

MAIL DATE

4/27/98

L/dd

Decision 98-04-070

April 23, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric
Company for Authorization to Sell the
Placer County Canal System to Placer
County Water Agency Pursuant to
Public Utilities Code Section 851.
(Water) (U39W)

ORIGINAL

Application 96-03-051
(Filed March 27, 1996)

**ORDER GRANTING A LIMITED REHEARING, MODIFYING
D.97-11-019 AND SUBSEQUENTLY DENYING REHEARING
OF THE DECISION AS MODIFIED**

Having identified legal error in Decision (D.) 97-11-019, to wit, the failure to include all appropriate findings and conclusions as required by section 1705 of the Public Utilities Code, today we grant limited rehearing of D.97-11-019 and modify the Decision to correct those errors. Thereafter, we deny rehearing of D.97-11-019 as modified.

I. PROCEDURAL BACKGROUND AND SUMMARY

D.97-11-019 was issued November 6, 1997. It authorizes the transfer of the Placer County Canal System (System) from Pacific Gas and Electric Company (PG&E) to Placer County Water Agency (PCWA), in accordance with the terms and conditions of the 1995 Transfer Agreement (Transfer Agreement) between

PG&E and PCWA. The Decision also denies the protest of Simpson Ranch (Simpson Ranch), a California Limited Partnership. The protest asks that:

“those parts of Application A. 96-03-051 concerning Simpson Ranch/Bear River Canal Water/PG&E Contracts be excluded and completely freed from any water facility sale accomplished between PG&E and PCWA. And, that this be so designated in the final PUC decision, thus in turn freeing the two parties to accomplish their goals unencumbered by Simpson Ranch rights and needs.” (D.97-11-019, page 7 quoting Protest, page 6.).

A prehearing conference was held to explore the possibility that PG&E and Simpson Ranch could develop mutually satisfying language to be used in an ordering paragraph of the Commission's decision. Those efforts were unsuccessful. No party requested evidentiary hearings and none were held.

An application for rehearing of D.97-11-019 was timely filed by Simpson Ranch as was the response to the application filed by PG&E. The 63-page application, including 37 pages of exhibits, is repetitive, sometimes confusing and contradictory. For the most part, it reasserts the positions more clearly expressed in the Simpson Ranch protest.

The application appears to allege the following errors as grounds for rehearing D.97-11-019: (1) The Commission violated its own Rules of Practice and Procedure by failing to distribute a proposed decision for comment by the parties prior to the adoption of D.97-11-019; (2) D.97-11-019 incorrectly denies Simpson Ranch's protest and wrongfully concludes that Simpson Ranch is not entitled to receive intervenor compensation for its participation in this proceeding; (3) Finding of Fact No. 4 of the Decision erroneously states that the transfer of the System is uncontested and Finding of Fact No. 5 wrongly concludes that the exclusion of Simpson Ranch from the order approving the Transfer Agreement is unnecessary to the preservation of protestant's alleged rights; and, (4) By using

words such as "alleged" or "contends" to describe positions of Simpson Ranch, D.97-11-019 attempts "to discredit the veracity of Simpson Ranch contractual rights" (Application, page 11.).

We have carefully reviewed Simpson Ranch's rehearing application, PG&E's response and the underlying record in this proceeding. As explained more fully below, we conclude that Simpson Ranch's allegations of error in D.97-11-019 are without merit and do not constitute cause for rehearing. However, we grant rehearing of D.97-11-019 for the purpose of modifying the Decision to add omitted findings and conclusions required by section 1705 of the Public Utilities Code regarding the issue of intervenor compensation and to add a clarifying finding which acknowledges the position asserted in Simpson Ranch's protest. Finally, we deny rehearing of D.97-11-019 as modified herein.

II. FACTS

For the most part, the errors in D.97-11-019 alleged in the application for rehearing relate to the Decision's denial of the Simpson Ranch protest. The application claims that if the order denying the protest is not removed and replaced with language clarifying that no party taking water from the Bear River Canal is included in or affected by the Transfer Agreement, the Commission's Decision "will have approved and legitimized a flawed and illegal Transfer Agreement contract" (Application, page 26.). This contention is best explained by reference to the Simpson Ranch protest which contains various arguments in support of the position that the Simpson Ranch water rights are legally non-transferable without its assent.

In D.97-11-019, we devoted little discussion to the substance of the protest. Our denial may be better understood if we take this opportunity to expand our discussion of some of the issues raised. For example, despite PG&E's assertions to the contrary, Simpson Ranch contends that it never was a tariffed

customer of the System owned by PG&E, that it never took water from the System, and that the Bear River Canal, from which Simpson Ranch takes its water, never was a part of the System to be transferred to PCWA. Both PG&E and Simpson Ranch reference an October 14, 1963 Receipt and Release, entered into by both parties, as proof of their contrary positions.

The terms of the 1963 Receipt and Release include, but are not limited to, the payment to Simpson Ranch of \$5,000 in exchange for the release and relinquishment to PG&E of all of "their right to take water from the Bear River and/or Lower Boardman Canals arising under a deed dated April 11, 1894 from J. E. Simpson Sr., to the South Yuba Water Company" ("Receipt and Release", Protest, Exhibit D.). PG&E identifies a letter, which is Exhibit B to the Receipt and Release, in support of its claim that Simpson Ranch is a tariffed customer. In its protest, Simpson Ranch disclaims the validity of the 1963 Receipt and Release. It outlines in considerable detail the claim that it recently discovered that PG&E had fraudulently induced Simpson Ranch to execute the 1963 Receipt and Release. Noting that a fraudulently obtained contract is legally invalid, Simpson Ranch claims that on those grounds, the 1963 Receipt and Release can have no legal effect and, therefore, the 1894 deed is revived as evidence of Simpson Ranch's property right in the water of Bear River Canal.

III. DISCUSSION

A. D.97-11-019's Denial of the Simpson Ranch Protest

A review of the facts noted above make it clear that the protest, like the 1963 Receipt and Release, is about a property right, in this case the right to water. Absent settlement of the dispute by the parties, only a legal decision interpreting the meaning and determining the validity of the 1963 Receipt and Release, the 1894 deed, and other relevant legal documents can resolve the respective interests

of the parties. This Commission's authority to interpret contracts which determine property rights is very limited. (See Camp Meeker Water System, Inc. v. Public Utilities Com., (1990) 51 Cal. 3d 845.) That authority is not applicable in this case.

As acknowledged in its application for rehearing, Simpson Ranch was advised by the Administrative Law Judge at the prehearing conference that the Commission would not make a judgment about the legal rights and obligations of Simpson Ranch in its dealings with PG&E (Application, page 8.). Under those circumstances, the Commission's denial of the protest should have been expected.

If the parties had been able to agree on appropriate language, we would have considered including in the order of D.97-11-019 a limiting paragraph regarding the Simpson Ranch/Bear River Canal Water/PG&E Contracts. However, absent such an agreement, the only action which this Commission could take was to deny the protest. A Commission order excluding Simpson Ranch from the PG&E/PCWA transfer, as the protest requests, either would have required the Commission to abuse its authority by adjudicating the property dispute, or, would have created a mistaken impression in the Decision that we had done so¹.

This is a proceeding pursuant to section 851 of the Public Utilities Code to consider the transfer of a water system. In this circumstance, the property right to water, or the lack thereof, arising from an alleged fraudulent contract or any other legal theory, is within the jurisdiction of the courts, not this Commission.

There is no merit to Simpson Ranch's claim that Finding of Fact No. 5 is error. In that finding, D.97-11-019 correctly concludes that "The protest of

¹ For similar reasons, D.97-11-019 employs conditional terms, such as "allege" or "contends" when identifying the disputed positions of the parties. Simpson Ranch objects to this practice as error in the Decision. The use of these terms is not designed to suggest that the party's position is not true but rather is intended to preserve the perceived and actual objectivity of the Decision. The use of such terms allows us to identify a position without appearing to adopt it. In any event, Simpson Ranch's allegation on this point does not raise a question of legal error and therefore, does not constitute a ground for rehearing.

Simpson Ranch that it be specifically excluded from the order approving the 1995 Transfer Agreement is unnecessary to the preservation of protestant's alleged rights." No water rights or property rights that may be subject to legal question by Simpson Ranch were adjudicated. We believe and we intend that nothing in D.97-11-019 authorizing the transfer of the System to PCWA extinguishes any legal right, including but not limited to, the possible complaint against PG&E for fraudulent transfer of water rights, which Simpson Ranch contends that it may pursue.

Simpson Ranch claims error in the declaration of Finding of Fact No. 4 that the transfer of the System to PCWA is uncontested. As we understand the protest, Simpson Ranch does not contest the transfer "per se" but rather, it seeks only to exclude from the transfer certain water rights which it claims. Finding of Fact No. 4 will remain unchanged. However, in the interest of clarity we shall modify D.97-11-019, as ordered below, to include a finding identifying the substance of the Simpson Ranch protest.

B. D.97-11-019's Implicit Denial of the Simpson Ranch Request For Intervenor Compensation

Simpson Ranch's claim for intervenor compensation for its participation in this proceeding is without merit. As noted in D.97-11-019, when deciding eligibility for intervenor compensation pursuant to sections 1801-1808 of the Public Utilities Code, this Commission has held in D.95-10-050 that complainants acting in their individual capacity seeking personal remedy are not eligible.

Simpson Ranch challenges the applicability of D.95-10-050 on the grounds that it is not a complainant, but a protestant, and because it is not seeking a remedy. As suggested in PG&E's response to the application for rehearing, the distinctions as to form asserted by Simpson Ranch are non sequiturs. Whether or not one properly would term the request a remedy, Simpson Ranch's protest is

seeking the relief of being individually excluded from the Transfer Agreement. Furthermore, Simpson Ranch's protestant status does not change the fact that it shares the essential characteristic of the party previously found to be ineligible for intervenor compensation, that is a party acting in its individual capacity seeking a result in its personal interest.

While the ineligibility of Simpson Ranch for intervenor compensation was implicit in the discussion of D.97-11-019, it was not addressed in the Decision findings and conclusions. Accordingly, we shall modify the Decision, as ordered below, to include the intervenor compensation issue in the appropriate findings and conclusions of the Decision.

**C. Circulation of a Proposed Decision For Comment
Prior To Issuing D.97-11-019**

Simpson Ranch claims that the Commission violated Rules 77.1 et seq. by not properly issuing a proposed decision for comment (Application, pp.2-4). This allegation of error has no merit. As we previously announced, "Rule 77.1 applies to all matters which have been heard." (Re Commission's Rules of Practice and Procedure [D.86-12-056] (1986) 23 Cal.P.U.C.2d 45, 46.) There were no evidentiary hearings in the instant proceeding. Therefore, there was no requirement that a proposed decision be circulated for comment prior to the Commission's issuance of D.97-11-019.

THEREFORE, GOOD CAUSE APPEARING, IT IS ORDERED that a limited rehearing is granted and D.97-11-019 is modified as follows:

1. Insert between Finding of Facts Nos. 4 and 5 the following Finding:

"The protest of Simpson Ranch requests that the Transfer Agreement and the Order of this Commission exclude Simpson Ranch/Bear River Canal Water/PG&E Contracts."

2. Add to the Findings of Fact the following Finding:

"Simpson Ranch filed a Notice of Intent to seek intervenor compensation."

3. Add to the Conclusions of Law, the following Conclusion:

"Because Simpson Ranch's participation in this proceeding was that of a protestant acting solely in an individual capacity and seeking personal relief, it is not entitled to claim compensation as an intervenor in a Commission proceeding as provided in sections 1801-1808 of the Public Utilities Code."

4. Where findings of fact and conclusions of law are modified herein, all remaining findings and conclusions shall be renumbered accordingly.

IT IS FURTHER ORDERED that rehearing of D.97-11-019 as modified above is denied.

This order is effective today.

Dated April 23, 1998, at Sacramento, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners