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MAIL DATE
12/8/97

Decision 97-12-054 December 3, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Selwyn and Loretta Vos,

Complainants,

vs.

Pacific Gas and Electric Company

Defendant.

ORIGINAL

C.95-09-030
(Filed September 15, 1995)

ORDER GRANTING LIMITED REHEARING AND MODIFYING DECISION 97-01-043 AND DENYING REHEARING OF THAT DECISION IN ALL OTHER RESPECTS

I. SUMMARY

This order disposes of the application for rehearing of D.97-01-043 (Decision) filed jointly by Pacific Gas and Electric Company and Pacific Gas Transmission (PG&E/PGT). The application does not demonstrate that any of the Decision's conclusions are in error. However, we note that various aspects of the Decision discussion require correction. Thus, we will grant rehearing and modify D.97-01-043 in this order. We will deny rehearing of the decision in all other respects.

II. BACKGROUND

This case is about PG&E's Bethany Compressor Station. PG&E built that compressor station as part of its "Expansion Project." We granted PG&E a certificate of public convenience and necessity (CPCN) for the Expansion Project in D.90-12-119. (Re Pacific Gas and Electric Company (1990) 39 Cal.P.U.C.2d

69.) The project expanded an existing natural gas pipeline and added related facilities. PG&E is responsible for the California portion of the Expansion Project. PGT is responsible for the interstate portion. The decision granting PG&E a CPCN also certified an Environmental Impact Report (EIR) and ordered PG&E to comply with "Mitigation Measures." (See Re Pacific Gas and Electric Company (1991) [D.91-06-028] 40 Cal. P.U.C.2d 601 (denying rehearing and explaining the effect of mitigation orders).) Mitigation Measures 27 and 28a are at issue here.

The complainants in this case, Selwyn and Loretta Vos (Voses),[1] own land across the street from the compressor station. In addition, the Expansion Project pipeline crosses their property. The Voses purchased this land in 1988. They state they plan to build a retirement home there. (Decision, p. 5 (mimeo).)

The construction of the Expansion Project brought PG&E/PGT and the Voses into conflict. In 1993, PG&E filed an eminent domain proceeding against the Voses in Superior Court, while the Voses filed a complaint against PG&E here. The eminent domain proceeding concerned an easement on the Voses' property for the pipeline. The complaint concerned the effect of the Bethany Compressor Station on the Voses.

In 1994, the Voses and PG&E settled their dispute. (1994 Settlement Agreement). The scope of the 1994 Settlement Agreement included the proceedings here. With respect to the Bethany Compressor station, PG&E agreed to pay $30,000 and the Voses agreed to withdraw their complaint here and not to institute any further Commission action relating to the Expansion Project. (Application, p. 9.) The Superior Court approved the 1994 Settlement Agreement and issued a final order in the eminent domain case. (See, Decision, pp. 1, 3.) The Voses filed a letter withdrawing their complaint on March 24, 1994. In D.94-05-

[1] Previous orders and pleadings referred to complainants Selwyn and Loretta Vos collectively as "the Vos."

003, the Executive Director dismissed the complaint on the basis of the Voses' letter, pursuant to Public Utilities Code section 308 and Resolution A-4638.

When the Voses filed this complaint, PG&E/PGT responded with a motion to dismiss. (See, Motion to Dismiss, filed December 12, 1995 (Motion to Dismiss) and Additional Briefing in Support of Motion to Dismiss, filed February 20, 1996 (Additional Briefing).) At a prehearing conference, the assigned administrative law judge (ALJ) stated that he would submit both the Motion to Dismiss and the substance of the complaint to the Commission simultaneously. This would produce only one Decision, which would address the substance of the complaint only if the motion to dismiss were denied. (Transcript, Prehearing Conference, July 11, 1996 (PHC Transcript), pp. 1-2.) PG&E and the Voses were amenable to this procedure. (PHC Transcript, pp. 2, 4, 9-10.) Complainants and defendants provided the ALJ with documents stating the substance of their claims. (The Voses' document, dated April 19, 1996 is referred to as the "Vos Petition" and defendants' document, dated September 9, 1996, is referred to as the "PG&E/PGT Response.")

We then issued D.97-01-043. The Decision concluded that the 1994 Settlement Agreement did not prevent us from considering the limited question of whether PG&E had complied with our orders. The Decision determined to proceed "solely in considering PG&E's compliance with . . . mitigation measures." (Decision, p. 4 (mimeo) (emphasis added).) The Decision announced: "We will not consider any reparations for the Vos[]." We stated that we would not treat the Voses as complainants, but rather "as citizen prosecutors. We will examine the evidence before us in this light." (Decision, p. 4 (mimeo).) The Decision asserted that we had a positive responsibility to enforce "the conditions attached to the permits we issue." (Decision, p. 4 (mimeo).) After denying the Motion to Dismiss, the Decision reviewed PG&E's compliance, found that PG&E contravened both

Mitigation Measures 27 and 28a and levied conditional fines pursuant to Public Utilities Code section 2107.

