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Decision 95-07-012 July 6, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Utility Power Pool, Imperial Irrigation District, Union Pacific Fuels, Inc., and Meridian Oil, Inc. for Rehearing of Resolution G-3072 Regarding an Interim Intrastate Access Rate.	Application 93-08-022 (Filed August 9, 1993)
In the Matter of the Application of Southern California Gas Company for Authority to Revise its Rates Effective April 1, 1994, in its Biennial Cost Allocation Proceeding.	Application 93-09-006 (Filed September 1, 1993)

ORIGINAL

(See Decision 94-12-052 for appearances.)

I N D E X

OPINION ON PHASE 3 ISSUES

In this proceeding a group of shippers seeks refunds of approximately $3.8 million plus interest from Southern California Gas Company (SoCalGas), which denies that refunds are due. Public hearing was held before Administrative Law Judge Robert Barnett.

Background

We have previously set forth much of the background to this proceeding in Decision (D.) 94-01-048 in Application (A.) 93-08-022 (In D.93-02-055) 2d CPUC 2d, rehearing denied D.93-08-030, 3d CPUC 2d, and D.93-05-009, 4th CPUC 2d (Interconnection Decisions) we approved the interconnection of the Kern/Mojave[1] and Pacific Gas and Electric Company (PG&E) Expansion Project[2] pipelines with SoCalGas' pipeline system. We also found that the costs of additions and improvements to SoCalGas' system made to facilitate firm deliveries from the interconnection pipelines should be recovered from those who used the interconnection facilities, not from ratepayers generally. Thus, we ordered SoCalGas to charge an "incremental interconnection

1 The Kern/Mojave pipeline is a joint project of both Kern River Gas Transmission Company and Mojave Pipeline Company. Separate Kern River and Mojave pipelines run from Wyoming and Arizona, respectively, into California, where the common Kern/Mojave pipeline begins. One segment of the Kern/Mojave pipeline interconnects with SoCalGas' pipeline system at Wheeler Ridge.

2 "The PG&E Expansion facilities consist of 414 miles of 42- and 36-inch diameter pipeline and related compression facilities from an interconnection point with PGT at [the Oregon-California border] to SoCalGas' facilities in Kern County, California." (D.93-05-009 at p. 2 (mimeo).) The Pacific Gas Transmission (PGT) pipeline, the upstream portion of the PG&B Expansion, runs from the Canadian border near Kingsgate, British Columbia, to the Oregon-California border

rate" which would "be a surcharge on the SoCalGas existing system rate, as shippers moving gas from Kern/Mojave [and PG&E] through the interconnection will still be utilizing the SoCalGas existing system." (D.93-02-055 at pp. 12-13 (mimeo.); D.93-05-009 at p. 18 (mimeo.).)

On May 7, 1993 SoCalGas filed Advice Letter 2176 requesting, among other things, approval of an "Interconnect Access Service" charge. The charge was to be applicable to "natural gas transportation deliveries nominated by shippers into the Utility's intrastate system at the Wheeler Ridge and Kern River Station points of receipt." (SoCalGas Schedule G-ITC, Sheet 1.) The tariff further specified charges for firm and interruptible service, a fuel charge, and other terms and conditions, including a provision that firm access be provided only under the terms of an Access Agreement which was also filed with Advice Letter 2176. SoCalGas's tariff indicated that it was interim in nature and subject to adjustment and refund.

The Commission Advisory and Compliance Division received a number of protests to Advice Letter 2176. Resolution G-3072 ordered modifications that were suggested in the protests and agreed to by SoCalGas. Resolution G-3072 further ordered certain changes in the rate design of the Interconnection Access Service charge because those changes could not be made at a later date. Other protest issues, which presented issues of adjustment to the final rate, were deferred to SoCalGas' next cost allocation proceeding. Resolution G-3072 affirmed that the tariff was interim in nature and subject to refund. Thus, the protest issues could be adjudicated in the cost allocation proceeding.

Southern California Utility Power Pool and Imperial Irrigation District (SCUPP/IID), Union Pacific Fuels, Inc., and Meridian Oil, Inc. applied for rehearing of Resolution G-3072. As a result of that application for rehearing we issued D.94-01-048 in which we held that the tariff containing the Interconnection

rate" which would "be a surcharge on the SoCalGas existing system rate, as shippers moving gas from Kern/Mojave [and PG&E] through the interconnection will still be utilizing the SoCalGas existing system." (D.93-02-055 at pp. 12-13 (mimeo.); D.93-05-009 at p. 18 (mimeo.).)

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Access Service charge conflicted with our previous decisions in this matter. For this reason, the tariff was annulled. We ordered SoCalGas to file a new tariff in compliance with our previous decisions. Further, SoCalGas was ordered to refund all Interconnection Access Service charges collected under its defective tariff. Finally, we consolidated A.93-08-022 with SoCalGas' cost allocation proceeding (A.93-09-006) to allocate the costs of interconnection facilities that were not recovered as a result of D.94-01-048.

Shortly after issuance of D.94-01-048 the Executive Director extended time for compliance with the refund provisions of the decision. The Division of Ratepayer Advocates (DRA), prior to the time D.94-01-048 became final, filed a petition for modification of the decision and requested an emergency stay of the decision's refund provisions. In D.94-04-087, we granted the emergency stay until such time as we issued an order disposing of DRA's petition.

We disposed of DRA's petition in D.94-09-038, ordering further hearings to be held to consider the use of the Interconnection Facilities by upstream shippers, the refund provisions of D.94-01-048, and necessary ancillary issues. We continued the stay order regarding refunds until a new decision is issued. In D.95-02-045 we denied rehearing of D.94-09-038. Further hearings having been held, the matter is ripe for decision.

The relevant dates for the refund period at issue in this case are July 13, 1993 through December 31, 1993. SoCalGas began to charge for the service at Wheeler Ridge on July 13, 1993. The end date for the refund period is December 31, 1993. Although the Commission annulled the tariff on January 19, 1994, SoCalGas had not yet billed for services rendered at Wheeler Ridge when the annulment order was issued. Therefore, the amount that had not been recovered from January 1 to January 19 was reflected in the Interconnect Charge Memorandum Account (ICMA).

