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Decision 92-07-078 July 22, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC COMPANY for Authority to Adjust its Electric Rates Effective November 1, 1991, and to Adjust its Gas Rates Effective January 1, 1992; and for Commission Order Finding that PG&E's Gas and Electric Operations During the Reasonableness Review Period from January 1, 1990 to December 31, 1990, were Prudent. (U 39M)	ORIGINAL Application 91-04-003 (Filed April 1, 1991)

OPINION

Summary

Today we deny the motion of Pacific Gas and Electric Company (PG&E) for summary judgment on issues concerning PG&E's alleged imprudence in purchasing Canadian gas during 1988-1990. We reject PG&E's arguments that we are preempted by law and barred as a matter of fairness and equity from even considering these issues. Without expressing a view as to the merits of the claimed imprudence, we remit the parties to an evidentiary hearing before the assigned Administrative Law Judge.

Introduction

PG&E filed what it styled a "Motion for Summary Judgment on Disallowance Claims" on May 12, 1992. The motion is directed at the disallowances recommended by the Commission's Division of Ratepayer Advocates (DRA), Sacramento Municipal Utility District (SMUD), and Toward Utility Rate Normalization (TURN) concerning PG&E's purchases of Canadian gas from February 1, 1988 through the end of 1990.[1] The proposed disallowances total $392 million.

PG&E's motion rests on two basic grounds. The first is a multiple assertion of federal preemption. The second invokes the doctrine of equitable estoppel and allied fairness arguments. These later contentions would be governed by state law.

After receipt of PG&E's motion, DRA moved for a 15-day extension to respond to the motion. DRA's request was granted by the Assigned Commissioner's Ruling of May 21, 1992. DRA and SMUD[2] filed oppositions to the motion on June 11, and PG&E replied to the oppositions on June 18.

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[1]For convenience, we will refer to DRA's proposed disallowances and DRA's recommendations. These references should be understood to include the proposals and recommendations of SMUD and TURN, as well as DRA.

[2]SMUD's arguments substantially overlap DRA's, and for convenience we will focus our discussion on DRA's points.

The Framework for Review

As PG&E acknowledges, the Commission's Rules of Practice and Procedure (Rules) do not explicitly provide for summary judgment motions.[3] In these circumstances, it is appropriate to look to the standards and procedures that govern motions for summary disposition of civil proceedings in California.

Summary judgment is a means of disposing of an action without trial when there are no disputed issues of material fact. The moving party has the burden of supporting the assertedly undisputed facts by means of "affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken" (Code of Civil Procedure § 437c(b)). The opposition to the motion must state which facts are still in dispute. Id.

The motion "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Code of Civil Procedure § 437a(c).) Conversely, if the parties' filings disclose the existence of a disputed issue of material fact, the motion must be denied.

Judged against these procedural criteria, PG&E has failed to assert a motion for summary judgment. Rather than supplying support for its factual assertions to attempt to eliminate factual disputes, PG&E restates DRA's recommendations and asks us to conclude that we are legally preempted and therefore lack jurisdiction to act on DRA's proposals. In PG&E's view, further

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[3]PG&E filed its motion under Rule 42, which sets forth the general procedure for filing and responding to motions.

action in this proceeding is senseless and summary judgment should be granted. Because PG&E's motion lacks factual support and is based on jurisdictional grounds, it is more in the nature of a demurrer (Code of Civil Procedure § 430.30) or a motion to dismiss (Commission Rules of Practice and Procedure, Rule 56; Federal Rules of Civil Procedure Rule 12(b)) than a conventional motion for summary judgment.

PG&E urges on several independent grounds that this Commission is preempted and therefore without jurisdiction to consider DRA's contentions. Because PG&E's preemption grounds are conceptually independent, if any one survives the summary judgment process, the motion must be granted. However, none of the grounds PG&E cites absolutely preempts the states from taking action. The law in each area permits some state action or excepts certain activities from the broader federal preemption. Thus before accepting any of PG&E's general preemption arguments, we must determine whether DRA's contentions are susceptible of a construction which falls within the ambit of permitted state authority.[4] As the moving party, PG&E has the burden of persuading us that its motion should be granted.

Background

The chain of transactions which generate the ultimate dispute begins in Canada where Alberta and Southern Gas Company, Ltd. (A&S) contracts with producers to purchase natural gas. The gas purchased by A&S is transported to

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[4]DRA's allegations should be liberally construed to determine if they allege any facts that, if proven, would defeat PG&E's jurisdictional arguments (see CCP § 452; Universal By-Products, Inc. v City of Modesto (1974) 43 Cal.App.3d 145, 151).

the international border, where it is transferred to Pacific Gas Transmission Company (PGT), an interstate pipeline company, which transports the gas to the Oregon-California border. At that point, the gas is transferred to the intrastate pipelines of PG&E for eventual distribution to its retail customers in California. PGT is a wholly owned subsidiary of PG&E, and A&S is a wholly owned subsidiary of PGT.

We are thus confronted with at least three levels of transaction which are, in turn, potentially subject to three different layers of regulation. First, PGT has contracted with A&S to purchase and import Canadian gas. This transaction is, obviously, international and is defined in a document referred to as the "International Agreement." Second, PGT transports the gas across several state borders, triggering the usual federal interest in interstate commerce, which in this field is delegated to the Federal Energy Regulatory Commission (FERC). Third, PG&E buys gas from PGT at the California border under arrangements referred to as the "Service Agreement." This Commission normally reviews the prudence of PG&E's purchases of gas and electricity in annual Energy Cost Adjustment Clause (ECAC) proceedings, such as the present proceeding.

The essence of the parties' dispute about the summary judgment motion is whether this Commission's scrutiny of PG&E's purchases of Canadian gas unlawfully intrudes into the federal jurisdiction over interstate and international commerce. PG&E thinks it does and that review of these purchases by this Commission is improper. DRA maintains that the Commission may lawfully review PG&E's purchases and adjust rates to reflect the result of that review without running afoul of any jurisdictional prohibitions.

PG&E contends that jurisdiction over commerce with foreign nations as well as interstate commerce resides with the federal government and not the several states. In its view, the objective of the DRA challenge is an attempt to mount a collateral attack on the findings or conclusions of appropriate federal agencies. Such an attack, we are told, is preempted by a determination of Congress or an appropriate federal agency to occupy the implicated fields of inquiry.

DRA's position is at once more complicated and simple. Simply stated, DRA contends that it seeks no more than a prudency challenge to purchases made by PG&E. A more complicated assertion of this position involves a number of related propositions. It is insisted that because of its imprudent actions, PG&E incurred about $130 million annually in excess purchased gas costs during the years in question. PG&E used its monopoly market power to foreclose competition and to deny customers, marketers, and producers nondiscriminatory access to the interstate gas transportation network. PG&E's objective was to maintain market share and high sales volume for A&S, the PGT subsidiary, because of its concern that A&S's take-or-pay liability would increase if A&S was unable to find markets for its gas. PG&E kept its monopoly over the sales of gas from Canada by maintaining such a high level of throughput on PGT's pipeline that practically no capacity was available to those who might want to transport gas independently purchased in Canada. This dominance over the only means of moving Canadian gas to Northern California virtually eliminated the competition from other Canadian marketers or producers who wanted to enter the market. Finally, it is contended that the lack of competition kept the price of Canadian gas sold in California at a level far above the cost of purchasing gas on the open market in Canada, to the detriment of California ratepayers. DRA recommends that a portion of the resulting overcharges should be refunded to ratepayers.

Discussion

A. Preemption

PG&E's preemption argument asserts that federal law completely prohibits Commission action of the sort requested by DRA. It follows that if DRA's allegations fall within a sphere where the law permits some state action, then the preemption element of PG&E's motion must fail.

PG&E's preemption argument has two basic elements. First, PG&E contends that DRA's recommended disallowance requires this Commission to regulate and determine the price of natural gas imports. Second, PG&E claims that DRA's recommendation calls on this Commission to review PGT's rates, purchases, and service offerings in interstate commerce, and thus trespasses on FERC's jurisdiction.