Without disputing our conclusions on the effect of the 1994 Settlement Agreement, PG&E/PGT now claim that we were legally barred from determining if PG&E complied with our orders.[2] The application asserts that the Commission's prior order of dismissal creates this bar, characterizing it as a "res judicata effect." The application further claims that the company was in full compliance with both mitigation measures and that the decision made various minor errors that deserve correction. The Voses challenge the application's claims. They also suggest that we should not have limited our consideration to the question of PG&E's compliance with our orders. The response to the application for rehearing asks us to provide "reparations" based on alleged harm PG&E caused. (Vos Response, pp. 1-2, 6-1.)

III. DISCUSSION

A. Principles of Res Judicata Do Not Prevent The Commission From Inquiring—For The First Time—Into PG&E's Compliance With Its Orders.

1. PG&E Cannot Avoid Regulatory Scrutiny by Claiming the Matter Is Decided.

In resolving PG&E/PGT's motion to dismiss we were presented with a difficult question: What should the Commission do when presented with

[2] The application suggests the Decision is in error because it "disregard[ed]" or "overlook[ed]" this question. (Application, pp. 3, 7.) In fact, the Decision responded to the issues raised in defendants' pleadings. (Decision, pp. 2-4.) There, PG&E/PGT argued that the Commission should not hear this case because the Voses violated the terms of the 1994 Settlement Agreement and the court's order approving that settlement. In a single paragraph PG&E/PGT recited the fact of the prior decision and argued only, "parties are bound by previous decisions involving them as parties." (Additional Briefing, p.12.) Defendants did not raise this issue previously and the Decision's lack of extensive discussion is not error.

evidence that a utility violated its orders by people who previously promised the utility that they would not present that evidence to the Commission?

The Decision determined that finding the 1994 Settlement Agreement barred us from reviewing this one issue would "serve to limit this Commission's jurisdiction." (Decision, p. 2.) For similar reasons, we determined that the order of the civil court adopting the settlement created no legal bar to our resolving the limited issue of compliance. (Decision, pp. 2-3, citing Ventura County Waterworks Dist. No. 12 v. Susana Knolls Mut. Water Co. (1970) 7 Cal.App.3d 762.)

Thus, the Decision relied on the principle that the Commission cannot be prevented from determining, at least once, if PG&E complied with its orders. This principle is correct. Neither the parties' private agreement nor a court's endorsement of that bilateral resolution of the dispute reduce our authority to determine if PG&E complied with our orders.

That principle also applies to the application for rehearing's claim that the prior dismissal of the Voses' earlier complaint legally prevents us from determining if PG&E complied with our orders. The fact that the Voses withdrew their earlier complaint and caused its dismissal does not have any bearing on whether we can exercise this authority over PG&E. In this connection it is important to note that we addressed only the limited question of whether a regulated utility, PG&E, complied with the orders of the appropriate regulatory agency, Mitigation Measures related to the Expansion Project. We held that issue was our "sole" concern. (Decision, p. 4 (mimeo).) We stated we would consider the Voses to be prosecutors, i.e., they pursued this case not for their own benefit but so we could determine if PG&E had contravened our orders. When we found

contraventions of Mitigation Measures 27 and 28a we imposed penalties and did not consider any relief for the Voses. We also did not provide the Voses with relief with respect to a "buffer" area

The application characterizes its claim that the prior order of dismissal legally bars consideration of PG&E's compliance as a question of res judicata. Principles of res judicata are designed to stop multiple litigation that causes vexation and expense for the parties and wastes judicial resources. (7 Witkin Cal. Procedure (4th ed. 1997) § 280, p. 820.) The doctrine of res judicata gives certain "conclusive effect" to a former court judgement in subsequent litigation on the same controversy. (7 Witkin Cal. Procedure (4th ed. 1997) § 280, p. 820.) When res judicata applies, a court cannot hear a decided matter for the second time.

If the prior dismissal of the earlier complaint were given "res judicata effect," we would be prevented from exercising its authority with respect to Mitigation Measures 27 and 28a in the first instance. While it is clear that the prior order dismisses the controversy between the Voses and PG&E/PGT it is not clear that the scope of that order encompasses our enforcement of "the conditions attached to the permits we issue." (Decision, p. 4 (mimeo).) Principles of res judicata, which prevent a "second bite at the apple," are not applicable when the question is whether this Commission may, in the first instance, determine if a regulated utility complied with regulatory orders.

Thus People v. Sims, (1982) 32 Cal.3d 468, and the Commission decisions cited in the application for rehearing are inapposite. (Cf., Application, pp. 7-8.) In those cases, a matter that had been considered and decided was being presented for further consideration. In People v. Sims the Court held "[i]n the particular and special circumstances of this case" the state could not prosecute a fraud case in court after the defendant was "exonerated" of the same charge in a quasi-judicial administrative hearing. (Id., 32 Cal.3d at p. 489.) The Court based its

holdings on principles of collateral estoppel and noted that "[c]ollateral estoppel effect is given to final decisions of ... agencies ... such as the ... Public Utilities Commission." (Id., 32 Cal.3d at pp. 480-481.) The "particular and special circumstances" presented in that case are not present here. Most importantly, PG&E was not "exonerated" in the Commission proceedings, which never went to hearing. Moreover, principles of collateral estoppel do not create a res judicata effect limiting the Commission's ability to decide the matter here.

