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Decision 92-10-058 October 21, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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| 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) | Application 91-04-003 (Filed April 1, 1991) |

**ORDERING DENYING REHEARING OF DECISION (D.) 92-07-078**

**Summary**

We deny the application for rehearing of Pacific Gas and Electric Company ("PG&E"). The Commission is not absolutely barred from inquiring whether PG&E was imprudent in its gas purchasing decisions from 1988 through 1990. Since questions concerning PG&E's prudence and the preemptive effects of federal agency decisions are inextricably tied to facts, summary judgement is inappropriate. We will further review these questions at the culmination of the hearing. In addition, we find no basis for PG&E's claims that equitable estoppel and waiver would preclude the Commission's review of PG&E's purchasing decisions.

**Introduction**

On July 22, 1992, we issued Decision (D.) 92-07-078 which denied PG&E's motion for summary judgment without

expressing a view as to the merits of claims as to PG&E's imprudence. These claims are being addressed in an evidentiary hearing before an assigned Administrative Law Judge, which has already lasted more than 9 weeks. The length of this hearing attests to the numerous factual disputes involved therein.

On August 24, 1992, PG&E filed an application for rehearing of D.92-07-078.[1] PG&E argues that as a matter of law, the Commission cannot review PG&E's purchasing decisions due to the alleged preemptive effect of the Department of Energy's ("DOE") import policies and of the Federal Energy Regulatory Commission's ("FERC") approval of filed rates by Pacific Gas Transmission Company ("PGT"). In addition, PG&E argues that the Commission erred in rejecting PG&E's equitable estoppel and waiver claims, which are based upon state law. We reject PG&E's arguments.

## Discussion

### A. The Commission Is Not Preempted From Reviewing PG&E's Purchasing Decisions Involving Imported Canadian Gas.

#### 1. Sections 1(b) and 1(c) of the Natural Gas Act recognize the authority of state commissions to regulate the retail sales of local distribution companies and Hinshaw pipelines.

PG&E first argues in its rehearing application that the Commission's authority to regulate PG&E's sales involving imported natural gas is preempted under Section 3 of the Natural Gas Act. PG&E claims that for the Commission to adopt the disallowance recommended by the DRA, Sacramento Municipal Utility District ("SMUD") and Toward Utility Rate Normalization ("TURN"),

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1. The Commission's Division of Ratepayer Advocates ("DRA") was the only party who filed a response to this rehearing application.

the Commission would have to find that PG&E could have purchased less expensive Canadian supplies. Undisputedly, PG&E's options during the 1988-1990 time period involve factual issues that require an evidentiary hearing. Nonetheless, PG&E alleges that even if it had such options, any finding of imprudence would be inconsistent with the DOE's approval of the International Agreement between PGT and its affiliate, Alberta and Southern Gas Company, Ltd. ("A&S").[2]

In support of its argument, PG&E refers to Northern Natural Gas Co. v. State Corporation Comm'n of Kansas (1963) 372 U.S. 84, 91 and Illinois Natural Gas Co. v. Central Illinois Public Service Co. (1942) 314 U.S. 498 for the proposition that states cannot engage in direct or indirect regulation of matters within the FERC's or DOE's jurisdiction. While PG&E concedes that these cases involved the FERC's regulation over interstate wholesales of natural gas, PG&E contends that Section 3 of the Natural Gas Act similarly occupies the field of import regulation, and, therefore, preempts our jurisdiction.

What PG&E ignores, however, is that we are not attempting to regulate the importation of natural gas. The Commission does not at all challenge the appropriateness of the International Agreement between PGT and A&S or the ERA's approval of the agreement as being in the public interest. The sole area of our inquiry is the retail sales of PG&E, which is a local distribution company ("LDC") and a "Hinshaw pipeline" subject to our jurisdiction under Sections 1(b) and 1(c) of the Natural Gas Act.

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2. The DOE initially exercised its import authorization through the Economic Regulatory Administration ("ERA"). Subsequently, the DOE transferred this authorization to the Office of Fossil Energy ("OFE"). (54 Fed. Reg. 11436 (1989)). For the sake of convenience, we will hereinafter use "ERA" to refer to either the ERA or the OFE.

It is clear that Congress did not intend to preempt state commission review of the retail sales of LDCs, such as PG&E. The intent of the Natural Gas Act was to complement state authority, not to usurp it. (See H.R. Rep. No. 709, 75th Cong., 1st Sess., pp. 1-3.) Thus, Section 1(b) of the Natural Gas Act preserves state authority to regulate the retail sales of natural gas. (Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Com. (1951) 341 U.S. 329, 332-337; Panhandle Eastern Pipe Line Co. v. Public Service Comm'n (1947) 332 U.S. 507, 517-24.) In addition, in 1954 Congressman Hinshaw's proposed amendment was adopted as Section 1(c) of the Natural Gas Act to further clarify that the provisions of the Natural Gas Act shall not apply to companies whose facilities are located within a state if all of the gas is consumed within the state and the rates and services of the company are regulated by a state commission.[3] Congress explicitly declared in Section 1(c) of the Natural Gas Act that regulation of such Hinshaw pipelines involves matters "primarily of local concern and subject to regulation by the several States."

In light of the history and provisions of the Natural Gas Act, it is difficult to see any merit to PG&E's argument that Congress has so occupied the field of natural gas importation, that we cannot even review the individual purchasing decisions of PG&E simply because they involved imported natural gas. What is critical in this regard is that, as more fully discussed below, the ERA's orders approving the International Agreement were merely permissive authorization for what PGT could import. In contrast, our inquiry involves the actual individual purchasing decisions of PG&E. Nothing in any of the ERA's orders required

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3. Hence, these companies have become known as "Hinshaw pipelines". PG&E is an LDC and a Hinshaw pipeline.

PG&E or any other California consumer to purchase gas imported by PGT.

Indeed, the ERA also authorized and found to be in the public interest the importation of other Canadian natural gas that could be transported on PGT to California. (See e.g., Dome Petroleum Corporation (1985) 1 ERA ¶ 70,601 and (1987) 1 ERA ¶ 70,735; Salmon Resources, Ltd. (1985) 1 ERA ¶ 70,612 and (1988) 1 ERA ¶ 70,749; Development Associates, Inc. (1986) 1 ERA ¶ 70,620 and (1988) 1 ERA ¶ 70,765; Poco Petroleum, Inc. (1986) 1 ERA ¶70,621 and (1988) 1 ERA ¶ 70,752; Amoco Energy Trading Corporation (1986) 1 ERA ¶ 70,624 and (1988) 1 ERA ¶ 70,772; Spot Market Corporation (1986) 1 ERA ¶ 70,665 and (1987) 1 ERA ¶ 70,712; Kerr-McGee Chemical Corporation (1986) 1 ERA ¶ 70,678 and (1989) 1 ERA ¶ 70,840; and Bonus Energy, Inc. (1987) 1 ERA ¶ 70,691, reh'g denied (1987) 1 ERA ¶ 70,702.) Thus, there are factual questions as to whether PG&E could have bought imported Canadian gas (other than from PGT) which the ERA has also found to be in public interest.[4] Accordingly, summary judgment is inappropriate.

Although Sections 1(b) and 3 of the Natural Gas Act have existed since 1938 (when the Natural Gas Act was enacted) and Section 1(c) of the Natural Gas Act was added in 1954, PG&E has not cited one decision from any state or federal court which found that the ERA's "public interest" determination under Section 3 of the Natural Gas Act preempted a state commission's

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4. For example, could PG&E have bought gas directly or indirectly from these other companies which received import authorization? Did PG&E have other access to the Canadian gas that was imported by others? What was the price and/or reliability of this other Canadian gas? If PG&E did not have access to less expensive Canadian supplies, could PG&E have taken actions in order to obtain such access? Were there obstacles to PG&E attempting to purchase less expensive Canadian gas?

jurisdiction over the retail sales of an LDC or Hinshaw pipeline. Nor have we found any such state or federal court decision.

Instead, PG&E primarily relies upon TransCanada Pipelines Ltd. v. F.E.R.C. ("TransCanada") (D.C. Cir. 1989) 878 F.2d 401, 407, which upheld the FERC's determination that the Secretary of DOE's 1984 orders, which had delegated authority between the ERA and the FERC, had precluded the FERC from reviewing the importing pipeline's prudence in purchasing decisions.[5] However, nowhere in TransCanada did the court find that downstream relationships were governed by the ERA's public interest determination under Section 3 of the Natural Gas Act. Far from it. In TransCanada, the Court held that the ERA's approval of an import contract did not preempt the FERC's decision to alter the terms of the contract between the pipeline and its customers, because the ERA's order only concerned the terms of the contract between the pipeline and the Canadian supplier. (Id. at p. 410.) The Court further found that simply because the decision made the terms more burdensome to the importing pipeline, the FERC's action was not inconsistent with the ERA's approval of the international contract. (Id. at p. 410.)

Since we regulate the relationship between the LDC and its customers, our review of the reasonableness of PG&E's rates is even one step further downstream that the one examined in TransCanada. Put another way, it is two steps removed from the International Agreement approved by the ERA, and our review does

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5. See New Policy Guidelines and Delegation Orders from Secretary of Energy to Economic Regulatory Administration and Federal Energy Regulatory Commission Relating to the Regulation of Imported Natural Gas and Delegation Order No. 0204-111 and No. 0204-112, 49 Fed. Reg. 6684 (1984) (hereinafter the "1984 Guidelines"). The 1984 Guidelines only concern the responsibilities of two federal agencies and make no mention of state commissions.

not even involve any party to that agreement. Consequently, TransCanada would support, rather than limit, our jurisdiction.

TransCanada relied, in large part, upon Wisconsin Gas Co. v. FERC ("Wisconsin Gas") (D.C. Cir. 1985) 770 F.2d 1144, 1156, cert. denied (1986) 476 U.S. 1114, wherein the Court held that notwithstanding a pipeline's import authorization from the ERA, the FERC could eliminate the pipeline's minimum bill such that none of its customers were required to buy the pipeline's imported gas supply. The basis for the Court's holding was that the FERC's order (i.e. Order No. 380) did not alter the terms of the international contract between the Canadian exporter and the importing pipeline; the FERC's order only related to the relationship between the pipeline and its customers. (Id. at p. 1156.) In addition, the Court declared, "that [FERC's] Order No. 380 may render the contractual provisions approved by the ERA more burdensome does not mean that the Order is inconsistent with the terms of the import authorization." (Id. at p. 1156.)

Since a pipeline's customers, including LDCs, are not required to buy the imported gas from the pipeline notwithstanding the ERA's import authorization, we do not understand how an LDC with alternate and less expensive supply sources could be immune from a prudence review simply because it bought the discretionary gas from the pipeline.[6] Whether a pipeline's prudence has been explicitly found by the FERC, or implicitly found by the ERA standing in the shoes of the FERC, an LDC's purchasing practices are subject to review by state commissions when the LDC has a choice as to purchases of other less expensive gas which were not precluded by the FERC or ERA.

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6. During the period in question, PGT actually had a 50% minimum bill, which required PG&E to pay for 50% of the gas that PGT tendered at the California border. The issues in the evidentiary proceeding could therefore focus on the other 50% of PG&E's purchases of gas from PGT, which were discretionary.

(Cf. Kentucky West Virginia Gas v. Pa. Public Utility Comm'n (3d Cir. 1988) 837 F.2d 600, 608-09, cert. denied (1988) 488 U.S. 941.)

In its Order No. 500-H, FERC Stats. & Regs., Regulations Preambles (1989) 1986-1990 ¶ 30,867 at p. 31,576, reh'g denied in relevant part, Order No. 500-I, FERC Stat. & Regs., Regulations Preambles (1990) 1986-1990, ¶ 30,880, the FERC explained that it lacked jurisdiction to review the purchasing decisions of LDCs. The FERC therefore supported state commission jurisdiction to review such purchasing decisions even after the FERC approved a pipeline's rates. Otherwise, the LDCs' purchasing practices would escape any prudence review, which is contrary to Congress' intent in the Natural Gas Act to close all gaps in regulation.

By the same token, the ERA does not review the prudence of LDCs' purchasing decisions. In addition, the ERA has found numerous import arrangements for gas destined to California to be in the public interest, besides PGT's import of natural gas under the International Agreement. If PG&E had a choice to purchase less expensive supplies from Canada, which is the whole inquiry of our evidentiary hearing, our Commission is the only agency that has the jurisdiction to determine the prudence of PG&E's actions.

It should be noted that Congress has recently enacted the Comprehensive National Energy Policy Act of 1992 ("CNEPA"). Section 201 of the CNEPA amends Section 3 of the Natural Gas Act such that all imports of natural gas from Canada (i.e. a nation with which there is in effect a free trade agreement) are deemed to be in the "public interest", and the ERA must grant all applications for importation of natural gas from Canada. Consequently, whether the Canadian gas is $1.00/MMBtu or $500.00/MMBtu, its importation is deemed in the public interest. The only question is whether there would be a willing buyer.

If one were to accept PG&E's argument - that a "public interest" determination under Section 3 of the Natural Gas Act,

which allows the importation of natural gas, automatically ousts the states from regulating the LDCs' retail sales of such gas (i.e. the rates they may charge their customers) - then every LDC in the nation could now evade state commission review of the LDCs' purchasing practices by simply importing natural gas from Canada.

Given that LDCs are monopolies with captive customers, and that is why the states have historically regulated the LDCs' rates, it is unreasonable to inflate the reaches of the "public interest" determination under Section 3 of the Natural Gas Act so as to oust the states from jurisdiction over the LDCs' purchasing practices. That is precisely why Congress has preserved such state jurisdiction under Sections 1(b) and 1(c) of the Natural Gas Act and Congress has never repealed those sections.

It should be noted in this regard that in Section 201 of the CNEPA, Congress has equated the importation of natural gas from Canada with first sales of natural gas, not with retail sales of natural gas. In the Natural Gas Policy Act of 1978 and subsequently in the Natural Gas Wellhead Decontrol Act of 1989, Congress has deregulated first sales of natural gas due to the many thousands of marketers and producers which compete to sell gas. Thus, competition works quite well in the first sale of natural gas, and Congress' deregulation of gas imports from Canada adds to these competitive forces to keep the price of first sales reasonable.

But Congress has never determined that retail sales by an LDC or Hinshaw pipeline should be deregulated. Because LDCs and Hinshaw pipelines are monopolies with captive customers, market forces simply cannot be relied upon to keep their sales rates just and reasonable. If state commissions could not regulate the retail sales rate of LDCs and Hinshaw pipelines, they would be able to charge their captive customers exorbitant prices. Consequently, the states have a compelling interest in the regulation of retail sales by LDCs and Hinshaw pipelines, and

Congress has recognized this interest in Sections 1(b) and 1(c) of the Natural Gas Act.

2. The Commission's review of PG&E's purchasing practices is not inconsistent with DOE or ERA orders.

In its application for rehearing, PG&E argues that the DOE's 1984 Guidelines were more than a delineation of responsibilities between the ERA and FERC. PG&E contends that the 1984 Guidelines represented the DOE's determination that the market, rather than government, should determine the terms of imported gas, and this allegedly preempts state regulation as well.

We have no doubt that the DOE determined that there was no longer a need for governmental obstacles to the importation of natural gas, because the market could usually be counted on to determine reasonable terms and prices for the imported gas. An industrial customer would simply not buy the imported gas if it were unreasonably priced, because the industrial customer could not afford higher fuel prices than its competitors. Thus, there was no reason for the federal government not to issue permissive authorization for the importation of gas. However, LDCs are monopolies with captive customers. Thus, when it comes to the LDCs' purchases of natural gas, the normal market forces are not at work.[7] This is precisely why the California Constitution and California Public Utilities Code have established our Commission to regulate utilities, such as PG&E. Consequently, even if the ERA authorizes gas imports, it does not mean that LDCs must buy any particular supply of gas.

Significantly, the DOE's 1984 Guidelines nowhere mention state governments in their discussion of import policies.

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7. This is particularly true herein, where PG&E buys gas from its subsidiary, PGT, which buys gas from PG&E's subsidiary, A&S.

Every reference to a governmental entity (when specified) is to a federal governmental agency. Nevertheless, citing Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, ("Arkansas Electric") (1984) 461 U.S. 375, 384, PG&E insists that a federal agency determination to forego regulation may implicitly preempt state regulation.

PG&E's reliance on Arkansas Electric is misplaced. While the Supreme Court recognized in Arkansas Electric that under certain statutes there is a possibility of implicit preemption by federal agencies, the Court stated in the very next sentence (after the passage quoted by PG&E) that "nothing in the language, history, or policy of the Federal Power Act suggests such a conclusion. Congress's purpose in 1935 was to fill a regulatory gap, not to perpetuate one." (Id. at p. 384.)

While Arkansas Electric concerned state jurisdiction under Section 201(b) of the Federal Power Act, the Court's disclaimer of implicit federal agency preemption applies equally herein, because Section 1(b) of the Natural Gas Act grew out of the same judicial history of and is a counterpart to Section 201(b) of the Federal Power Act. (Federal Power Com. v. Southern Cal. Edison Co. (1964) 376 U.S. 205, 211-212.) As with the Federal Power Act, there is nothing in the language, history, or policy of the Natural Gas Act to suggest that a federal agency could deregulate the states' jurisdiction in the regulation of retail sales. Congress' purpose in the Natural Gas Act was to fill a regulatory gap, not to perpetuate one. (See H.R. Rep. No. 709, 75th Cong., 1st Sess., pp.1-3; Panhandle Eastern Pipe Line Co. v. Public Service Com., supra, 341 U.S. at p. 332-337; Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, supra, 332 U.S. at pp. 517-524; see also, Federal Power Comm'n v. Panhandle Eastern Pipe Line Co. (1949) 337 U.S. 498, 502-503 & 512-513; Interstate Natural Gas Co. v. Federal Power Comm'n (1947) 331 U.S. 682, 690.)

A close scrutiny of the ERA's orders and policies reveal that the Commission's review of PG&E's purchasing

practices are not inconsistent with the ERA's orders. First, it should be noted that the ERA had issued permissive authority to PGT to import natural gas. Nothing in the ERA's orders required PGT to actually import any amount of gas. (See e.g., Pacific Gas Transmission Company (1984) 1 ERA ¶ 70,591 at p.72,387, emphasis added. ["The import authorization . . . is amended to increase the authorized volumes to permit PGT to import up to 1023 MMcf of Canadian natural gas per day for the period November 1, 1985 through October 31, 1993."])

Secondly, the ERA approved PGT's International Agreement with A&S and found it to be in the public interest, precisely because of the flexibility it allowed PGT. According to the ERA:

> "The substantial reduction in PGT's take-or-pay obligations, the elimination of its minimum physical take obligations, the reduction in the price of the Canadian gas imported by PGT, and the flexibility provided by the semi-annual review and redetermination provisions amply demonstrate that PGT's import arrangement is competitive and market-responsive, and can be expected to remain so over the term of the underlying contract." (Id. at p. 72,386.)

In view of PGT's elimination of its minimum physical take obligations and its reduction in take-or-pay obligations to the 50 percent level, PG&E could have taken advantage of any less expensive Canadian gas supply (if it were available and accessible) for the 50% discretionary volumes, and this would have been completely consistent with the ERA's public interest findings. Thus, our review in the evidentiary hearing does not question the ERA's orders, but merely concerns the choices facing PG&E in light of the flexibility in the International Agreement which the ERA found to be in the public interest.

In this regard, if PG&E made imprudent individual purchasing decisions notwithstanding the flexibility in the International Agreement, then it would properly be a matter

within our jurisdiction. As the ERA stated in Brooklyn Union Gas Co. ("Brooklyn Union") (1990) 1 FE ¶70,285 at p. 71,215: "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."

PG&E attempts to distinguish Brooklyn Union by alleging that this statement only applied to "rate design" and not to prudence reviews. The basis for PG&E's allegation is a reference to Connecticut's request discussed in Brooklyn Union (id. at p. 71,206) for denying "as-billed treatment." However, immediately preceding the above-quoted passage (id. at p. 71,215), the ERA referred to Connecticut's request as being one which asked that the ERA not decide the prudence question.

Significantly, PG&E completely overlooks an earlier passage in Brooklyn Union which conclusively demonstrates that states may review individual purchasing decisions of LDCs (which were referred to therein as "Repurchasers") even though the ERA found the import arrangement was in the public interest. The ERA explicitly stated in Brooklyn Union that "the above assertion that certain of the Repurchasers, having an interest in the IGTS, will purchase ANE gas for that reason, when more economical supplies are available, does not demonstrate that the import arrangements are not competitive. Furthermore, individual purchase decisions can be reviewed by state regulatory agencies." (Id. at p. 71,213, emphasis added.)

This is precisely what our evidentiary hearing has attempted to address - PG&E's individual purchasing decisions. PG&E contends, however, that its purchasing decisions are not to be judged compared to the price of gas in Canada, because the "market to be served" is the California market. PG&E erroneously contends that the "market to be served" standard requires a review of only domestic gas sold in California. This contention ignores the fact that at the time PG&E was making its purchasing decisions, the ERA was also authorizing the importation of

Canadian gas into the California market. Therefore, it is appropriate to review in the evidentiary hearing the price of all the Canadian natural gas imported into the California market.

For example, in Dome Petroleum Corporation, supra, 1 ERA ¶ 70,601, at p. 72,417, the ERA granted Dome Petroleum Corporation ("Dome") blanket import authorization to make spot market sales into California and elsewhere because it would "foster the new and positive competitive forces which the applicant's import would bring to the marketplace." Although PGT intervened and wanted assurances that its long-term supply arrangement would not be adversely affected, the ERA noted that it had "made a decision on PGT's concerns when [the ERA] authorized the blanket import arrangements requested by Cabot Energy Supply Corporation, Northwest Alaskan Pipeline Company, and Tenngasco Exchange Corporation and LHC Pipeline Company. In those orders, we found that there was no need for the government to protect long-term, firm imports against competition from short-term spot imports. Long-term suppliers have options available to meet such competition which they can exercise without government assistance or interference." (Id. at p. 72,417.)[8]

The ERA made similar determinations in the numerous other decisions granting blanket import authorization to others to import Canadian gas to sell in spot market sales in California. (See e.g., Salmon Resources Ltd., supra, 1 ERA ¶ 70,612 at p. 72,454. ["The DOE strongly supports the establishment of a spot market, and the competition such short-

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8. In Dome Petroleum Corporation, supra, 1 ERA ¶ 70,735, the ERA extended for two years Dome's blanket authorization and increased the volume (up to 200 Bcf) for Dome to import for spot market sales in the United States, including California.

term, spot sales bring to the marketplace.");[9] see also, Development Associates Inc., supra, 1 ERA ¶ 70,620 at p. 72,472, and 1 ERA ¶ 70,765; Poco Petroleum, Inc., supra, 1 ERA ¶ 70,621 at p. 72,474 and 1 ERA ¶ 70,752; Windward Energy and Marketing Company (1988) 1 ERA ¶ 70,751 at pp. 72,826-27; Amoco Energy Trading Corporation, supra, 1 ERA ¶ 70,624 at p. 72,481 and 1 ERA ¶ 70,772; Kerr-McGee Chemical Corporation, supra, 1 ERA ¶ 70,678 at p. 72,636 and 1 ERA ¶ 70,840; Spot Market Corporation, supra, 1 ERA ¶ 70,665 at pp. 72,573-72,574 and 1 ERA ¶ 70,712; and Bonus Energy, Inc., supra, 1 ERA ¶ 70,691 at p. 72,666, reh'g denied (1987) 1 ERA ¶ 70,735.) Thus, the competitiveness of gas in PG&E's market area included the price of Canadian gas, besides the gas sold by PGT.

We therefore reject PG&E's argument that the issues in the hearing can only involve a comparison between PG&E's purchase price for Canadian gas and the price of gas from domestic producers. The ERA's policy of granting blanket import authorization was to increase competition in the market with the import of Canadian gas, including Canadian spot gas. As the Court explained in Panhandle Producers & Royalty Owners Ass'n v. ERA (5th Cir. 1988) 847 F.2d 1168, 1177:

> "PPROA offers no reason to doubt that spot-market transactions will occur only under competitive terms. Because the ERA's policy is to grant blanket authorizations routinely ... applicants and their agents will face competition from others obtaining the ERA authorizations, making it unlikely that the applicants can reap supracompetitive profits."

Finally, we take issue with PG&E's characterization in its application for rehearing of DOE approval of PGT's Canadian

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9. Salmon Resources Ltd's import authorization was extended for two years in Salmon Resources, Ltd. 1 ERA ¶ 70,749 (1988).

gas costs. To be sure, PGT's application for import authorization was noticed in the Federal Register, was the subject of a proceeding before the ERA in which interested parties participated, and resulted in the ERA's permissive authorization and findings that the such importation was not inconsistent with the public interest due to the flexibility in the International Agreement.

In sharp contrast, however, PGT's reports of annual price renegotiation, which were filed with the ERA, were merely reports filed pursuant to Section 590.407 of the ERA's administrative procedures, 10 C.F.R. § 590.407. These reports were never noticed in the Federal Register or subject to any proceeding, and the ERA never made findings as to whether these new rates were in the public interest. To the contrary, in each ERA letter (which PG&E submitted as Exhibits F through J attached to its motion for summary judgment), the ERA refers to PG&E's claims as assertions, acknowledges receipt and acceptance of the report, and qualifies that its acceptance "should not be construed as a waiver of [ERA's] authority to consider the amended contract at a later time or to further condition your import authorization as a result of such later consideration."

By the same token, the ERA also accepted the reports of all of the other companies which had received import authorization (e.g. Dome, Salmon Resources, Ltd., etc.). But the ERA never picked or chose which gas at which price should actually be bought in the marketplace. The ERA's philosophy was that customers would not buy gas, even if the ERA approved the import, if the gas was not the least expensive available to the customer. As the Court stated in Panhandle Producers v. Economic Regulatory Admin. (D.C. Cir. 1987) 822 F.2d 1105, 1113, the ERA's position was that "if the terms were flexible enough (allowing the price to move down and the importer to reduce volumes), no gas would be imported unless it were priced competitively."

The focus of our evidentiary hearing is to find out whether PG&E purchased competitively-priced Canadian gas from

1988-1990. Since PG&E is a monopoly and was affiliated with both PGT and A&S, we cannot automatically assume that PG&E's purchases were reasonable and that PG&E would not have purchased all of the PGT sales gas (beyond the 50% minimum bill requirements) unless it were priced competitively.

We therefore find that our inquiry into these factual issues is not preempted by Section 3 of the Natural Gas Act and is not in any way inconsistent with the ERA's orders. However, we express no view herein as to numerous factual questions that are being considered in the hearing.

### B. The Filed-Rate Doctrine Does Not Preclude Our Factual Inquiry As To PG&E's Alternatives.

In its application for rehearing, PG&E also maintains that under the filed-rate doctrine, the FERC's orders approving PGT's rates and certificate applications prevent us from disallowing the recovery of PG&E's Canadian gas costs. However, as we noted in D.92-07-078, the filed-rate doctrine does not preclude a state commission's review when a utility has alternatives. (D.92-07-078, pp. 18-21 (slip op.).) As the Supreme Court stated in Nantahala Power & Light Co. v. Thornburg ("Nantahala") (1986) 476 U.S. 953, 972, "we 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, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, price." Even the FERC itself has agreed that Nantahala does not preclude state regulators from reviewing the prudence of LDCs' purchasing decisions. (See Order No. 500-H, supra, ¶30,867 at p.31,576.)

PG&E nevertheless raises three issues in its application for rehearing. First of all, PG&E alleges that "under PGT's FERC-filed certificates and tariffs, PG&E did not have the ability to purchase and transport Canadian gas on its own behalf until August, 1989." This allegation, however, will

be tested in the hearing and cannot properly be resolved on a motion for summary judgment.

PG&E's argument implicitly concedes that for the record period as of August 1, 1989, PG&E had access to alternative Canadian supplies.[10] Moreover, it is not clear to us at this stage whether or not PG&E had access or could have had access to alternative Canadian gas supplies even before August 1, 1989. After the evidentiary hearing has been concluded, we expect to be more informed as to whether, in fact, PG&E had direct or indirect access to the gas of others, including those whom the ERA had authorized to import gas from Canada. Also, if PG&E did not have such access to less expensive supplies, would it have been reasonable for PG&E to have taken actions to obtain such access? For example, if PGT had applied under Section 7(c) of the Natural Gas Act for interruptible transportation authority for other shippers, why wouldn't PGT have applied for such authority for PG&E? If PG&E utilized interruptible transportation rights to purchase spot market gas on the El Paso Natural Gas Company interstate pipeline, why couldn't PG&E have obtained and utilized interruptible transportation rights on the PGT system?

Since these issues are inextricably tied to factual questions and require a much greater analysis than provided by PG&E in its summary judgment motion and rehearing application, summary judgment is inappropriate.

PG&E's second argument emphasizes the FERC's approval of PGT's rates and services. But, as previously mentioned, there is an exception to the preclusive effect of the filed-rate

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10. Although PG&E asserts that disallowances for PG&E's post-August 1, 1989 purchases would "hinge" on a finding that PGT's sales rates could have been lower, this is absolutely not true. A disallowance finding could hinge on <u>PG&E</u> not utilizing its access on PGT to less expensive Canadian supplies, if such alternatives were available.

doctrine when there are other alternatives beyond the FERC-approved rates. This exception has become known as the "Pike County" exception based upon the decision in Pike County Light & Power Co. v. Pennsylvania Public Utility Comm'n (Pa. Commw. Ct. 1983) 465 A.2d 735. PG&E nonetheless relies upon San Diego Gas and Electric Co. v. Public Utilities Comm'n, ("San Diego"), No. C-89-3551 MHP (N.D. Cal., April 29, 1992) (slip op. at p.12), where the court generally recognized the Pike County exception but found that one particular disallowance by the Commission did not fall within the exception, because the "[Commission] did not make the crucial determination that alternative sources of [energy] were available at a lower price."

PG&E's reliance upon San Diego is misplaced. The passage from San Diego quoted by PG&E involved a situation after an evidentiary hearing was completed and the Commission had not made the crucial determination concerning alternative sources. If anything, this quote establishes why PG&E's summary judgment motion is inappropriate. The Commission cannot determine the applicability of the Pike County exception in a ruling on a summary judgment motion, because it is necessary to complete an evidentiary hearing in order to make the crucial determination whether or not alternative sources were available and accessible or could have been available and accessible.

The third issue raised by PG&E is that there is no exception to the filed rate doctrine solely because affiliates are involved. On this point, we agree with PG&E. But in considering the choices that were available to PG&E, we may certainly consider the affiliate relationship in terms of subissues, such as whether PGT would have applied for Section 7(c) transportation authorization for PG&E prior to August 1, 1989, if PG&E had asked it to apply for such individual certificate authorization, or whether PG&E itself had a conflict

in interest in not seeking access to and purchases of less expensive Canadian gas supplies.[11]

Thus, we agree with PG&E that our focus should solely be based upon PG&E's actions, and we do not and cannot review the reasonableness of PGT's actions. However, whether or not PG&E was an affiliate of PGT, PG&E's purchasing decisions (i.e. beyond the 50% minimum bill level) and PG&E's action and inaction in FERC proceedings and contract negotiations obviously influence PGT. And we clearly have authority to review PG&E's actions.

As the FERC recently observed in its Order No. 636, LDCs' actions in FERC restructuring proceedings are not exempt from prudence challenges in proceedings before state regulatory commissions. (Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation; and Regulation of Natural Gas Pipelines After Wellhead Decontrol (1992) FERC Stats. & Regs. ¶ 30,939 at p.30,460 n.288.) Although PG&E and another LDC sought rehearing of this issue, in its Order No. 636-A the FERC rejected their arguments. The FERC explained that "LDCs will have some critical decisions to make during restructuring proceedings -- e.g. whether or not, or to what extent, to exercise their rights to reduce or terminate their sales entitlements under existing contracts, and arrange for alternate gas supplies. The [Federal Energy Regulatory] Commission does not intend to preempt state commissions from determining whether those customers were prudent in making those decisions during restructuring proceedings. This is consistent with the so-called 'Pike County doctrine' respecting purchasing decisions, not contrary to it." (Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing

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11. Even if PGT were not affiliated with PG&E, it is at least questionable whether PGT would have turned down such a request from its largest customer, who could also have filed a complaint with the FERC alleging undue discrimination by PGT.

Transactions Under Part 284 of the Commission's Regulations, Regulations of Natural Gas Pipelines After Partial Wellhead Decontrol and Order Denying Rehearing in Part, Granting Rehearing in Part, and Clarifying Order No. 636 (1992) FERC Stats. & Regs. ¶ 30,950 at p.30,656.)

We do not decide here the applicability of the Pike County exception in this proceeding. We find, however, that summary judgment on the preemptive effect of the filed-rate doctrine is inappropriate, because it is necessary to resolve numerous factual issues to determine whether the Pike County exception to the filed-rate doctrine is justified in the present case.

C. The Commission Did Not Err When It Rejected PG&E's Equitable Estoppel And Waiver Claims.

In its rehearing application, PG&E alleges that the Commission "erred in denying PG&E's motion on grounds of equitable estoppel and waiver because it: (1) failed to articulate a legally sustainable basis for its decision; (2) misapprehended the validity of President Hulett's letter and the letter's significance relative to PG&E's actions; and (3) misconstrued the breadth of the estoppel the Commission's conduct created." (Application for Rehearing, p. 27.) These estoppel and waiver arguments are without merit.

1. D.92-07-078 provides a legally sufficient justification for the rejection of PG&E's estoppel and waiver claims concerning the Commission's support and participation during the ERA's proceedings.

Generally, the Commission is required to set forth its underlying reasoning for each of the decisions it issues. The reasoned analysis should be sufficient to allow a reviewing court to determine whether the Commission has acted arbitrarily, and to inform a party why it lost. (See California Motor Transport Co. v. Public Utilities Com. (1963) 59 Cal.2d 270, 274; see also,

California Manufacturers Assn. v. Public Utilities Com. (1979) 24 Cal.3d 251, 259; Greyhound Lines, Inc. v. Public Utilities Com. (1967) 65 Cal.2d 811, 813.)

Contrary to PG&E's allegation, we did provide a legally sustainable justification for our rejection of PG&E's equitable estoppel and waiver arguments, which PG&E based on our support and participation in the ERA's proceedings on the import arrangements involving PGT and A&S. In D.92-02-078, we stated that our support of the import arrangement in 1982-85 that reduced PGT's previous take-or-pay liability and our silence in criticizing the import arrangement in 1988 and 1989 in no way bar us from reviewing the reasonableness of PG&E's Canadian gas purchases during 1988-1990. (D.92-02-078, pp. 21-22 (slip op.).) Further, we made reference in the decision to the fact that the proper forum for deciding the issue of PG&E's purchasing decisions is and has been our own proceedings. (Id. at p. 22 (slip op.).) D.92-07-078 also indicates that PG&E was well aware of this fact, but conveniently overlooked it for purposes of raising its equitable arguments. Hence, this is the reason for labeling this portion of PG&E's estoppel and waiver arguments "disingenuous". (Id.)

Consequently, we did explain our rejection of the estoppel and waiver claims which PG&E based on our role in the ERA's proceedings. This explanation amounted to more than a mere conclusory statement. It constituted a reasoned analysis which comports with the spirit of such decisions as California Motor Transport Co. v. Public Utilities Com. and California Manufacturers Assn. v. Public Utilities Com., supra.

We would also add that during these proceedings, we never represented, by our support or participation, that we were deciding prospectively or contemporaneously the reasonableness of PG&E's Canadian gas purchases, or that we were intentionally waiving our statutory duty or authority to review such purchases.

The issue during the ERA proceedings was whether the PGT import arrangements were in the public interest, and not

whether PG&E's Canadian gas purchases were reasonable under the Commission's own standards in reviewing the conduct of an LDC. The latter question is the very issue to be decided on the merits during the evidentiary hearing. Therefore, as previously stated, it is appropriate to review in an evidentiary hearing the price of all the Canadian natural gas imported into the California market and the choices faced by PG&E in light of the flexibility in the International Agreement which the ERA found to be in the public interest. Further, such a review would not be inconsistent with the ERA's orders.

For equitable estoppel, the following four elements must be present. "(1) The party to be estopped must be apprised of the facts, (2) he must intend that his conduct shall be acted on, or must so act that the other party has a right to believe it was so intended, (3) the other party must be ignorant of the true state of facts, and (4) he must rely on the conduct to his injury." (Longshore v. County of Ventura (1979) 25 Cal.3d 14, 28.)

Over the years, PG&E has participated in numerous Commission prudency reviews, such that the utility was well aware that the issue of the reasonableness of its Canadian gas purchases would be the subject of Commission proceedings. Thus, PG&E was not ignorant of the true state of facts -- that the prudency of its choices, e.g., as between different Canadian suppliers, had not been determined during the ERA's proceedings in which the Commission participated, and that PG&E's purchasing decisions would be reviewed in future Commission proceedings. Further, it is inconceivable that PG&E relied on the Commission's participation in the ERA's proceedings to its detriment. PG&E obviously knew that its purchasing decisions would be judged by Commission reasonableness review standards in future proceedings. Thus, several elements of equitable estoppel are missing, and PG&E's arguments on this equitable ground fail.

Further, it would be unreasonable to apply the doctrine of equitable estoppel to allow our support of an import

arrangement in 1982 to 1985 to bar further and future consideration of PG&E's conduct for the period of 1988 through 1990. No case law has applied the doctrine in such a manner.

Moreover, the mere participation of this Commission in the ERA proceedings between 1989 and 1990 and lack of criticism of the import arrangement does not preclude the Commission's reasonableness review. It would be unreasonable to conclude that the mere participation at the ERA's proceedings constituted a determination that PG&E's Canadian gas purchases were prudent. Such a conclusion would be an improper application of the doctrine of equitable estoppel because it would preclude us from performing our statutory duty to ensure that the actions of utilities are prudent, and that their rates are just and reasonable. (See Pub. Util. Code, §§451 & 761.)

The courts have not invoked the doctrine of estoppel to contravene constitutional and statutory provisions that define an agency's powers. (See Longshore v. County of Ventura, supra, 25 Cal.3d at p. 28.) Further, "neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public." (County of San Diego v. Cal. Water Etc. Co. (1947) 30 Cal.2d 817, 826; see also, City of Long Beach v. Mansell (1970) 3 Cal.3d 462, 493, which stated that it is a "well-established proposition that an estoppel will not be applied against the government if to do so would effectively nullify 'a strong rule of policy, adopted for the benefit of the public . . . .' ") To allow our support of the import arrangements during 1982 to 1985 and our participation between 1989 and 1990 in the ERA's proceedings to abrogate our statutory authority and duties would "defeat the effective operation of a policy adopted to protect the public." (County of San Diego v. Cal. Water Etc. Co., supra, 30 Cal.2d at p. 826.)

Further, we are charged with the regulation of public utilities such as PG&E. (See Pub. Util. Code, §216; see also, Cal. Const., art. 12, §3.) This regulation includes reviewing

the prudency of all purchasing decisions of the utilities to ensure that rates are just and reasonable. (See Pub. Util. Code, §§451 & 761. There has been no waiver of this statutory duty. "'Waiver is the intentional relinquishment of a known right.' (Citation omitted.)" (Guild Wineries & Distilleries v. Land Dynamics (1980) 103 Cal.App.3d 966, 977, emphasis in original; see also, Wienke v. Smith (1918) 179 Cal. 220, 226.) Therefore, waiver is inapplicable, because we never intentionally waived our statutory duty or authority to review the reasonableness of PG&E's Canadian gas purchases by participating in the ERA proceedings.

2. The Commission did not err when it refused to give estoppel effect to the Hulett letter.

As discussed above, the doctrine of estoppel will not be applied to "defeat the operation of a policy adopted to protect the public." (County of San Diego v. Cal. Water Etc. Co., supra, 30 Cal.2d at p. 826.") With limited exceptions, the law requires that the Commission "take action" as a collective body in noticed public meetings. (Pub. Util. Code, §306; Gov. Code, §§11120, 11122 & 11132.) To give estoppel effect to the Hulett letter would be an abrogation of the law which has been enacted to protect the rights of public to have the performance of our statutory duties be "open and public." (Pub. Util. Code, §306; Gov. Code §§11120, 11122 & 11132.) Further, we have never formally approved or ratified this letter in a subsequent Commission meeting or decision. (See El Camino Community College District v. Superior Court (1985) 173 Cal.App.3d 606, 612.)

PG&E was well aware that the law mandates that the Commission "take action" as a body in the "open" and in "public". Thus, having knowledge of these legal mandates, it was unreasonable for PG&E to allegedly rely on a letter written by a single commissioner which did not comport with the law as to what constitutes Commission action. Estoppel does not lie where a

party knows of the legal limitations on an individual to bind the entire body. (See id. at pp. 613-614.)

Moreover, the Hulett letter's support for continued importation of A&S gas did not constitute a representation of the reasonableness of PG&E's use of A&S gas to the exclusion of other importers. As we stated in D.92-07-078, it would not be reasonable to give the Hulett letter such an interpretation. (D.92-07-078, p. 23 (slip op.).) Thus, the reasonableness of PG&E's Canadian purchasing choices is still an issue for us to decide on the merits in the evidentiary hearing.

3. The Commission did not err in its rejection of PG&E's inference that the disallowance claims based on anticompetitive activities were subsumed in the Commission's support and participation in the ERA's proceedings and in D.88-12-099.

PG&E argues that we erred in rejecting the scope of the evidence presented in support of its estoppel claims. PG&E asserts that it was reasonable for it to infer that its Canadian gas purchasing practices were consistent with the public interest, and not anti-competitive as DRA claims. PG&E bases this assertion on the "Commission's overt support of PG&E's Canadian gas purchasing practices expressed during the ERA proceedings and its implied approval of these practices in Decision No. 88-12-099 in which the Commission affirmed the core-election program"; and the fact that PG&E allegedly carried out its Canadian gas arrangements consistent with D.88-12-099. (Application for Rehearing, p. 33.) In sum, PG&E claims that it could have reasonably relied upon our support, that by inference, we "found PG&E's Canadian gas purchasing practices consistent with the public interest," and thus this inference subsumes the disallowance claims based on anticompetitive activity. (Application for Rehearing, p. 34.)

PG&E's inference is plainly wrong. We never represented that we found PG&E's Canadian gas purchasing practices reasonable

or not anticompetitive either in our support and conduct during the ERA proceedings, or in D.88-12-099. As stated above, the inference drawn by PG&E would abrogate our statutory authority and obligation to review the prudency of PG&E's purchasing decisions in our own proceedings. (See Longshore v. County of Ventura, supra, 35 Cal.3d at p. 28.) Accordingly, equitable estoppel will not be invoked to allow such an abrogation.

**CONCLUSION:**

We have reviewed each and every argument presented by PG&E's application for rehearing of D.92-07-078. PG&E has failed to allege any facts or raise any legal issues which constitute error.

**THEREFORE, IT IS ORDERED**, for the reasons stated above:

1. The application by PG&E for rehearing of D.92-07-078 is hereby denied.

Dated October 21, 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, Executive Director