The Final Order Issue

We have set out the procedural history of this dispute at some length to show that a final order on refunds has never been issued. Resolution G-3072 approving an access charge tariff was a lawful order of the Commission; a timely application for rehearing challenged its consistency with prior decisions and caused us to annul the tariff (and order refunds); a timely petition for modification caused us to stay the refund order and order further hearings. There has never been a final order in this proceeding. Under these circumstances we have ample authority to review and modify D.94-01-048, the decision ordering refunds. An order of the Commission which has been challenged by an application for rehearing does not become a final order until the disposition of the application for rehearing. (Public Utilities (PU) Code § 1731; City of Los Angeles v. PUC (1975) 15 C 3d 680, 707.) And an order made in response to an application for rehearing itself is subject to a further application for rehearing. (PU Code § 1736; City of Los Angeles v. PUC (1975) 15 C 3d 680, 707.) The same result occurs if, prior to our order becoming final, a petition for modification is filed and acted upon. (PU Code § 1708; see, Sale v. Railroad Comm. (1940) 15 C 2d 612, 616.) The function of the timely filed application for rehearing or petition for modification is to permit the Commission to review its decisions and correct errors, when found, prior to appellate review. Because of the severe consequences which could result from applying the prohibition against retroactive ratemaking to a final rate order, it is imperative that the Commission have the authority to correct its decisions prior to finality. We recognized our jurisdiction to modify D.94-01-048 when, in reopening this matter for further hearings, we said: "Here, several circumstances justify reopening this proceeding. [D.94-01-048] reserved jurisdiction over the portion of the issues related to cost allocation relating to refunds and the refunds in this matter have

not yet been paid and are being tracked in a memorandum account. (D.94-01-048 at p. 6.) We believe it is appropriate to consider these questions as part of our further consideration of cost allocation issues. (D.94-01-048) was also issued in a docket where no record existed and we believe it is now appropriate to develop a factual record. In addition, the concerns which often prompt us to refrain from reexamining matters previously decided are not as strongly present here, where we seek to implement our rate policy rather than to adjudicate a dispute between parties." (D.94-09-038 at p. 7 (footnote) emphasis added.) Having considered the facts adduced at the further hearing, we are persuaded that our refund order in D.94-01-048 was in error and should be rescinded.

Shippers as Customers

In D.94-01-048 we determined that some interstate shippers - those to whom refunds were ordered - were not customers of SoCalGas and should not have been charged an access fee. We said, "Instead of charging its own customers, SoCalGas has chosen to charge the customers of the interconnecting pipelines. In the case of interstate shippers on the Kern/Mojave pipeline, SCG's tariff is too broad; it may charge shippers who will not be SoCalGas customers." (D.94-01-048, mimeo. p. 4.) We based our statement on the arguments raised by the parties, not on any evidence taken at a hearing. We now have the benefit of a public hearing and find that the facts are quite different from what we had been led to believe. It is quite clear that there are no interstate shipments involved; all are intrastate. It is also quite clear that the shippers who seek refunds are all customers of SoCalGas who shipped gas in intrastate commerce over the Wheeler Ridge interconnect.

The witness for SoCalGas testified:

> "Q. [By Edison counsel] . . . How an interstate shipper on a hypothetical day, August 1st of 1993, when this tariff was in place, how that interstate shipper would nominate gas

and how that gas would ultimately end up at Edison's burner tip?

"A. The interstate pipeline shipper would utilize the electronic bulletin board or fax to notify SoCal of the volume of gas they were planning to deliver to the interconnection point, and at that point, they would also indicate which end-use customers they were delivering that gas to.

"At that point, the gas would be delivered to the SoCalGas system and transported on the SoCalGas system under an intrastate transmission agreement entered into by the end-use customer. That gas would travel from the point of interconnection to the end use facility and through the meter to the customer.

"Q. In that scenario, who calls SoCalGas and says I have some volumes to nominate, the end-use customer or the interstate shipper?

"A. The interstate pipeline shipper.

"Q. And who is in control of the gas when it is delivered to the Wheeler Ridge facility?

"A. The interstate pipeline shipper.

"Q. And...when they advise you or nominate gas via the electronic bullet board or fax, are they advised that there is some form or some type of access fee for entering SoCalGas's system?

"A. Not at each time they make the nomination. But the first time they made a nomination after the fee had been placed and GITO tariff had been approved, they were at that time notified that there was a fee, what that fee would be, and asked to provide a billing address for payment.

"ALJ BARNETT: I want to go one step further. After you get the nomination, I believe you

said you then confirmit with your customer/ your end-use customer?

"THE WITNESS: Right. And the reason for that is a physical one. Because we have so much interstate pipeline capacity coming through the territory in the PG&E expansion and the Kern, Mojave Pipeline, there's far more capacity coming in than SoCal has within it is system.

"So we have to insure that there is a place to put all the gas that is delivered, and that's where the nomination and confirmation process comes in. We have an end-use customer that can consume it or a storage facility that can take it, and we confirm the nominations for a reason.

"ALJ BARNETT: And who do you bill

"THE WITNESS: For the intrastate transmission portion we bill the end-use customer. For the access portion during the period in question July of '93 through January of '94, we bill the interstate pipeline shipper for the gas they nominated for access." (Reporters Tr. pp. 2398-2400.)

The witness for Can West Gas Supply USA, Inc. (CanWest) testified:

"Q. When CanWest offers gas to end users in California, is that offered price a bundled or unbundled price including Wheeler Ridge or not?

"A. Our contract structure was such that the price, was a bundled price, that the price-- prices offered to customers were computed in many factors. And that basically is it.

"Q. Did SoCalGas bill you for the access fee?

"A. Yes, they did.

"Q. And you paid the bill with it to SoCal?

"A. Yes, we paid the bills to SoCal. . . . We paid all access fee charges to SoCal." (Reporter's Tr. pp. 2293-94.)