Similarly, the Commission decisions cited deny parties' the ability to reinstitute claims on matters that were already decided. Those cases do not provide that we may not exercise our authority in the first instance. They also do not demonstrate that we are prevented from reconsidering a matter after we have rendered a decision, if we choose to do so. In past decisions we have noted that rules of res judicata should be applied more flexibly to Commission orders than to determinations made in the judicial system. (See, e.g., D.97-08-055, p. 26 (mimeo).)

We wish to emphasize that the Decision reviews the question of PG&E's compliance in the first instance. We dismissed the Voses' earlier case solely on the basis of the complainants' letter of withdrawal. (See, Letter dated March 24, 1994 in C.93-12-022.) The order of dismissal was entered before hearings were held and without any consideration of the substance of the complaint. (See, C.93-12-022, February 23, 1994 Prehearing Conference Transcript, p. 73.) The 1994 Settlement Agreement was not submitted to the Commission. D.94-05-003 made no mention of the Voses' agreement to abstain from further litigation and omitted mention of prejudice. Resolution A.4638, which formed the basis for that order provides that orders may be dismissed by the Executive Director when all parties are in agreement. It does not provide for such orders to address substantive issues. Had the parties presented the 1994 Settlement Agreement to the Commission, the matter of the 1994 Settlement Agreement's

attempt to preclude future Commission action would have been before us when we dismissed the earlier complaint.

PG&E/PGT assert our rules on settlements[3] provide that unreviewed settlements in complaint cases have "conclusive effect" except in multi-party cases. (Application, p. 10.) The application relies on "the Commission's expressed intent" when it adopted Rule 51, which governs settlement procedures. On the contrary, when we adopted settlement rules we insisted that they be made applicable to complaint cases stating concern with complaint settlements that addressed issues "not limited to the complainants." (Re Commission's Rules of Practice and Procedure [D.88-09-060] (1988) 29 Cal.P.U.C.2d 392, 393.) Our statement that such cases "frequently" have multiple parties does not create a new rule giving a settlement conclusive effect "except in cases involving multiple parties where due process concerns were implicated." (Cf., Application, p. 11.) Here, our enforcement of our own rules is an issue "not limited to the complainants and the defendant." Rule 51 does not give the settlement "conclusive effect" on the issue of PG&E's compliance without our review of the settlement.

Thus, the Decision correctly held that we could review matters that were of concern to us as the regulatory body with a mandate to ensure PG&E complied with relevant law, rules and orders. The application asserts that compliance with our orders, Mitigation Measures 27 and 28a, is not a matter of Commission concern but is only "personal to the Vos." (Application, p. 11.) The application bases this claim on the fact that Mitigation Measure 27 required PG&E to resolve conflicts between its Expansion Project plans and adjacent landowners' own plans for development "through mutual agreement." Mitigation Measure 28a required advance notice of construction to landowners near construction sites.

[3] The Commission's Rules of Practice and Procedure appear at Title 20, California Code of Regulations, sections 1-88. Each section is referred to here as a "Rule".

As the Decision correctly stated, we have a responsibility to determine if PG&E complied with our orders that is independent of the Voses' concerns about any harm the Bethany Compressor Station has done them. (Decision, p. 4 (mimeo).) The extent of our authority to determine if PG&E complied with these orders is not determined by the extent of the Voses' right to sue PG&E simply because the Voses were intended to benefit from these orders. In effect, PG&E/PGT argue that our authority to determine compliance with our orders is co-extensive with the Voses' ability to litigate against PG&E. This Commission's authority is not so limited.

The application is equally incorrect when it implies that we have no authority in this respect because Mitigation Measures 27 and 28a do not involve broad issues "of common public importance," such as air quality. (Application, p. 12.) If we determine to attach a condition to a CPCN, we have an interest in reviewing compliance with that regardless of the utility's opinion of its importance.

For similar reasons, Section 1709[4] does not have the effect the application claims. The application argues that a legal bar preventing us from reviewing compliance with Mitigation Measures 27 and 28a would amount to no more that an "estoppel of the Vos' claims" under Section 1709. (Application, p. 11.) However, as explained above, the Voses' ability to litigate their claims is not the same as to our authority to determine if PG&E complied with its orders. The collateral estoppel effect provided for in Section 1709 does not create the res judicata effect PG&E/PGT claim applies here. Thus, there is no basis for the claim that the Commission's prior order of dismissal now bars it from determining if PG&E complied with orders.

[4] All section references are to the Public Utilities Code unless otherwise specified.

2. PG&E/PGT Overstate the Res Judicata Effect of the Prior Order of Dismissal.

Even when principles of res judicata are applied to this case it is not at all clear the prior order of dismissal has the effect PG&E/PGT claim. As the Witkin summary notes, principles of res judicata are designed to prevent repeated litigation on the same topic. Yet the Decision clearly establishes that the topic of compliance with Commission orders was not dealt with previously. More specifically, the Commission's prior order merely dismissed C.93-12-022 at the Voses' request, omitting any mention of prejudice. The Commission's normal rule in these circumstances—dismissal is not res judicata—is acknowledged by PG&E/PGT. (Application, p. 8.)

However the application claims an exception to our normal rule exists when there is an "intention that [the dismissal] operate as a retraxit." (Application, p. 8.) PG&E/PGT allege a "retraxit" occurred since the dismissal was made in exchange for consideration. The application claims the exchange of consideration pursuant to a settlement makes the dismissal "operate as a retraxit regardless of whether the dismissal was with prejudice." (Application, p. 8.)

We are not persuaded that we must follow the rule stated in the application. A judgment that results from a settlement will bar a new action if it is entered with prejudice. (Witkin, supra, § 321 (3), p. 873 (emphasis added).) Thus dismissal with prejudice seems necessary to obtain the effect the application claims. One court stated, "dismissal with prejudice is the modern name for a common law retraxit," implying that prejudice is an essential element in creating a bar to future action. (Torrey Pines Bank v. Superior Court (1989) 216 Cal.App.3d 813, 820.)

There is no clear rule on the effect of a dismissal omitting mention of prejudice. 46 American Jurisprudence 2d Judgments, section 608 explains:

> Under some circumstances, the omission in a judgment of dismissal, of the reservation that it is "without prejudice," has been regarded as rendering the judgment a determination on the merits. On the other hand, there is authority for the rule that such an omission does not necessarily preclude subsequent litigation of the same cause of action. In such case, the court in the subsequent action is permitted to look beyond the mere entry of the judgment to determine whether it was rendered on the merits.

Thus the allegation that the Decision must apply the rules of retraxit to the prior dismissal does not demonstrate error. Sunland Refining Corp. v. Southern Tank Lines, Inc. [D.86714] (1976) 80 Cal.P.U.C.2d 806, 810, cited in the application does not require otherwise. That case does not establish procedural rules relevant here. The language quoted is not a holding but merely that decision's paraphrase of the Code of Civil Procedure, to which we were looking to for guidance in establishing procedures in that case. While it is appropriate for us to find guidance in procedural rules established by or for courts, we believe we should not follow such rules blindly and should determine whether they are properly applied in our own proceedings. On reflection, we do not think PG&E's version of the rule relating to "retraxit" should be applied here because it would allow PG&E to buy immunity from Commission review of its compliance with regulatory orders by providing "bona fide consideration" to private complainants.

Moreover, dismissal under a settlement, even with prejudice, is not a bar to subsequent action involving an issue that "was not and could not have been" part of the settlement agreement. (Neil Norman Ltd. v. William Casper & Co. (1983) 149 Cal.App.3d 942, 948; Nakash v. Superior Court (1987) 196 Cal.App.3d 59, 67.) Here, the issue that PG&E claims is precluded—the Commission's review of compliance—could not have been settled among the parties. Put bluntly, no amount of consideration paid by PG&E to the Voses can have resolved, on the

Commission's behalf, the issue of compliance. Once again, the application fails to take into account the distinction between the Voses' interest in this case and the Commission's interest. The Decision explicitly held that the Commission's interest was to review PG&E's conduct and not to consider any of the claims the Voses made in their own interest.

3. Policy Considerations That Weigh In PG&E/PGT's Favor Do not Demonstrate Error.

The application's final res judicata argument claims that the Decision erred by not considering policy issues that PG&E/PGT claim favor dismissing the Voses' claim. It is true that the Decision's approach in this case is somewhat unusual.[5] Also, we note the Voses received money from PG&E in exchange for a promise not to re-file their complaint, and then did just that. The application further claims that allowing the Voses to reinstitute violated public policies in favor of judicial economy, the finality of legal process and the integrity of settlements. (Application, p. 13.) The application complains that PG&E/PGT were exposed to an experience that seemed to them like the film "Groundhog Day." (Application, p. 14.) Finally, PG&E/PGT argue that the Decision erred by not considering what it alleges will be drastic results on the Commission's complaint procedures. (Application, p. 14.)

While these arguments would have given us good reason to dismiss this complaint, had we chosen to do so, they do not require us to do so. Thus, they do not require a grant of rehearing. The application asserts that the Decision did not even consider these issues, which it claims was an abuse of discretion. In fact, other policy considerations support the procedures the Decision adopts. The

[5] The claim that the Decision would have benefitted from a rigid application of procedural rules does not demonstrate error here. The Decision makes its intentions clear, and the mere act of closing one proceeding styled a complaint to commence another styled an investigation, would be a victory of form over substance. The ALJ made the procedure to be followed clear at the Prehearing Conference; PG&E/PGT cannot now claim error.

Decision represents a considered approach to the difficult problem presented by our being confronted with evidence of PG&E's wrongdoing by people who previously promised PG&E they would not present that evidence to us. While PG&E/PGT may disapprove of the solution the Decision adopts, it was explained and it is not legally flawed. (Decision, p. 4. (mimeo).) Thus the Decision contains no abuse of discretion. Finally, many of the application's policy arguments are overstated. The facts of this case seem unique and it is unlikely that they will present themselves in the future. We do not believe we are inviting future similar complaints or a wholesale re-litigation of settled matters.

B. The Decision Properly Found Violations Of Orders.

1. Mitigation Measure 27.

The Decision fined PG&E for its failure to comply with Mitigation Measure 27. Mitigation Measure 27 provides:

> Where the proposed project would be located in new right-of-way in an area planned for development and would be incompatible with the plans of the development project, the applicant shall contact landowners to resolve any conflict through mutual agreement. Develop a form letter to inform property owners of their rights.

The Decision found that PG&E did not comply with Mitigation Measure 27 because it was "less than forthright with the Vos about the company's plans." (Decision, p. 6 (mimeo).) The Decision noted that PG&E's "fail[ing] to specifically inform neighbors of the company's plans" and "evad[ing] specific questions" prevented the Voses from participating in the planning process. (Ibid.)

The application claims that PG&E complied with Mitigation Measure 27. As a result of the EIR process, PG&E/PGT state the Voses had "legal notice" of the possibility that the compressor station would be built across the street from their property. (PG&E Application, p. 15.) PG&E also reiterates its

version of conversations about the compressor station, which it claims gave the Voses "personal notice" through "direct communication." (Application, pp. 15, 17.) Finally, the application asserts PG&E must be excused from full compliance with Mitigation Measure 27 because it had to account for both the Voses and their neighbors, who had opposed interests. (Application, pp. 19-22.) These claims do not demonstrate error.

The application' claims about providing notice do not demonstrate error because Mitigation Measure 27 required PG&E to do more than "put the Voses on notice, as a matter of law of the contents of the" EIR. (Cf., Application, p. 16.) Mitigation Measure 27 specifically required PG&E to "contact landowners." The Decision noted that "implicit in [Mitigation] Measure 27" was an "obligation to seek out" information from the Voses on their plans for developing their property. (Decision, p.6 (mimeo).) For similar reasons, the application's claim that PG&E satisfied Mitigation Measure 27 because local newspapers published articles about the Expansion Project does not demonstrate error. (Cf., Application, p. 16.)

In any event, whether or not the Voses were given notice as a result of the EIR process is beside the point. Mitigation Measure 27 was designed to govern PG&E's actions after the EIR was certified; it required PG&E to do more that relying on what our staff had done in creating a notice program for the EIR.

Moreover, Mitigation Measure 27 required PG&E to actually resolve conflicts arising from incompatible uses proposed by landowners and the Expansion Project. Because PG&E was unaware of the Voses' plans as a result of its own failure to contact them, as required, the Decision correctly found that PG&E contravened Mitigation Measure 27 by not resolving land use conflicts. (Decision, p. 15 (mimeo).) The Decision stated, "PG&E's obligation to seek out this information in a more assertive manner is implicit in Measure 27."

The further claim that PG&E's employees had conversations with the Voses that complied with Mitigation Measure 27 attempts to re-argue a factual dispute. PG&E/PGT state they introduced evidence showing that Land Agent Jim Armstrong discussed the Bethany Compressor Station with Loretta Vos during a walk on her property. (Application, p. 17.) However, PG&E/PGT acknowledge that the Voses presented evidence that a different conversation took place. (Ibid.) The claim that this factual issue was disputed does not demonstrate that the Decision's resolution of it is in error.[6]

Also, the Decision's finding that "PG&E was less than forthright" with the Voses is not based on this one event. (Decision, p. 6 (mimeo).) The Decision notes that in the spring of 1991 the Voses discussed locating a septic field near the expansion pipeline and were given no information about the compressor station. (Decision, p. 5 (mimeo).) The Decision also explains that the Voses' neighbors, not PG&E, actually informed them of PG&E's intention to build a compressor station. According to the Voses, when they approached PG&E's Land Agent Hirko to discuss this, he assured them the compressor station would be built in Contra Costa County. (Decision, p. 5 (mimeo).)

Finally, PG&E claims that it complied with Mitigation Measure 27 by giving precedence to the needs of the Voses' neighbors, the Gomes family (Gomes). The application argues that Mitigation Measure "applies far more directly" to the Gomes because they owned the land on which Bethany Compressor Station was to be built. The application also asserts that the geography

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[6] PG&E also claims that the Decision fails to explain why it adopted the Vos' version of this story. PG&E notes that no hearing allowed observation of witnesses demeanor and that the Voses had the burden of proving they were correct. The ALJ provided PG&E with an opportunity to request a trial-type hearing at the Prehearing Conference. The ALJ made it clear that he would resolve the substance of the complaint if he denied the motion to dismiss. Nevertheless PG&E did not request a hearing. (PHC Transcript, pp. 3-4.) PG&E cannot now argue that our resolution of this facutual dispute is in error.

of the Gomes' property and the Gomes' desire to continue farming the land "constrained" PG&E's ability to find a location on the Gomes parcel that would satisfy both the Gomes and the Voses. (Application, p. 19.)

On close analysis, the application does not support the claim that it would have been impossible to accommodate both the Voses and the Gomes. The application indicates only that accommodating both landowners would "raise the amount of money [the Gomes] are asking [for]." (Application, p. 20, quoting PG&E/PGT Response, Exhibit 1-F.) Mitigation Measure 27 does not indicate that in such circumstances PG&E was excused from accommodating one landowner so it could reduce the amount of money paid to another. Rather, considering conflicting land uses seems to be what Mitigation Measure 27 required.

Thus, there is an adequate basis to support the Decision's conclusion that PG&E contravened Mitigation Measure 27. The application's re-arguing the evidence and suggestions that Mitigation Measure 27's requirements were somehow qualified do not demonstrate that the Decision is in error.

2. Mitigation Measure 28a.

The Decision found PG&E did not notify the Voses of the construction of the Bethany Compressor Station two weeks in advance of construction. (Decision. p. 15, Finding of Fact 5.) Mitigation Measure 28a provides:

> Two weeks in advance and by direct contact, notify all permitted users, landowners and land managers along the right-of-way and residents within 660 feet of the right-of-way whose safety, property, business, or operations might be affected by any construction activity. Notify all local residents of construction activity through the local media.

The application claims that the Voses were given notice "of construction" by virtue of a letter informing them of the proposed commencement of pipeline construction. (Application, p. 22, citing PG&E Response, Exhibits P

and P (there are two exhibit marked "P").) This notice, contained in a letter sent to the Voses on June 25, 1992, did not discuss the compressor station. The notice informed the Voses that construction activity would occur as follows:

> Construction activities will generally follow a basic sequence: preconstruction plant and wildlife studies, flagging and temporary fencing of environmental and cultural resource exclusion areas (where required), clearing and grading the right-of-way, digging the trench, stringing and welding the pipe, lowering the pipe, backfilling the trench, testing the pipe, and performing final grading, clean-up and restoration.

The application asserts this notice satisfies Mitigation Measure 28a since "construction of the pipeline and compressor station occurred simultaneously as a single activity." (Application, p. 22.) The application states that since the California Environmental Quality Act (CEQA) required study of "the entire Line 401 pipeline and all ancillary facilities" that no separate notice was required for the compressor station. (Cf., Cal. Code Regulations, tit. 14, § 15378, subd. (a).) The application for rehearing also argues that "[n]either the wording nor the intent of Mitigation Measure 28a required specific notice of the compressor station construction." (Application, p. 22.)

Although an environmental lawyer familiar with CEQA's definition of "project" might view the Bethany Compressor Station as an integral element of the pipeline project, this does not make notice of compressor station construction an implicit part of PG&E's letter. The letter could not have helped property owners them understand compressor station construction was an necessary part of building the Expansion Project. The letter indicates just the opposite: construction would involve the laying of pipe and no more.

In fact, construction of the compressor station was much more involved that laying pipe. The application itself states that work on the Bethany Compressor station started in August and did not end until October, 1992. (PG&E Response Tab 1, p. 15.) In contrast, laying the pipeline under the Voses' property

started and ended in July, 1992. (Application, p. 25.) The mitigation measure provides that all landowners within 660 feet be notified of "any construction activity." This language clearly required PG&E to notify the Voses not only of the construction activity that was to occur on their land but also to inform them the more extensive activity that would then occur on their neighbors' property. The Decision assumed that the Voses did not receive notice of compressor station construction because PG&E did not provide notice to landowners separated from construction by a public road. (Decision, p. 8.) Under this logic, if the pipeline had not crossed the Voses' property, they would have not received any notification, even though a 40 acre compression facility was being built directly across the street from their land. Mitigation Measure 28a cannot be read to support that result.

Finally, the application argues that notification was designed to allow those near construction zones to plan for the actual effects of construction. (Application, p. 24.) PG&E/PGT note that this notice requirement was not designed to solicit input on issues such as siting. The application concludes that the value of information about construction activity near their property "had potentially less value for the Vos, as the Vos . . . did not . . . live on the property." (Application, p. 24.)

The application is correct to dispute the Voses' description of the harm the lack of notice caused them. For example, the Voses' claim that the lack of notice caused them not to know of the compressor station has no merit. The Decision found that the Voses knew about the compressor station in February 1992, over six moths before the Measure 28a notice was required. However, this does not mean PG&E was excused from compliance with Mitigation Measure 28a. The fact that the Voses unreasonably expected more benefits would ensue from this notice does not excuse PG&E from complying with the Commission's order. We determined that landowners should receive notice of construction for good reason. The three months of construction across the street from one's property,

even if one did not live there, seems to warrant a notice allowing one to plan accordingly. Thus, it is not error to conclude that PG&E violated Mitigation Measure 28a and to levy a fine.