1. The Regulation of Natural Gas Imports

a. **Congressional Intent to Occupy the Field of Gas Import Regulation**

The essence of the preemption doctrine is that when Congress intends to occupy a field committed to federal custody, the authority of the several states is ousted. PG&E's preemption arguments reside in its assertion of the power of Congress respecting the regulation of interstate commerce as well as its exclusive authority to regulate international trade and commerce. PG&E contends that Congress occupied the field of gas import regulation in enacting the Natural Gas Act (15 U.S.C. §§ 717-717w), with the consequence that state commissions are preempted from action in this area. The Constitution establishes that only Congress may regulate commerce with other nations (U.S. Const. Art I, § 8, cl. 3.), and PG&E claims that the recommended disallowances would result in impermissible state regulation of international commerce. PG&E further states that preemption is particularly common in areas where there is a "uniquely federal" interest, such as the importation of natural gas.

While we readily concede the general power of Congress as defined in the Constitution, we do not find that power offended by the prudency review sought by DRA. Because PG&E has laid much emphasis upon the terms of the Natural Gas Act and the contention that it reflects an intent to oust our jurisdiction, we begin with those arguments.

In order to accept the contentions of PG&E we would have to repudiate what we deem to be a controlling opinion of the Supreme Court of the United States. The Court has concluded that the Natural Gas Act was carefully drafted to avoid impinging on the states' traditional authority to regulate retail sales of gas. Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana (1947) 332 U.S. 507. Section 3 of the Natural Gas Act grants the Federal Power Administration and its successor, the Department of Energy (DOE),[5]

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[5]The Department of Energy initially exercised this authority through the Economic Regulatory Administration (ERA). The Department transferred authority over the natural gas import and export authorization program from ERA to the Office of Fossil Energy (OFE) on January 6, 1989. (54 Fed.Reg. 11436 (1989).) Because of the time periods involved in this case, it will frequently be convenient to use "ERA" to refer to both ERA and OFE.

exclusive jurisdiction over the import and export of natural gas but does not limit in any way the power of state commissions to review matters related to intrastate gas sales. As the Supreme Court stated in Panhandle:

> The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way....
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> * * *
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> The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and in no manner usurping their authority.

Id., at 517-518, 520.

Similarly, PG&E's concerns about the distinctive federal role in the area of foreign trade are inapposite, because DRA does not dispute the price PGT paid A&S under the International Agreement. Instead, DRA challenges the amounts that PG&E should be allowed to recover from ratepayers. DRA concludes, "The mere fact that the gas happened to originate in Canada does not destroy the Commission's power to ascertain whether PG&E acted reasonably in purchasing it." (DRA Opposition, p. 14.)

DRA's recommendations, when fairly considered, make no claim on the Department of Energy's powers to regulate the export and import of natural gas. DRA's focus is on PG&E's decision to purchase imported gas in certain circumstances, not on the federal decision to allow the imports. Nothing in the Natural Gas Act or in the cases construing the Act suggests that states may not regulate intrastate retail sales of natural gas, regardless of its place of origin.[6] To the contrary, § 1(b) of the Act specifically states: "The provisions of this chapter...shall not apply to any [intrastate] transportation or sale of natural gas or to the local distribution of natural gas...." (15 U.S.C. § 717(b).) Moreover, § 1(c), commonly referred to as the Hinshaw amendment, similarly exempts from the provisions of the Act entities that transport and sell gas within a single state, even if that gas was in the stream of interstate commerce before entering the state. Intrastate sale and transportation of such gas "are declared to be matters primarily of local concern and subject to regulation by the several States," provided that "the rates and service of such person and facilities be subject to regulation by a State commission." (15 U.S.C. § 717(c).)

PG&E's points about preemption based on Constitutionally mandated federal control of foreign commerce are likewise inapplicable. DRA has alleged a factual dispute that concerns the reasonableness of PG&E's gas purchases for its customers in California not the terms of the International Agreement. So construed, the dispute falls within an area which Congress has clearly reserved for the states.

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[6]PG&E's citations do not support its contention that in enacting the Natural Gas Act Congress intended to occupy the field of natural gas importation. In its quotations from pertinent Supreme Court cases, PG&E neglects to clarify that the discussions of preemption refer only to the area of interstate wholesale sales. The suggestion, in the text surrounding the excerpts from Illinois Natural Gas Co. v. Central Illinois Public Service Co., (1942) 314 U.S. 498 and Northern Natural Gas Co. v. State Corporation Comm'n of Kansas, (1963) 372 U.S. 84, that the Court found broader preemption in the Natural Gas Act comes perilously close to a misleading and false statement of law, in violation of Rule 1.

b. Conflict with Federal Policies and Decisions

PG&E argues that DRA's recommendations require the Commission to act in conflict with federally established gas import policies and decisions, and that the Commission is preempted from doing so. The national policy articulated in the DOE guidelines (49 Fed.Reg. 6684 (1984)) is to let the market, not the government, determine the price and other terms of import agreements. The policy presumes that trade arrangements resulting from free negotiations between buyers and sellers are competitive and responsive to market forces.. If the arrangement is shown to be competitive in the proposed market area, the policy further presumes that the gas is needed in the market. PG&E argues that this trade policy preempts any consideration of DRA's challenges to PG&E's or PGT's purchases of Canadian gas.

PG&E urges that DRA's recommendations violate a second federal policy which allows ERA to establish and maintain a uniform federal policy for evaluating gas imports. According to PG&E, allowing 48 state governments to second-guess ERA's assessments would severely disrupt the course of trade between the U.S. and Canada.

PG&E contends that these policies are followed and elaborated in ERA's approval of the International Agreement and other decisions precluding a state's review of imports approved by ERA. PG&E reads these decisions to hold that ERA's approval of an import arrangement "necessarily subsumes" a finding of the prudence of the purchases made under the approved arrangement. PG&E concludes, "In approving the International Contract, ERA implicitly found that it was prudent to purchase Canadian gas that is 'competitive with the price of major competing energy sources in [PG&E's] market,'. . .irrespective of whether

PG&E 'could have obtained gas elsewhere for less.'" (PG&E Motion, p. 33.) None of these propositions is well taken.

The concept of preemption implied from federal agency action has been rejected by the highest federal authority. The United States Supreme Court has stated that when a federal administrative agency intends to preempt state law, it must do so explicitly: "[i]t is appropriate to expect an administrative regulation to declare any intention to pre-empt state law with some specificity." California Coastal Comm'n v. Granite Rock, (1987) 480 U.S. 572, 593, citing Hillsborough County v. Automated Medical Laboratories, Inc., (1985) 471 U.S. 707, 718. The DOE guidelines are devoid of any such statement of an intent to preempt state regulation.

Even if this doctrine were now to be invented, PG&E has failed to demonstrate that a preemption intent may be raised by implication. The statements about ERA's jurisdiction over imports are excerpted from decisions resolving disputes between ERA and FERC.[7] Similarly, PG&E cites decisions in which FERC deferred to ERA's jurisdiction over imports (Northwest Pipeline Corp., (1987) 39 FERC ¶61,215). In addition, DOE's guidelines were promulgated to help resolve confusion over the roles of ERA and FERC in the federal regulation of imported gas, and the policies articulated in the guidelines are primarily intended to assist ERA in carrying out its responsibilities. In the context of a different regulated industry, there is recent federal judicial authority to the effect that a comparable policy statement delineating the jurisdiction of

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[7]TransCanada Pipelines, Ltd. v. FERC, (D.C.Cir. 1989) 878 F.2d 401, and Valero Transmission Co., (1985) 30 FERC ¶61,035).

two federal agencies did not limit state jurisdiction. Southern Pacific Transportation Corp. v. Public Utilities Comm'n, (N.D. Cal. 1986) 647 F.Supp. 1220, 1226, aff'd 820 F.2d 1111 (9th Cir. 1987).

PG&E also quotes from ERA's response to requests that it augment an order to include an explicit disclaimer that the determination of prudence was left to FERC or state agencies.[8] Th ERA declined to make such a disclaimer on the ground that its finding that an import arrangement is not inconsistent with the public interest "subsumes" a finding that the import "is not imprudent." In context, this quotation is somewhat weaker than PG&E might like; we note that the same passage states that ERA "has not made an explicit prudency finding in approving imports under Section 3" of the Natural Gas Act. These cases do not expressly hold that ERA's determinations preempt the appropriate state authority.

DRA points out that both DOE and OFE have held that their approval of import agreements does not preclude state commissions from reviewing purchases under the agreements and setting rates accordingly. Brooklyn Union Gas Co., (1990) 1 FE ¶70,285 at pp. 71,213, 71,215. Brooklyn Union responds to PG&E's argument concisely:

> A DOE finding that an import is not inconsistent with the public interest subsumes a finding of prudence. However, this finding is not meant to preclude state agencies from setting appropriate rates for entities they regulate.

1 FE ¶70,285 at p. 71,215.

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[8]Northern Natural Gas Co., (1988) 1 ERA ¶70,812; Tennessee Gas Pipeline Co., (1989) 1 ERA ¶70,034; and Alenco Resources, Inc., (1988) 1 ERA ¶70,808.

Far more persuasive has been FERC's recognition of this Commission's jurisdiction over PG&E's purchases from PGT, even those that involve Canadian supplies. Pacific Gas Transmission Co., (1990) 50 FERC ¶61,067 at p. 61,133. In a case that also concerned imported Canadian gas, FERC expressly deferred to this Commission's jurisdiction over the local distribution company's "purchasing strategy." Northwest Alaskan Pipeline Co., (1984) 29 FERC ¶61,304 at p. 61,638. Similarly, ERA has recognized that this Commission "appropriately regulates purchases of gas made by local distribution companies in that state." EnTrade Corp., (1988) 1 ERA ¶70,774 at 72,885.

DRA finds similar problems with the implications of PG&E's interpretation of legal authority:

> Under PG&E's view of TransCanada, once the ERA approved an import contract, every single term of that contract would have to be reflected and enforced in contracts further down the contractual chain. Given this approach, if PG&E could manage to purchase all of its gas supply from Canada, it would remove cost of gas from its rate case and reasonableness reviews.

DRA Opposition, p. 19.

As we have shown, the relevant authorities refute PG&E's contention.

In any event, DRA's recommendations are directed to PG&E's purchasing practices, not to the specific terms of the import arrangement. Pertinent cases establish that as long as an agency does not challenge ERA's import authorization, the agency retains its existing authority to exercise its jurisdiction over imported gas. Courts have found, for example, that FERC continues to have the jurisdictional leeway to exercise its obligations, even for gas imported under ERA's authorization. TransCanada, supra, 878 F.2d at 410; Wisconsin

Gas Co. v FERC, (D.C. Cir. 1985) 770 F.2d 1144. FERC may render the terms of the import contract more burdensome, eliminate minimum bill provisions, and reclassify costs from demand to commodity rates and still be consistent with ERA's import authorization. In response to arguments similar to PG&E's, the United States Court of Appeals for the District of Columbia Circuit has concluded that "ERA's approval of the import contracts did not preempt FERC's action because FERC's decision only altered the terms of the contracts between the pipeline and its customers, not the terms of the contract between the pipeline and their Canadian supplier." TransCanada, supra, 878 F.2d at 410; see Pacific Gas Transmission Co., (1992) 58 FERC ¶61,138 at pp. 61,434-61,435. If ERA's import authority does not preempt FERC from taking these actions at the interstate level, it is difficult to understand why ERA's authority would preempt this Commission from taking similar actions at the state level.

PG&E also places great weight on DOE's guideline that "[t]he terms and conditions of the gas purchase contract, taken together, must provide a supply of gas that the importer can market competitively over the term of the contract" (49 Fed.Reg. at 6688) and ERA's corollary that "the competitiveness of an import arrangement in the markest [sic] served is the primary consideration for meeting the public interest test" (Pacific Gas Transmission Co., (1985) 1 ERA ¶70,591 at p. 72,386). When this guideline was adopted in 1984, imported gas was priced higher than domestic gas, and the DOE emphasized that its intent was to require importers to lower their prices to compete with cheaper domestic gas. The historical context for this "market-competitive" test makes it clear that the intention was to lower the price of imported gas to compete with domestic sources. The resulting competition would "provide immediate as well as long-term benefits to the American economy" (49 Fed.Reg. at 6684).[9] Thus, the point of the "market-competitive" test was to spur price competition, not to hinder it. DRA alleges that PG&E uses the "market-competitive" test to shield its anticompetitive actions from regulatory scrutiny. We conclude that this test should not be used to limit this Commission's ability to investigate allegations of anticompetitive activity in PG&E's purchases of Canadian gas.

In announcing its import guidelines, DOE gave considerable weight to the need for flexibility in the import arrangements:

> The contract arrangement must be sufficiently flexible to permit pricing and volume adjustments, as required by market conditions and available competing fuels, including domestic natural gas.... Contracts should also contain provisions to protect the parties in the event of changes in the circumstances in which the contract is expected to operate, and to permit contractual adjustments in such circumstances."

49 Fed.Reg. at 6688.

DRA alleges that PG&E interfered with competition by limiting the ability of competitors and lower-priced gas to reach Northern California, and thus prevented the flexible pricing provisions of the agreement from operating as ERA presumed. The California Supreme Court has held that a consideration of the anticompetitive effects of actions taken by utilities under our jurisdiction is both permitted by the antitrust statutes and mandated by our responsibilities to uphold the public interest. <u>Northern California Power Agency v. Public Utilities</u>

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[9]As DRA points out, one of the prime considerations behind ERA's approval of the International Agreement was that it reduced PGT's then-existing take-or-pay obligation to 50%, greatly improving PGT's purchasing flexibility and lowering the overall price of the imported gas.

Comm'n, (1971) 5 Cal.3d 370. Moreover, DRA's testimony may raise factual questions on the material issue of whether PG&E's actions limited PGT's ability to take advantage of the contract's flexible pricing provisions or influenced PGT's exercise of its contractual right to invoke the flexibility provisions to lower the cost of gas.

We conclude that DRA's allegations raise both factual and policy questions that fall within our jurisdiction and are most appropriately decided after completion of evidentiary hearings.

2. The Regulation of Gas in Interstate Commerce

a. Jurisdiction over PGT

PG&E next contends that DRA's proposals improperly intrude on FERC's exclusive jurisdiction over PGT. PG&E purchased all of its Canadian gas from PGT at FERC-approved rates. FERC has exclusive jurisdiction to review the prudence of purchases by an interstate pipeline. DRA's claims affecting the purchasing practices of PGT are thus preempted at an additional level, according to PG&E. Similarly, DRA's contention that PGT should have accepted an open-access transportation certificate in 1987 contradicts FERC's determination that the decision to accept or reject such certificates is completely voluntary and rests solely with the pipeline. FERC specifically upheld PGT's decision to reject the certificate in 1987 (Pacific Gas Transmission Co., (1989) 46 FERC ¶61,072 at p. 61,324).

However, PG&E's arguments are inapplicable in this context, because DRA is not disputing FERC's jurisdiction over PGT. The primary focus of DRA's allegations is on PG&E's purchasing decisions, which FERC acknowledges are subject to our jurisdiction. Northwest Alaska Pipeline Co., supra; Order No. 500-H, FERC Stats. & Regs., Regulations Preambles 1986-1990, ¶30,867 at p. 31,576 (1989); reh'g denied in relevant part, Order No. 500-I, FERC Stat. & Regs., Regulations Preambles 1986-1990, ¶30,880 (1990). In light of PG&E's immediate and extended corporate relationships to PGT and A&S and the vertical supply relationship, it is not unreasonable for DRA to recommend that we consider actions that PG&E might have taken to influence upstream purchasing decisions for the benefit of PG&E's ratepayers. It is also noteworthy that the Commission had previously warned both PG&E and PGT that it would hold both entities responsible for promoting access to Canadian gas for California end-users (Decision (D.) 86-03-012, slip op. at 7).

We conclude that DRA's allegations that PG&E improperly restricted competition through its influence over its subsidiaries raise both factual and policy issues that we may properly consider.

b. The Filed-Rate Doctrine

PG&E next argues that DRA's recommendations are barred by the filed-rate doctrine. The filed-rate doctrine forbids a federally regulated utility from charging different rates from those properly filed with the appropriate federal agency. Nantahala Power & Light Co. v. Thornburg, (1986) 476 U.S. 953, 964; and Arkansas Louisiana Gas Co. v. Hall, (1981) 453 U.S. 571, 577. A corollary of this doctrine is that state commissions "may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." Nantahala, supra, 476 U.S. at 966; see Narragansett Electric Co. v. Burke, (R.I. 1977) 381 A.2d 1358, cert. denied (1978) 435 U.S. 972. From its review of the relevant cases, PG&E concludes that "[o]nce FERC determines that a particular rate is just and reasonable, then it is both a just and reasonable charge for the selling utility and a just and reasonable expense for the purchasing utility." (PG&E Motion, p. 44.) Thus, since FERC has approved the tariff under which PGT sold gas to PG&E, this Commission must accept the resulting charges as a reasonable price for the purchases from PGT. The corporate affiliation between PGT and PG&E does not create an exemption from the application of federal preemption or the filed-rate doctrine, according to PG&E.

PG&E also contends that the filed-rate doctrine forecloses speculation about what PG&E might have done if it had open-access transportation rights. When PGT declined to accept the open-access certificate, the certificate terminated by its own terms, and it became unlawful for PGT to offer open-access transportation service under the certificate. "PG&E cannot be faulted for failing to exercise non-existent transportation rights," PG&E concludes (PG&E Motion, p. 48).

PG&E applies the filed-rate doctrine too broadly. The doctrine does not preclude a state agency from reviewing whether a utility made reasonable purchasing decisions, even though it may not review the FERC-approved wholesale rate. Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n, (Pa. Commw. Ct. 1983) 465 A.2d 735. In Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Comm'n, (3d Cir. 1988) 837 F.2d 600, cert. denied (1988) 488 U.S. 941, the court noted that retail sales are specifically excluded from federal regulation under the National Gas Act (15 U.S.C. § 717(b)) and held that a state agency could lawfully consider the utility's decision to purchase from one FERC-approved source rather than another in determining the costs that could be recovered in retail rates.

In a discussion of the treatment of take-or-pay costs incurred by interstate pipelines, FERC concurred that Nantahala does "not preclude state regulators from reviewing the prudence of LDCs' [local gas distribution companies'] purchasing decisions" and explained its reasoning:

> [FERC] believes that this result is consistent with Congress' intent in enacting the [Natural Gas Act] to close all gaps in the regulation and transportation of natural gas. [FERC] lacks jurisdiction to review the prudence of LDCs' purchasing practices, and accordingly does not do so. Therefore, if state regulatory agencies also lacked such authority, the LDCs' purchasing practices...would escape any prudence review, contrary to Congress' intent.

Order 500-H, supra, ¶30867 at p. 31,576, footnote omitted.

Most persuasive in confirming our view of the Commission's jurisdiction to review PG&E's purchase decisions is the Court's language in Nantahala:

> [W]e may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price.

476 U.S. at 972, emphasis in original; accord, Mississippi Power & Light Co. v. Mississippi ex rel. Moore, (1988) 487 U.S. 354, 373-374.

DRA places its recommendations in the same context: "DRA has merely asked the Commission to disallow that portion of PG&E's gas purchases that were unreasonably incurred based on other choices...it had." (DRA Opposition, p. 26.) We conclude that we are not preempted under the filed-rate doctrine from considering DRA's request, and DRA should be permitted an opportunity to support its recommendations in hearings.[10]

B. Estoppel

PG&E argues that the Commission should reject DRA's recommendations as a matter of fairness and justice, because this Commission had previously encouraged the import arrangements for supplying Canadian gas to California. We are urged to be mindful that the Commission actively supported this supply arrangement in proceedings before the ERA from 1982 through 1985. In 1988, the Commission's President, Stanley W. Hulett, sent a letter to the National Energy Board of Canada supporting A&S's request to extend its export license. The Commission also gave implicit support to the supply arrangements in D.88-12-099, in which the Commission continued core-election and affirmed PG&E's strategy of attracting noncore customers to the core portfolio to gain price benefits for core customers. Under the principles of waiver and equitable estoppel, PG&E argues, the Commission should not now consider DRA's recommendations.

We do not find PG&E's arguments compelling. The Commission's support of an import arrangement in 1982-85 that reduced PGT's previous take-

[10]We note that two United States District Courts considering comparable issues have come to similar conclusions. (San Diego Gas and Electric Co. v. Public Utilities Comm'n, No. C-89-3551 MHP (N.D. Cal., April 29, 1992); Tucson Electric Power Corp. v. Arizona Corp. Comm'n, No. CIV 90-049 PHX WPC (D.Ariz., Sept. 17, 1990).)

or-pay liability does not bar further consideration of the reasonableness of PG&E's subsequent behavior. PG&E's argument that the Commission's failure to actively criticize the import arrangement in 1988 and 1989 bars our current examination is disingenuous. Such a contention overlooks the well accepted proposition that the instant proceeding <u>is</u> the forum for considering PG&E's purchasing decisions in those years.

PG&E places great weight on former President Hulett's letter and includes his declaration to support its argument. The declaration describes President Hulett's letter, which attempted to obtain the individual concurrence of the other Commissioners. Two reasons, one dealing with fundamental requirements for the procedure which must be observed in our discharge of the public's business, the other centering on the content of the Hulett communication, preclude us from regarding this correspondence as the basis for an estoppel conclusion.

The essence of an estoppel claim is that a party, notwithstanding its exercise of reasonable diligence, has been misled by the actions or inactions of another. To succeed in this aspect of its motion, PG&E bears the burden of convincing us that it was reasonable in developing amnesia respecting the most fundamental rule which governs Commission action. With limited exceptions, we "take action" as a collective body in noticed public meetings. This requirement is both ancient and statutory. Pub. Util. Code § 306; Gov't Code §§ 11120, 11122, 11132. It is the essence of understatement that we are not persuaded that the movant's burden has been discharged by reliance upon a piece of correspondence authored by a single Commissioner.

Equally dispositive is the fact that neither former President Hulett's letter nor any other expressions of support for the International Agreement addressed the anticompetitive activity alleged by DRA. The Hulett letter's support for continued importation of A&S gas cannot reasonably be read as support for A&S to the exclusion of other importers. These considerations undermine the basis of PG&E's appeal on grounds of both equity and more general fairness.

Conclusion

Recognizing that the instant motion is not specifically accommodated by our Rules of Practice and Procedure, we have considered it as partaking of a motion for summary judgment and a motion in the nature of a demurrer. However construed, the objective of the motion was to obtain a summary preclusion of our ability to consider the disallowances recommended by our Division of Ratepayer Advocates, Sacramento Municipal Utility District and Toward Utility Rate Normalization in an evidentiary hearing. For the purposes of disposing of this motion only, we have assumed the ability of these parties to sustain with adequate proof the positions which they have advanced. Our discussion here should not and cannot be read as indicating any disposition as to the validity of those propositions. All we have done is to determine that we are not precluded on any ground fairly ascribed to PG&E's motion from permitting that regular evidentiary process from proceeding.

ORDER

THEREFORE IT IS ORDERED that the "Motion of Pacific Gas & Electric Company for Summary Judgment on Disallowance Claims," filed May 12, 1992, is hereby denied.

This order is effective today.

Dated July 22, 1992, at San Francisco, California.

DANIEL Wm. FESSLER
President
JOHN B. OHANIAN
PATRICIA M. ECKERT
NORMAN D. SHUMWAY
Commissioners

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

Neal J. Shulman

NEAL J. SHULMAN, Executive Director