During questioning by Edison's counsel the witness for the Indicated Producers said that all of her clients were interstate shippers.

"Q. And they do ship gas to Wheeler Ridge?

"A. Yes. All of the clients have shipped and, in fact, shipped volumes to Wheeler Ridge during the refund period.

"Q. And I was not trying to make a distinction as when the title changed, but they got to the doorstep at Wheeler Ridge, so to speak?

"A. Yes. The delivery point was Wheeler Ridge.

"Q. And in so doing, would they nominate a volume and the date of delivery to SoCalGas?

"A. Yes, that definitely was the standard. I have seen nomination sheets for some of the shippers, and as such as described yesterday by SoCal's witness, they would send information to SoCal regarding the customers for which the gas was nominated to cross the SoCal system.

"Q. For example, in August of 1993, when they would make that -- make such a nomination, they would have been aware, would they not, that there was some type or form of access fee at Wheeler Ridge?

"A. Certainly the shippers were aware and, in fact, were paying their invoices under protest and had filed -- a number of them had filed a petition for rehearing and had filed motions before FERC for the relief.

"Q. But yet, they were still aware that there was a fee, that SoCal was imposing a fee for access?

"A. They were very aware that there was a fee.

(Reporter's Tr. pp. 2293-94.)

"Q. And they, aware of that, elected to go forward and use Wheeler Ridge facilities they did ship gas into?

"A. There is no denying that my clients shipped volumes of gas during the months of July through December 1993." (Reporter's Tr. pp. 2460-62.)

Exhibit 16 consists of a number of pages of nominations by shippers in this proceeding to SoCalGas of amounts of gas to be delivered by the shippers to SoCalGas for delivery by SoCalGas to end users on SoCalGas' system. One such nomination is attached as Appendix A. It shows a nomination by Shell Western (one of the Indicated Producers) on October 27, 1993 of 23,059 MMBtu for delivery to SoCalGas at Wheeler Ridge (Code 1007) on November 2, 1993. (The end user's name has been deleted from the exhibit in the interest of confidentiality.)

The Indicated Producers contend that the conclusion that interstate shippers become customers of SoCalGas by virtue of nominating at Wheeler Ridge is incorrect. It argues that interstate shippers do not become customers of SoCalGas merely by nominating deliveries into SoCalGas' system; an interstate shipper cannot nominate deliveries on its own behalf on SoCalGas' system. SoCalGas' witness admitted that only an interstate shipper that also had an agreement with SoCalGas for storage or transmission could nominate on its own behalf to SoCalGas' system. It is the end-use customers' transmission rights that are used to transport gas on SoCalGas' system, not any real or imagined rights that may vest in the interstate shipper. Therefore, imposition of the surcharge upon interstate shippers is inappropriate.

In the Indicated Producers' case, it points out, each shipper transported volumes to Wheeler Ridge; for at least some of the volumes, however, they did not continue to transport the gas through the interconnect as a SoCalGas customer. Amoco and UPFI, for example, did not have access agreements for use of the Wheeler

Ridge facilities or downstream rights on SoCalGas' system during the Refund Period, and therefore, they were not SoCalGas' customers. Similarly, many of the volumes delivered by Shell, Mobil, and Chevron were not transported using these shippers' own downstream rights, but rather, were shipped using the downstream rights of other end-use customers. Imposition of the surcharge on the interstate shippers for these volumes would, therefore, also be improper because they were not acting as SoCalGas customers for these volumes. In slightly different form, other nominators also claim they are not customers of SoCalGas. CanWest and Petro-Canada assert that as interstate-only shippers they were not customers of SoCalGas. They had neither an explicit nor an implicit contractual arrangement with SoCalGas. As interstate shippers they made periodic nominations to SoCalGas that identified gas that was shipped to the SoCalGas system for redelivery by SoCalGas to individual end-use customers. Nominations of gas volumes delivered to the SoCalGas system did not create a customer relationship between CanWest and Petro-Canada, on the one hand, and SoCalGas, on the other hand. They argue that it is because CanWest and Petro-Canada had no customer relationship with SoCalGas that SoCalGas should not have imposed Schedule G-ITC charges upon these interstate-only shippers. For deliveries over the SoCalGas intrastate system (including the interconnection facilities), the customers were the core and noncore end users on the SoCalGas system that received transportation only service from SoCalGas. They strongly disagree that a contract between an interstate shipper and SoCalGas was created when the interstate shipper chose to make deliveries to SoCalGas when the shipper was aware of the existence of the access fee. In their opinion no contract was created because, first, SoCalGas provided no service to the interstate shipper, and second, because the payments were made at a time when the lawfulness of the

access fee was subject to protest through applications for rehearing of Resolution G-3072.

They claim that SoCalGas provided no consideration for the payment. SoCalGas did not promise to do anything in exchange for remittance of the G-ITC charge. Rather, SoCalGas' contract was with the end-use customer. In exchange for the end-use customer's agreement to pay the intrastate transportation rate under SoCalGas' applicable tariff, SoCalGas agreed to ship the customer's gas from the interconnection with the interstate pipeline to the customer's burnertip. (See SoCalGas Rule 30, Paragraph A.1.) No service was being provided to the interstate shipper.

It is obvious to us that these nominators are customers of SoCalGas; service was provided to the interstate shipper. In California they nominate in writing to SoCalGas for SoCalGas to transport gas to be delivered by the nominator to SoCalGas at Wheeler Ridge; the destination of the gas is the facility of the end user; the shippers agree to pay SoCalGas' access charge; SoCalGas accepts the nomination; they deliver the gas to SoCalGas in California at Wheeler Ridge; SoCalGas accepts the gas in accordance with the terms of the nomination and transports it to the end user in California; SoCalGas bills the nominator for the access charge; the nominator pays the access charge. On these facts, we cannot reach any conclusion other than that the nominators are customers of SoCalGas.

Ownership of the Gas

In regard to the obligation to pay the access charge our discussion in D.94-09-038 placed emphasis on the ownership of the gas as it was transported on SoCalGas' system. We ordered further hearings to consider:

> "(i) the identity of those shippers who use the Interconnection Facilities and the extent to which upstream shippers are also shippers over the Interconnection Facilities in their intrastate capacities; (ii) whether the refunds ordered in D.94-01-048 should be modified to

> take into account whether some shippers would have paid the interconnection rate no matter which tariff was in place; and (iii) such ancillary issues which, in the discretion of the Administrative Law Judge, it may be necessary to consider if it appears we should alter our refund order."

We also wished "to clarify the relationship between, on the one hand, the shippers who use the (SoCalGas) facilities at issue here and, on the other hand, shippers on the non-SoCalGas pipelines upstream of the SoCalGas facilities." (Decision mimeo. at p. 2.) Upon review of our prior orders in this matter, we said: "We choose not to ignore our previous statement and to interpret it in accordance with its plain meaning: 'put bluntly, the costs of the Interconnection Facilities should be paid by those who own the gas that travels through them.'" But by emphasizing ownership we did not mean to suggest that participants in the gas marketplace could not agree to allocate these costs as they choose, nor did we intend to ignore the relationship between upstream shippers and end users.

Some parties seeking refunds place great emphasis on the ownership issue, and all who were not end-users assert that title to the gas passed to the end users just prior to the gas' entry into the SoCalGas system. The CanWest witness and the Petro-Canada witness both testified that their companies did not own or control the gas (which they had sold to SoCalGas customers) after the gas was delivered to the interconnection between the Kern River pipeline and the SoCalGas system. They said that the delivery point for these gas sales was the interconnection between the Kern River pipeline and the SoCalGas system; title to the gas passed from CanWest and Petro-Canada to the customers at the delivery point. They made their nominations on behalf of end-users.

They claim that both the Commission's rules and SoCalGas' tariff provisions (Rule 30)[3] make it clear that CanWest and Petro-Canada, as suppliers, could not have owned the gas (held title to the gas) when the gas was shipped on the SoCalGas system. Because neither CanWest nor Petro-Canada is an end-use customer on the SoCalGas system, and because neither CanWest nor Petro-Canada holds storage rights on the SoCalGas system, neither of these suppliers has the right to hold title to the gas while the gas is on the SoCalGas system. They assert that any nomination made by a supplier for deliveries on SoCalGas' intrastate system must be made on behalf of a specific customer. Meridian claims that by contract title to Meridian's gas passed to end-use customers at Wheeler Ridge prior to its entering SoCalGas' facilities.

The Indicated Producers' argument is to the same effect, but with a twist. Indicated Producers' brief states:

> "In the case of Indicated Producer members Amoco and UPPI, since they did not hold downstream rights on SoCalGas' system, they could not continue to own the gas as it flowed on SoCalGas' system. All Amoco and UPPI volumes were delivered to the Wheeler Ridge interconnect where title passed to another entity who was the transporter on SoCalGas' intrastate system. Indicated Producer members Chevron, Mobil, and SWEPI delivered volumes to the Wheeler Ridge interconnect where title passed to another entity for a portion of those volumes, with the balance of the volumes being shipped across SoCalGas' system by the respective producers for use in their own facilities."

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3 Rule 30, Paragraph A.1, provides that "the customer will deliver or cause to be delivered to the Utility and accept on redelivery quantities of customer-owned gas." Under Rule 1, "customer-owned gas" is defined as "[n]atural gas transported by the Utility for customer's own use where title to such natural gas is held by the customer."

In an apparent contradiction to its emphasis on title passing, Indicated Producers also assert that the issue of where title passes presents a number of problems. The current Wheeler Ridge access tariff has no such requirement. In fact, such a criterion seems in conflict with SoCalGas' current criteria and is inconsistent with its current practices. SoCalGas does not currently require a shipper to demonstrate where title passes and the Commission should not retroactively impose this criterion. It is unfortunate that so much emphasis has been placed on the issue of where title passes as it pertains to gas ownership. D.94-09-038, with its discussion of ownership, did its share in emphasizing a minor consideration. What we wished to convey was that the owners of the gas should bear the cost of the interconnect facilities, but we did not specify how those costs were to be paid. We said: "We do not mean to suggest, however, that participants in the gas marketplace may not agree to allocate these costs as they choose." (D.94-09-038, p. 4, footnote 3.) As Indicated Producers aptly state: "SoCalGas does not currently require a shipper to demonstrate where title passes and the Commission should not retroactively impose this criteria." (Indicated Producers' brief p. 26.) We agree with Indicated Producers' statement. It would be an intolerable (and irrelevant) exercise for SoCalGas to demand proof of title before it accepts gas. We are not going to impose this criterion and to the extent D.94-09-038 appears to require it, the decision is disapproved.

We thought we had made clear in D.94-09-038 that it was use of the facilities, not ownership of gas, that generated the obligation to pay the access charge. "In the Interconnection Decisions we concluded that shippers should decide whether or not they wished to use the Interconnection Facilities, and if they used them, they should pay for them." The holding that those shippers who move gas over the Interconnection Facilities are responsible for its costs is entirely consistent with this policy.

Shippers who use the Interconnection Facilities are SoCalGas customers by virtue of their use of those facilities, not because they may also be end users." (D.94-09-038, p. 6, emphasis added.)

Our concern with ownership of the gas is to ensure that no person other than a user of the interconnect facility pays any part of the incremental cost of the facility. But ownership is not the issue; use of the facilities is. We certainly do not expect SoCalGas to station a lawyer at the facility to review all shipper-end user contracts to determine ownership of the gas as the molecules pass through Wheeler Ridge. The shippers who testified were candid. They testified that the contract price was a bundled price which included the interconnect facility surcharge.[4]

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4 The shippers who testified represented CanWest and Petro-Canada. Meridian's witness did not testify. His testimony (Exhibit 15) was received by stipulation. There was no cross-examination. His substantive testimony in its entirety is:

> "All of Meridian's Gas Sales and Purchase Agreements for deliveries of gas to Meridian's California end use customers at Wheeler Ridge ('Contracts') provided that the gas Meridian sold and delivered would be delivered and received at the interconnect of the facilities of Mojave Pipeline Company and SoCalGas at Wheeler Ridge and that title to the gas would pass to Meridian's customers at that point. Meridian lost title to its gas sold and purchased at that point and its California non core customers took and held title to such gas upon its entry into and travelling through SoCalGas' facilities at Wheeler Ridge.
>
> "All of Meridian's Contracts not only did not allow Meridian to collect from or pass through any access fee which SoCalGas charged Meridian for access to their Wheeler Ridge Facilities but also actually prohibited any such collection or passthrough."