We note however, that the discussion portion of the Decision does not account for the letter PG&E sent relating to pipeline construction. The Decision assumes that no notice was sent because the Voses' property was across the road from the Bethany Compressor Station. The Decision found that "PG&E appears to concede that it never notified the Vos . . . ." (Decision, p. 8 (mimeo).) The application calls this assumption a "misunderstanding." (Application, p. 22.) The discussion portion of the Decision attempts to convey that PG&E/PGT's response to the allegation that they provided no notice was to provide explanations for why no notice was sent, rather than asserting compliance. In our mind, stating that failure to comply with Mitigation Measure 28a should be excused because the Voses live across the road, or are absentee landowners, or should have known that CEQA defines ancillary facilities as part of the pipeline construction "project" concedes that no notice was sent. In order to make the basis of our conclusion clear, we will grant rehearing and modify the Decision in this order so it correctly describes the notice that was sent and our reasons for concluding that it did not meet the requirements of Mitigation Measure 28a. We will modify our Decision in this order following a grant of rehearing because the application fails to demonstrate that our holding is in error or that further proceedings are necessary. The record fully supports our holding, as the modifications make clear.

C. The Calculation of Fines and Description of Gas Release Notification Will be Corrected.

In addition to Mitigation Measure 28a, the application describes other minor errors in the decision. PG&E/PGT ask that they be corrected.

1. Fine Amounts.

The Decision assessed fines against PG&E for violating the orders of the Commission. The Decision concluded that PG&E violated Mitigation Measure 27 during the time between when the Voses' neighbors were informed of PG&E's intention to build the compressor station and when the Voses were informed.[7] The Decision established that the Voses' neighbors were informed on January 24, 1991. (Decision, p. 14.) The Decision puts "the date PG&E first discussed the compressor station with the Vos" at "February 1992." (Decision, p. 5.) The Decision stated it obtained the "by February" date from a letter sent to the Voses by PG& Land Agent Hirko, from which it quotes. (Decision, p. 5.) The application states the Voses received this letter on January 21, 1992. (PG&E Application, p. 17.) The number of days between those two dates is 362. (See, PG&E Application, p. 18, fn. 11.) Thus, it seems the Decision miscalculated the number of days for which PG&E should be subject to a fine and should be corrected.

For Mitigation Measure 28a, the Decision fined PG&E $20,000 a day for each of 14 days, "prior to the initiation of construction . . . during which PG&E was in violation of its notice requirement." (Decision, p. 14.) The Decision stated that the $20,000 a day amount was "the maximum level then allowed by law." The Decision is inconsistent on this point. It concluded that the maximum fine for the Measure 27 violation is $2,000 a day, explaining that the maximum fine was not raised to $20,000 until after the violation occurred. PG&E argues that the Measure 28a fine must be assessed in the amount of $2,000 rather than $20,000 a day. (PG&E Application, pp. 26-27.) The application is correct and we will modify the Decision accordingly.

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[7] The original version of the Decision mailed on January 24, 1997 contained an error that was corrected by D.97-01-057. The Decision assessed a total fine of $790,000 for violations of Mitigation Measure 27. This number represents 395 days times $2,000. However the Decision stated the amount of days PG&E was in violation as 585.

2. Gas Release Notification.

The application for rehearing clarifies that PG&E does not provide notice to customers with personal contact or a door hanger for evacuations, as the Decision states. (Compare, Decision, p. 12 (mimeo), Application p. 27.) The application informs us that PG&E only provides this notice for pipeline blowouts.

The Decision discussed gas release notification in the context of its directing the Safety Branch to develop a plan that will ensure the Voses receive appropriate information on pipeline evacuations. PG&E/PGT do not contest this portion of the Decision. The import of our discussion was that the level of notice provided by PG&E should be subject to review and prospective refinement. We do not believe the mischaracterization of the level of notice provided detracts from that conclusion. Therefore, this order grants rehearing and corrects the Decision so it states that neighbors were notified only in the even of a pipeline blowout.

D. The Commission Should Not Determine Whether Or Not The Voses Are Entitled To Reparations.

The Voses' Response to Application for Rehearing of D.97-01-043 argues that we should have provided the Voses with some form of "reparations." (See, e.g. Response, pp. 1-2, 6-1.) PG&E/PGT treat this claim as an application for rehearing by the Voses and argue that it should be summarily rejected. (Defendants' Response to Complainants Untimely Request for Rehearing, filed March 31, 1997.) The Response also asks us to re-evaluate the 1994 Settlement Agreement.

The Voses' pleading, a response to PG&E/PGT's application for rehearing, does not indicate that the Voses wish to apply for rehearing. The response does not claim to be an application for rehearing and it was filed after the statutory deadline. Moreover, the Voses do not claim that the Decision is in error for failing to consider the issue of reparations. They simply request that it be "reconsidered."

The most straightforward reading of this claim is that the Voses want to emphasize that the Decision did not decide all issues in their favor. It is appropriate to respond to PG&E/PGT's application with a reminder that the Commission found against the Voses on some issues. We read the response to suggest that we should reconsider the issues that went against the Voses if rehearing is granted.

Moreover, even if the Voses' request were treated as an application for rehearing, it would not demonstrate error. First, as PG&E/PGT point out, it was filed after the statutory deadline. That deadline is imposed upon the Commission by the legislature and we have no authority to bend the rule. Moreover, the claim that reparations should have been considered demonstrates no error. The Decision properly excluded that issue when it ruled that only the question of PG&E's compliance should be dealt with here. We will also not re-evaluate the 1994 Settlement Agreement.

IV. CONCLUSION

We will grant rehearing here and modify the Decision to correct certain matters we find to be in error. We will then deny rehearing of the Decision, as modified herein.

Therefore, good cause appearing,

IT IS ORDERED THAT limited rehearing of D.97-01-043 is granted and the D.97-01-043 is modified as follows:

1. The discussion on page seven beginning after the quotation of Mitigation Measure 28a, commencing "The Vos state. . ." and ending half way down page 8 with the sentence, "However the notice does not discuss a compressor station[]" is replaced with the following discussion:

   The Vos state that they were never notified of the construction of the compressor station across the street from their property. As a result, they argue, they were denied the opportunity to have direct contact with the construction property manager about the scope of the facilities and to request the Commission's assistance in obtaining

information about the compressor station. Although we will not make any findings about the effect of the lack of notice on the Vos, we find that PG&E did not notify the Vos of its construction plans for the compressor station.

Defendants provided the Vos with notice "of construction" by virtue of a letter informing them of the proposed commencement of pipeline construction. The Vos responded to this letter (PG&E Response, Exhibits P and P (there are two exhibit marked "P").) However, the letter did not discuss the compressor station. PG&E/PGT described the construction activity that would occur as follows:

> Construction activities will generally follow a basic sequence: preconstruction plant and wildlife studies, flagging and temporary fencing of environmental and cultural resource exclusion areas (where required), clearing and grading the right-of-way, digging the trench, stringing and welding the pipe, lowering the pipe, backfilling the trench, testing the pipe, and performing final grading, clean-up and restoration.

Although an environmental lawyer familiar with CEQA's definition of "project" might view the Bethany Compressor Station as an integral element of pipeline construction, this does not make notice of compressor station construction an implicit part of PG&E's letter. This letter could not have helped landowners understand compressor station construction was an necessary part of building the Expansion Project. The letter indicates just the opposite: construction would involve the laying of pipe and no more.

In fact, construction of the compressor station was much more involved than laying pipe. Work on the Bethany Compressor station started in August and did not end until October, 1992. (PG&E Response, Tab 1, p. 15.) The mitigation measure provides that all landowners within 660 feet be notified of "any construction activity." This language clearly required PG&E to notify the Vos not only of the construction activity that was to occur on their land but also to inform them the more extensive activity that would then occur on their neighbors' property.

Defendants are not excused from providing notice of compressor station construction by virtue of the fact that the Vos' land was separated from construction by a public road. Under this logic, if the pipeline had not crossed the Vos' property, they would have not

received any notification at all, even though a 20 acre compression facility was being built directly across the street from their land. Mitigation Measure 28a cannot be read to support that result. Other circumstances, such as the fact that the Vos do not live on their property also do not excuse the lack of notice.

While the Vos expected more benefits that receipt of notice would have actually provided, this does not mean PG&E was excused from compliance with Mitigation Measure 28a. We determined that landowners should receive notice of construction for good reason. The three months of construction across the street from one's property, even if one did not live there, seems to warrant a notice allowing one to plan accordingly. In our mind, arguments that state the lack of notice was unimportant, or somehow excusable, concede that the notice was not sent.

2. The first two sentences of the first full paragraph on page 14, which begins "For its failure to resolve . . ." are restated as follows to correct the number of days for which a fine is imposed and the total fine:

   For its failure to resolve development plan conflicts by mutual consent (Measure 27), we conditionally fine PG&E for each day between the date that PG&E informed the Vos' neighbors of its intention to build the compressor station (January 24, 1991) and the date PG&E first discussed the Compressor station with the Vos (January 21, 1992). This potential fine totals $724,000, representing $2,000 for each of the 362 days during this period.

3. The second full paragraph on page 14, which beings, "For its failure to notify . . ." is restated to correct the amount of the fine imposed and the resulting total fine as follows:

   For its failure to notify the Vos of anticipated construction activity at least two weeks in advance of construction, we conditionally fine PG&E $28,000. This represents a $2,000 fine (the maximum level then allowed by law) for each day prior to the initiation of construction of the compressor station during which PG&E was in violation of this notice requirement.

4. The parenthetical statement in the partial paragraph at the top of page 15, which appears on the fourth and fifth lines of that page and begins "(which may be . . ." is modified to read: "(which may be significantly less that the legal maximum of $752, 000)."

5. The first sentence of Conclusion of Law 10, on page 17 is modified to read, "Pursuant to Public Utilities Code section 2107, we conditionally penalize PG&E up to $752,000 for its failure to comply with Mitigation Measures 27 and 28a."

6. In last paragraph on page 12 under the heading "Natural Gas Releases," after the fourth sentence, which ends "approximately 11 minutes[]" a new sentence is added. The new sentence shall read: "In addition, pipeline blowdowns occur and are generally scheduled one month in advance."

In addition, good cause appearing, **IT IS FURTHER ORDERED THAT:**

7. Rehearing of D.97-01-043 is denied in all other respects.

This order is effective today.

Dated December 3, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners