rate increases, (2) a city may limit adult movie theatres to a specific area, even if the location is undesirable, and (3) an ordinance limiting residential rents does not violate Federal antitrust law.

In Pacific Gas & Electric Co. v. Public Utilities Commission, the Court found unconstitutional the CPUC requirement that utility companies four times a year must permit a lobbying group which occasionally participates in regulatory matters to place information, including funding appeals, in the utility's billing envelope. A spokesman for San Diego's version of a utility lobbying group, UCAN, has stated publicly that the decision will make it difficult for UCAN to function in utility regulatory matters in the future. As our record in the Tesoro matter indicates, however, the San Diego ratepayer is being represented favorably before the CPUC by the City. Such representation predates UCAN and will continue in the event UCAN is forced to

terminate its activities for financial reasons.

In City of Renton v. Playtime Theatres, an ordinance banning "adult movie theaters" from within 1,000 feet of any residential area, park, religious institution or school was upheld, even though it relegated adult theaters to sites already occupied by a sewage disposal and treatment plant, a race track, an industrial business park, a warehouse, an oil tank farm and an operating shopping center. San Diego was one of several California cities to join in filing a brief in the case supporting the City of Renton. Another brief in support of Renton was filed by the National Institute of Municipal Law Officers (NIMLO), of which I serve as national president this year. Both briefs stressed arguments adopted by the Court in its decision.

Because the challenge to the rent control ordinance in Fisher v. City of Berkeley amounted to an assertion that local regulatory measures violate antitrust laws, we joined other California cities in filing a brief in support of Berkeley in the case. The Court's decision appears to go a long way toward freeing legitimate City regulation from the threat of antitrust liability. It does not mean that cities are constitutionally free to impose harsh, unreasonable or confiscatory rent control measures and San Diego would not join in a brief supporting such measures. The Supreme Court decision is a major victory, however, in untieing the City Council's hands so that it may accomplish reasonable regulation in the public interest.

Three of the four decisions reported here are favorable to local government. They may signal a major change of course by the Court to permit less federal interference in local affairs. As of mid-February, there were 37 cases pending before the Court involving issues of major importance to local government. With the assistance of NIMLO's Washington staff, we are carefully monitoring them and will keep you informed on their progress.

Respectfully submitted,
JOHN W. WITT
City Attorney

JWW:c:480.3(x043.1)
RC-86-7