(Footnote continues on next page)

Whether we consider the shipper a customer of SoCalGas or the designee of the end user (and logically it had to be one or the other; if it was not acting for an end user it was acting for itself) the owner of the gas paid the charge.

If ownership is the burning issue, as some contend, then the law is on the side of SoCalGas. SoCalGas had no reason to know where title to the gas passed. It did not review the contract between shipper and end user. We do not require such review and the contracting parties desire contractual confidentiality. Title passes according to the agreement of seller and buyer. Calif. Com. Code § 2401 states, in part:

> "(1) Title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.
>
> "(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any

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(Footnote continued from previous page)

The contracts were not offered by Meridian. But even if they had been, and were exactly as testified, we could not find that the Wheeler Ridge access fee was not bundled into the consideration paid by the end-use customer. Such a finding would defy common sense and our knowledge of competitive market principles. (See, for example, the testimony of the PetroCanada witness, Tr. p. 2503, l. 19 through p. 2505, l. 26.) We are not bound to accept unchallenged testimony.

(Footnote continues on next page)

reservation of a security interest by the bill of lading

(a) If the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; but

(b) If the contract requires delivery at destination, title passes on tender there."

Under ordinary circumstances title to goods passes when the goods have arrived at destination. The California Supreme Court has held:

> "Whether or not delivery to a carrier constitutes delivery to the buyer depends upon the intention of the parties as ascertained from the contract and the other circumstances of the case; and ordinarily, unless a contrary intent appears, where the seller contracts to deliver goods at a given destination and he delivers them to a carrier consigned to the buyer with freight charges paid by the seller (f.o.b. point of destination), the delivery to the carrier does not constitute delivery to the buyer and title does not pass until the goods have arrived at their destination. (See Lewis vs. Farmers Grain etc. Co., 52 Cal.App. 211, 214 [198 P. 426]; 1 Williston on Sales [2d ed. 1924] §§ 280-280b; 46 Am.Jur. 349-350, 609; 101 A.L.R. 292, 295 et seq.; cf. Civ. Code §§ 1738, 1739 [rule 5], 1766; Sales Tax Ruling No. 26, supra.) The rule is based upon the theory that in such event the carrier is made the agent of the seller, not the buyer, in transporting the property." (Standard Oil Co. v. Johnson (1944) 24 C 2d 40, 45-46.)

The interstate shippers own the gas, by their own admission, at the time they nominate it for shipment over Wheeler Ridge; further, they say that the nominations are made on behalf of specific customers; the interstate shippers pay the access charge;

finally, they concede that their price to their customers is a bundled price which includes the access charge. No matter how the transaction is viewed, the owner of the gas has paid for the transportation over Wheeler Ridge.

Resolution G-3072 Tariff Shippers

In D.94-01-048 we annulled SoCalGas' interconnect tariff because the "access charge applies to shippers in their capacity as Kern/Mojave or PG&E shippers, not as SoCalGas shippers" (at p. 4).

Having heard the witnesses and considered the evidence regarding how gas is shipped over Wheeler Ridge, we now turn to review the tariff which we had approved in Resolution G-3072 and later declared invalid in D.94-01-048. In pertinent part it stated:

"Schedule No. G-ITC, Interconnect Access Service

"Applicability

"Applicable for natural gas transportation deliveries nominated by shippers into the Utility's intrastate system at the Wheeler Ridge and Kern River Station points of receipt ('interconnects') with the interstate pipeline systems of Kern River Gas Transmission Company, Mojave Pipeline Company and the Pacific Gas and Electric Company Expansion project."

The current tariff approved by the Commission states:

"Schedule No. G-ITC, Interconnect Access Service

"Applicability

"Applicable for natural gas transportation deliveries nominated by or on behalf of intrastate shippers (customers) into the Utility's intrastate system at the Wheeler Ridge and/or Kern River Station points of receipt ('interconnects') with the interstate pipeline systems of Kern River Gas Transmission Company, Mojave Pipeline Company and the Pacific Gas and Electric Company Expansion project. The charge is also applicable to volumes designated for storage and for core aggregation service."

The difference between the two tariffs is in the opening words:

Bad: "Applicable for natural gas transportation deliveries nominated by shippers into the Utility's intrastate system."

Good: "Applicable for natural gas transportation deliveries nominated by or on behalf of intrastate shippers (customers) into the Utility's intrastate system..." (Emphasis added.)

It is now apparent to us that in D.94-01-048 too much emphasis was placed on the magic of words and no consideration was given to the real world. We sought to correct this in D.94-09-038, when we ordered further hearings to find facts. We have now found those facts, we reconsider D.94-01-048 in the light of standard rules of tariff construction, and conclude that the interstate shippers were shippers within the meaning of the tariff approved in Resolution G-3072, used the facilities, and should pay the tariff rates.

The rules and principles of tariff construction that must be applied are well settled. SoCalGas is under a duty to comply with its filed and effective tariffs. (Johnson v. PT&T Co. (1969) 69 CPUC 290, 297; J. Richard Co. v. San Gabriel Valley Water Co. (1951) 50 CPUC 545, 550.) And shippers are similarly bound. (Sunny Sally, Inc. v. Lom Thompson (1958) 56 CPUC 552 (abstract).) While it is a general rule of tariff interpretation that any ambiguities or uncertainties in a tariff must be resolved in favor of the party obligated to pay the tariff charges (Lennox Industries, Inc. v. California Cartage Co. (1980) 4 CPUC 2d 26), "the ambiguity must be a reasonable one. In the exercise of its discretion the Commission may determine whether an interpretation of a tariff rule, as sought, is reasonable. Accordingly, such claimed ambiguities must have a substantial basis and be considered

in light of Commission decisions which set forth the policy on the matter in dispute." (Pacific Gas and Electric Company (1985) 19 CPUC 2d 105, 110.) In addition, "a tariff should be given a fair and reasonable construction and not a strained or unnatural one..." (Hargraves Secret Service v. PT&T (1975) 78 CPUC 201, 204.)

> "Under generally recognized rules of tariff interpretation the tariff should be given a fair and reasonable construction and not a strained or unnatural one. All the pertinent provisions of the tariff should be considered together, and if provisions may be said to express the intention of the framers under a fair and reasonable construction, that intention should be given effect; and constructions which render some provisions of the tariff a nullity and which produce absurd or unreasonable results should be avoided..." (Emphasis added.) (Vultee Aircraft Corp. v. Atchison, Topeka & Santa Fe Railway Co. (1945) 46 Cal.RRC 147, 149; see also Sunland Refining Corp. v. Southern Tank Lines (1976) 80 CPUC 806, 814; California Chemical Co. v. So. Pac Co. (1965) 64 CPUC 590, 596.)
>
> Words in a tariff must be construed in context.

Interpretive constructions which defy common sense or lead to mischief or absurdity are to be avoided. (Calif. Mfgrs. Assn. v. PUC (1979) 24 Cal 3d 836, 844.)

The pivotal words of the annulled tariff are "deliveries nominated by shippers." The evidence produced at the hearing shows unequivocally that all of the parties seeking refunds are shippers who nominated natural gas deliveries. The two largest shippers, Edison and SDG&E, admit they are shippers and do not seek refunds; their position is refunds should be denied to all. The other shippers admit they are shippers (albeit interstate shippers), admit they nominated natural gas deliveries to SoCalGas, admit they delivered gas to SoCalGas at Wheeler Ridge, admit they requested SoCalGas to transport the gas to end users, admit that in many instances they were shipping to themselves, and admit they agreed

to pay the tariff rate for the interconnect service at Wheeler Ridge. To say that these shippers are not "shippers" within the meaning of Resolution G-3072 defies common sense, is absurd, and will lead to the mischief discussed below in the Refund Section, a result which should be avoided. (Calif. Mfgrs. Assoc. v. PUC (supra) at 844.)

The argument that they are "interstate" shippers who do not ship over SoCalGas' system and, therefore, are exempt from the tariff is belied by the facts. The nominations are received in California and accepted in California, the gas is delivered in California, the gas is transported in California pursuant to the nomination to California end-users. Nothing more is required to show that the shippers are, in fact, intrastate shippers, shippers within the scope of the tariff.

Let us assume a contrary set of facts. The interstate shippers nominate shipments to be delivered in Los Angeles through Wheeler Ridge and offer to pay the access charge. SoCalGas refuses to accept the nominations because the interstate shippers are not "shippers" or "customers" within the meaning of SoCalGas' tariff. The interstate shippers sue to require SoCalGas' acceptance of the shipments. It is difficult to imagine this Commission's refusing to order SoCalGas to accept the shipments.

We are mindful that the customers seeking refunds are customers of an interstate pipeline subject to regulation by the Federal Energy Regulatory Commission (FERC) as well as customers of SoCalGas. However, we cannot conclude that their status as interstate pipeline shippers immunizes them from having to pay "just and reasonable" charges for service they have in fact received from a state regulated Hinshaw pipeline. The issue here is whether customers of a state regulated Hinshaw pipeline -- whether or not they may also be customers of a FERC-regulated interstate pipeline -- should be required to pay a state regulated entity for services rendered. We conclude that they should. We are unwilling

to assume that the FERC would countenance such parties' unjust enrichment solely by reason of their status as customers of an interstate pipeline. We were in error in annulling Resolution G-3072. We will rescind D.94-01-048, SoCalGas' current interconnect tariff may remain in effect as it changes nothing.

Refunds and Equitable Considerations

D.94-09-038, Ordering Paragraph 1, ordered further hearings to consider, among other things, the refund provisions of D.94-01-048. We said, "Upstream shippers who were also interconnection shippers in their intrastate role would have paid the interconnection rate had a narrower tariff been in place. We wish to consider whether refunds to these shippers would constitute a windfall. Reexamination of these issues may indicate that the refunds granted in the Decision [D.94-01-048] were redundant." (D.94-09-038, at p. 6.)

SoCalGas and DRA argue that no refunds should be ordered; and Edison and SDG&E, the two largest shippers over the interconnect during the period in question and the largest beneficiaries of refunds, say that refunds should not be ordered. In D.94-09-038 we said that the further hearing should address "the effect of City of Los Angeles v. PUC (1972) 7 C.3d 331, 356 on our decision to grant refunds." (At p. 8.) We have discussed above whether City of Los Angeles mandates refunds in the absence of a final order of the Commission and concluded that it does not. We now consider City of Los Angeles as it provides guidance regarding the standards to be applied when determining whether to order refunds where we have discretion. In City of Los Angeles, when ordering approximately $80,000,000 in refunds, the Court took equitable principles into consideration. It said any inequity would not result from the refund because the record did not "not demonstrate that the increased rates are necessitated by changes since the 1968 rate proceeding in the relationship of

revenue and expense of the utility." (7 C 3d 331, 357-8.) In the case of Wheeler Ridge an inequity most certainly would result if refunds were granted. There has been a change since SoCalGas' last rate case of an increase of over $40,000,000 in SoCalGas' expenses to pay for the Wheeler Ridge facilities. With refunds ordered there is no offsetting revenue. In City of Los Angeles there was a prior tariff in effect. When the Court annulled the new tariff the parties simply had to pay the old rate. In this case there is no prior tariff, consequently there is no prior rate. Those who used the facilities would be receiving free service. The entire refund in City of Los Angeles was due to a rate increase caused by "changes in accounting principles and accounting evaluations made by the Commission" (7 C 3d at 358). In this proceeding the entire rate increase was due to the investment in a $40,000,000 interconnection facility. Hard dollars, not accounting legerdemain. City of Los Angeles lends no support for a refund order in this proceeding.

Equitable considerations are especially important in this case simply because by approving a refund some shippers will receive free service, some will be compensated twice, and the ratepayers will be unfairly charged for a service they did not use. If we were to refund to those interstate shippers who were not end users they would receive a windfall as they have already collected the access charge from the end user in their bundled rate. If we were to refund to those interstate shippers who were also end users, they would have received free access. If we were to order SoCalGas to collect the access fee from end users, those who paid a bundled rate would pay twice; those who shipped to themselves would merely repay.

It is important to note that both Edison and SDG&E, the two largest shippers, are opposed to any refunds for anyone. They used the facilities and they are willing to pay for that use; they expect others to do the same.

If we were to order refunds and permit SoCalGas to recover those refunds through a balancing account, it would be unfair to Edison and SDG&B. As they point out, during the refund period they shipped approximately 17% of the volumes across Wheeler Ridge. Today, they ship approximately 40% of the volumes. For SoCalGas to recover the refunded amount in current rates, Edison and SDG&B would pay 40% of that amount after having caused only 17% of the costs. An inequitable result. Further, as the rates paid by Edison and SDG&B are passed through to their ratepayers, the result would be the ratepayers of Edison and SDG&B paying the refunds to the interstate shippers. A grossly inequitable result.

Motion for Sanctions

Meridian moves to impose sanctions on SoCalGas and its counsel, David B. Follett (Follett). Meridian further asks that we direct SoCalGas to amend its opening brief to correct at worst intentionally false statements or at best carelessly misleading statements of fact contained therein, and to award Meridian its costs and attorney fees incurred in bringing this motion.

Meridian alleges that SoCalGas' false or misleading statements in its brief pertain to the issues of (a) where title to the gas transported by Meridian passed to its end-use customers on SoCalGas' system and (b) whether Meridian will receive a windfall should the Commission order reimbursement of Wheeler Ridge access fees paid to SoCalGas by Meridian. Specifically, in support of its position that refunds should not be given to any shippers, including Meridian, SoCalGas states:

> "[T]he Commission must also note that not one of the shippers seeking refunds has entered documentary evidence into the record to prove that it did not own the gas as it traveled through the facilities and therefore did not use the facilities. By this omission, they have failed to rebut the conclusion that they owned the gas as it went through the facilities, just as they owned the gas they

shipped on the interstate pipeline." (Brief at p. 9.)

Additionally, in the brief's conclusion SoCalGas states:

"Finally, there is no documentary record evidence whatsoever that these shippers did not hold title to the gas nominated for delivery at Wheeler Ridge as it entered and was processed through the facilities." (Brief at p. 20.)

Also in support of its position, SoCalGas states in its brief:

"Since they made no effort to prove otherwise, it has to be assumed that, like any other business, these shippers passed the access fee along to their customers. Since they are already presumed to have recovered the fee, to now confer refunds upon these same shippers would only cause their unjust enrichment at the expense of others." (Brief at pp. 20-21.)

Meridian asserts, contrary to the brief's statements, (1) that it did in fact enter evidence into the record to prove that it did not own the gas as it traveled through the facilities and (2) that it did not pass through the Wheeler Ridge charge to its customers. Meridian points out that not only did it enter this evidence into the record, but also Follett examined the contracts themselves and stipulated on the record that he was satisfied Meridian had demonstrated that title passed at Wheeler Ridge and Meridian would receive no windfall or refund. (The Meridian witness's stipulated testimony is set forth in footnote 4.)

SoCalGas, in response, says that there is no basis for the allegations made by Meridian. (No) statements of a misleading nature are contained in SoCalGas's opening brief. The allegations that Meridian has made reflect Meridian's misunderstanding. Meridian objects to the passages from SoCalGas's opening brief that it was SoCalGas' opinion that no shipper, including Meridian, "entered documentary evidence into the record" to prove either that it did not use the Wheeler Ridge facilities or that it had not

already recovered the Wheeler Ridge access fee directly from its customers (Motion, pp. 3-4, quoting SoCalGas opening brief, pp. 9, 20, 21). (emphasis added)

SoCalGas states that it stands by those statements. SoCalGas explains that while several shippers, including Meridian presented witnesses to offer opinion testimony to the effect that the gas was not owned by them when it entered Wheeler Ridge and that the Wheeler Ridge fee has not been recovered from end-users, not one of these shippers or their witnesses introduced into the record the actual contracts that may have confirmed their opinion testimony concerning these disputed points. It was to their failure to produce the actual contracts that SoCalGas referred in its opening brief when it said that there was no "documentary evidence" in the record to support the shippers' claims. SoCalGas never claimed, as Meridian incorrectly alleges, that there was no second-hand opinion testimony on these issues, only that there was no first-hand "documentary" evidence. SoCalGas argues that there is a qualitative difference in the probative value of having someone's opinion about a document as compared to having the actual document itself and, whether Meridian is aware of the distinction or not, SoCalGas is not guilty of a deception for pointing it out.

We do not believe sanctions are warranted against SoCalGas and its attorney. What we have here is a quibble, a petty argument over emphasis, attorneys' accentuating the positive. Meridian, in its opening brief, did the same. On page 3, Meridian states: "Further, SoCalGas witness Edgar testified that Meridian is not a customer of or have (sic) any intrastate transportation agreement with SoCalGas for any service." (Transcript, Page 2366, Lines 24-27) When we look at the transcript we find:

"Mr. Blumberg: Q. Does Meridian have any intrastate transportation agreements of any nature with SoCal for service?

"A. Not to my knowledge."

Not to my knowledge does not equate to "Meridian is not a customer of or have (sic) any intrastate transportation agreement with SoCalGas for any service." We wish to avoid a philologic discussion of the inferences to be drawn from these semantic differences. Counsel for SoCalGas and Meridian have both emphasized what they consider to be their strong points and leaved to others the task of ferreting out weaknesses. Meridian's motion is denied.

Findings of Fact

1. Resolution G-3072 approved SoCalGas' Interconnect Access Service tariff, D.94-01-048 annulled the tariff and ordered refunds, D.94-04-087 stayed the refund provisions. D.94-09-038 ordered further hearings to consider the use of the interconnection facilities, the refund provision, and necessary ancillary issues.

2. Because of the various decisions, stays, and orders in this proceeding, there has never been a final order.

3. The interstate shippers nominated in writing to SoCalGas, in California, for SoCalGas to transport gas to be delivered by the nominator to SoCalGas at Wheeler Ridge, the destination of the gas is the facility of the end user; the shippers agreed to pay SoCalGas' access charge; SoCalGas accepted the nomination; they delivered the gas to SoCalGas in California at Wheeler Ridge; SoCalGas accepted the gas in accordance with the terms of the nomination and transported it to the end user in California; SoCalGas billed the nominator for the access charge; the nominator paid the access charge.

4. All of the interstate shippers who nominated gas to be shipped over the Wheeler Ridge interconnection used the interconnection facilities and were customers of SoCalGas.

5. Shippers who use the interconnection facilities are SoCalGas customers by virtue of their use of those facilities, not because they may also be end-users.

SoCalGas provided a valuable service to the interstate shippers who nominated gas.

7. SoCalGas does not require a shipper to demonstrate where title to the gas passes. It would be an irrelevant, time consuming, expensive exercise for SoCalGas to demand proof of title before it accepts the gas.

8. Those that use the interconnect facilities should pay for that use.

9. The interstate shippers own the gas at the time they nominate it for shipment over Wheeler Ridge; nominations are made on behalf of specific customers; the interstate shippers pay the access charge. Their price to their customers is a bundled price which includes the access charge. The owner of the gas has paid for the transportation over Wheeler Ridge.

10. The interstate shippers were shippers within the meaning of the tariff approved in Resolution G-3072 and they used the interconnection facilities.

11. All of the parties seeking refunds are shippers who nominated natural gas deliveries at the Wheeler Ridge interconnect. They admit they are shippers (albeit interstate shippers), admit they nominated natural gas deliveries to SoCalGas, admit they delivered gas to SoCalGas at Wheeler Ridge, admit they requested SoCalGas to transport the gas to end users, admit that in many instances they were shipping to themselves, and admit they agreed to pay the Resolution G-3072 tariff charge for the interconnect service at Wheeler Ridge (albeit under protest).

12. The interstate shippers ship over SoCalGas' system and, therefore, are not exempt from the tariff. The nominations are received in California and accepted in California, the gas is delivered in California, and the gas is transported in California pursuant to the nomination to California end users. Nothing more is required to show that the shippers are intrastate shippers within the meaning of the Resolution G-3072 tariff.

13. An inequity would result if refunds of the Wheeler Ridge access charges were granted. There has been a change since SoCalGas' last rate case of an increase of over $40,000,000 in SoCalGas' expenses to pay for the Wheeler Ridge facilities. The access charges were imposed to recover that investment. Should refunds be ordered there is no offsetting revenue. There is no prior tariff, consequently there is no prior rate. Those who used the facilities would be receiving free service.

14. It is inequitable to order refunds of the access charges. By approving a refund some shippers will receive free service, some will be compensated twice, and future ratepayers will be unfairly charged for a service they did not use.

15. A refund to those interstate shippers who were not end users would cause a windfall as they have already collected the access charge from the end user in the bundled rate.

16. A refund to those interstate shippers who were also end users would result in free access.

17. If we were to order SoCalGas to collect the access charge from end users, those who paid a bundled rate would pay twice; those who shipped to themselves would merely repay.

18. To permit SoCalGas to recover refunds through a balancing account would be unfair to Edison and SDG&E. During the refund period they shipped approximately 17% of the volumes across Wheeler Ridge. Today, they ship approximately 40% of the volumes. For SoCalGas to recover the refunded amount in current rates, Edison and SDG&E would pay 40% of that amount after having caused only 17% of the costs. An inequitable result. Further, as the rates paid by Edison and SDG&E are passed through to their ratepayers, the result would be the ratepayers of Edison and SDG&E paying the refunds to the interstate shippers. A grossly inequitable result.

Wesley Franklin
Acting Executive Director

Conclusions of Law

1. The interstate shippers seeking refunds were, during the period in question, customers of SoCalGas and "shippers" within the meaning of the tariff approved by Resolution G-3072.

2. There has never been a final order in this proceeding.

3. Ownership of the gas is irrelevant to determining use of the interconnect facilities.

4. The tariff approved by Resolution G-3072 was a valid tariff applicable to the interstate shippers.

5. The Commission was in error in annulling Resolution G-3072.

6. D.94-01-048 should be rescinded. The refund order in D.94-01-048 should be annulled.

7. Meridian's motion for sanctions is denied.

O R D E R

IT IS ORDERED that Decision (D.) 94-01-048 is rescinded and the refund order in D.94-01-048 is annulled.

This order is effective today.

Dated July 6, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
Commissioners

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

Wesley Franklin
Acting Executive Director

Created Date: 10/27/93
Flow Date...: 11/02/93

Nomination Report

Role Code	Cust Code	Customer Name	Trans Code	Storage Code	Contract No.	Req Pkg	Conf Pkg	Agt/OCC Rank	Volume
[redacted]			TB		1007				23,059 ✓
					97YG				5,000 ✓
								GRAND TOTAL VOLUME	28,059

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To SOCAL	From Patty Vanderwerf
Co.	Co. SWEPI
Dept. Gas Transactions	Phone # 805-326-5868
Fax # 213-244-1283	Fax # 805-326-5327

FAX BACKUP TO GASELECT

(END OF APPENDIX A)