

Decision 88 12 087 DEC 19, 1988

**ORIGINAL**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the practices of Citizens Utilities Company of California, its operating divisions and its subsidiaries, with regard to the transfer of real property rights and the management of its watershed resources.

DEC 20 1988

OII 83-11-09  
(Filed November 30, 1983)

In the Matter of the Application of Citizens Utilities Company of California for authority to increase rates and charges for water service in its Guerneville Water District.

Application 60220  
(Filed January 27, 1981)

**OPINION DISMISSING PETITION  
FOR MODIFICATION OF DECISION 88-04-068**

On October 28, 1988, People for Fair Water Policy (PATRIOTS) filed a petition for modification of Decision (D.) 88-04-068. That decision ordered certain refunds and deferred rate increases to be made by advice letter, if the Water Utilities Branch of the Commission Advisory & Compliance Division (staff) agreed with Citizens Utilities Company of California (CUCC) upon the amount to be amortized and the method of amortization.

D.88-04-068 was the culmination of the Guerneville District phase of a lengthy investigation proceeding involving several CUCC districts. The issues were litigated during 11 days of hearing in which PATRIOTS participated. PATRIOTS also filed opening and closing briefs. On February 2, 1988, the administrative law judge's proposed decision was mailed to the parties, as required by Public Utilities (PU) Code § 311. PATRIOTS filed its comments on the proposed decision on February 22, 1988.

After D.88-04-068 was issued on April 27, 1988, PATRIOTS did not file an application for rehearing, even though, as a party to the proceeding, it had a statutory right to do so. (PU Code § 1731(b), et seq.) Instead, it waited six months before filing a petition for modification.

Protest of CUCC

On November 28, 1988, CUCC filed its protest to the petition, asking that it be denied. CUCC points out that:

1. The petition is not based upon any newly discovered evidence. Rather, it is based upon evidence that: was first distributed to the parties in September, 1984; was received during public hearings; and was subjected to cross-examination.

2. The petition was not filed to make minor changes in an order. Rather, PATRIOTS seeks a fundamental change in the accounting treatment ordered for CUCC's transfer of timber harvesting rights. In effect, the modification requested by PATRIOTS would reverse the result reached in D.88-04-068.

3. PATRIOTS did not file an application for rehearing of D.88-04-068 and thus failed to exhaust its administrative remedies. It now seeks to accomplish indirectly by petition for modification what it could have done directly (but did not) by application for rehearing. Having failed to file a timely application for rehearing, PATRIOTS cannot do so now in the guise of an untimely petition for modification.

Discussion

If PATRIOTS was aggrieved by D.88-04-068, it should have filed an application for rehearing before the decision became final. The time for filing an application for rehearing has elapsed, and D.88-04-068 is no longer subject to reconsideration or rehearing by the Commission or review by the California Supreme Court. PATRIOTS may not evade the requirements of the PU Code and our Rules of Practice and Procedure by filing a petition for

modification. In Desert Express, et al., (1957) 56 CPUC 1, 5, the Commission cited with approval the following holding:

"Having failed to apply for rehearing within the time limit fixed by the code he cannot accomplish the same purpose by a petition to reopen, that petition differing in form only, not in substance, from a petition for a rehearing." (Young v. Industrial Accident Commission, 63 Cal. App. 2d 286, 291-292.)

The Young holding was also quoted with approval in Northern Cal. Assn. v. CPUC (1964) 61. C. 2d 126, 134-135, wherein the petitioner sought to reopen a proceeding after rehearing had been denied and after it had failed to seek review in the California Supreme Court. The petitioner then attempted to use the Commission's order denying reopening and its order denying rehearing of that order as a vehicle for seeking review of the original decision in the proceeding. The court rejected that approach, holding that the petition to reopen could not be considered an application for rehearing and that there is no statutory right to reopen Commission proceedings once submitted and decided. The court also held that, even if the petition was regarded as as an appeal to the Commission to exercise its discretion under PU Code § 1708, petitioner is in no better position, as a proper exercise of discretion is not subject to judicial review. (Id.)

Under § 1708 we could not modify D.88-04-068 without giving notice to the parties and affording them an opportunity to be heard. Even if we were to consider the petition of PATRIOTS for modification to be a petition to reopen under § 1708, we would not be inclined to exercise our discretion and order a reopening in this case. PATRIOTS has offered nothing more as a basis for reopening than the evidence that is now in the record. On that record we reached a different conclusion than that advocated by PATRIOTS. Mere recourse to record evidence will not, without more, support reopening.

Finally, PU Code § 1709 provides:

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

The petition of PATRIOTS attempts to initiate a supplemental proceeding - though within the same docket - in order to modify a final decision of the Commission. However, § 1709 clearly mandates the conclusiveness of final decisions against such challenges.<sup>1</sup>

Conclusions of Law

1. The petition of PATRIOTS, considered as an application for rehearing, is untimely and should be dismissed.

2. The petition, considered as a petition to reopen under PU Code § 1708, does not allege facts constituting grounds for reopening and should be dismissed. Mere recourse to the record will not, without more, support reopening.

3. As a final decision, D.88-04-068 is conclusive against an untimely challenge in a supplemental proceeding.

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<sup>1</sup> See D.84-03-042 in OII 42 where the Commission concluded that the effect of a petition for modification of a final decision "is to open a supplemental proceeding, the purpose of which is limited to the scope of the petition." (Mimeo. p. 3.)

ORDER


IT IS ORDERED that the petition of PATRIOTS for modification of Decision 88-04-068 is dismissed.

This order becomes effective 30 days from today.

Dated December 19, 1988, at San Francisco, California.

STANLEY W. HULETT  
President  
DONALD VIAL  
FREDERICK R. DUDA  
G. MITCHELL WILK  
JOHN B. OHANIAN  
Commissioners

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



Victor Weisser, Executive Director

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