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Decision 99-01-033 January 20, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southwest Gas Corporation to modify the terms and conditions of the Certificate of Public Convenience and Necessity granted in D.95-04-075, to provide natural gas service in areas of El Dorado, Nevada, and Placer Counties, California. (U 905 G)

Application 97-07-015
(Filed July 1, 1997)

ORIGINAL

ORDER DENYING APPLICATION FOR REHEARING OF DECISION 98-07-031

I. INTRODUCTION

On August 12, 1998, Southwest Gas Corporation (Southwest) filed an application for rehearing of Decision (D.) 98-07-031. In that decision, we dismissed Southwest's application requesting that the Commission modify the terms and conditions of the Certificate of Public Convenience and Necessity (CPCN) authorized in D.95-04-075 to extend its certificated service territory in Northern California in the Lake Tahoe area, to include, among other things, the Town of Truckee. Southwest's application sought to increase a previously approved construction cost cap to provide natural gas service in the expansion area, increase the previously approved amount of construction expenditures to be recovered through a facilities surcharge, and modify the expansion area so that approximately 1,500 potential natural gas customers will be required to apply for service under Southwest's Main and Service Rule rather than the offered service as set forth in D.95-04-075. In D.98-07-031, we also rejected a settlement reached by

Southwest and the Office of Ratepayer Advocates (ORA)[1] in this proceeding, which continued to propose shifting the major portion of any cost overruns from Southwest's shareholders to its ratepayers. We rejected the ORA-Southwest settlement and dismissed Southwest's application because we did not find extraordinary circumstances warranting reopening final Commission decisions that had approved Southwest's prior settlement agreements. We also found that Southwest had waived any right to file its application seeking such modifications without the written agreement of all the parties to the previous settlements.[2] We further ordered Southwest to proceed with all deliberate speed to fulfill its obligations as set forth in D.95-04-075 and D.94-12-022.

II. DISCUSSION

In its application for rehearing, Southwest makes a number of arguments concerning the legality of the Commission's decision to dismiss Southwest's application and reject the ORA-Southwest settlement. However, Southwest concedes in its application that the Commission does have the discretion to dismiss its application without a hearing pursuant to Rule 47(h)[3] of the Commission's Rules of Practice and Procedure.[4] (Southwest Application for Rehearing at 10.) As many of Southwest's arguments are predicated on the

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[1] Formerly known as the Division for Ratepayer Advocates (DRA).

[2] There are two prior settlement agreements concerning Southwest's expansion project. D.94-12-022 approved an all-party settlement in Southwest's General Rate Case (GRC), which set forth cost recovery for the project. In that settlement, Southwest agreed that its shareholders would be responsible for any cost in excess of the cost cap. (D.94-12-022, Appendix A, p. 22.) In D.95-04-075, the Commission granted Southwest a CPCN for the expansion project. That decision approved a settlement which incorporated the rate issues resolved in D.94-12-022, including the construction cost cap and facilities surcharge. In both settlement agreements, the parties agreed that the terms and conditions of the settlement may only be modified by a writing subscribed by the parties.

[3] Rule 47(h) provides: "In response to a petition for modification, the Commission may ... summarily deny the petition on the ground that the Commission is not persuaded to modify the decision, or take other appropriate action."

[4] All Rules refer to the Commission's Rules of Practice and Procedure, unless otherwise stated.

assumption that Southwest met the requirements for seeking modification of the prior settlements, that issue will be addressed first.

1. **The Commission Did Not Commit Legal Error in Dismissing Southwest's Application and Rejecting the ORA-Southwest Settlement as Southwest Failed to Meet the Requirements for Modifying the Previous All-Party Settlements.**

Southwest argues that it met the requirement for modification of the original GRC and CPCN settlements, and as such, the Commission's denial of the ORA-Southwest Settlement was legal error. Both previous settlement agreements contain provisions by which the parties agreed that the terms and conditions of the settlements may only be modified by a writing subscribed by the parties.

The Commission denied the ORA-Southwest Settlement in D.98-07-031 on the basis that "other parties to these previous settlements have not subscribed in writing to the new settlement in order for Southwest to have any right to seek to modify its obligations under the previous all-party settlements." (D.98-07-031, Mimeo at 11.) Southwest argues that this statement "is flatly contradicted by the record in this case." (Application for Rehearing, at 11.) Southwest refers to the "poll" it conducted of the parties to the A.93-12-042 and A.94-01-021 proceedings, the results of which were sent to the Commissioners and filed in A.97-07-015. Southwest argues that these poll results, allegedly signed by all of the signatories to the original settlements, are undeniable proof that those parties agreed in writing to modify those settlements.

Contrary to Southwest's claims, however, the poll results filed by Southwest do not meet Commission standards for modifying a decision which adopts a settlement. In D.94-03-014, the Commission advised parties that "any future petition for modification of a decision which adopts a settlement must include the signature of each party to the original settlement, or a statement why

the signature is not included." Subsequently, in D.95-02-025 (a later decision in In the Matter of the Regulation of Used Household Goods Transportation by Truck proceeding), the Commission modified its MAX-4 transportation rate under the household goods tariff that had been established by an all-party settlement, after the parties requesting modification attached a letter from the two non-signing settlement parties that they had no objections to the modification. The Commission took the opportunity to clarify its statement in D.94-03-014 by stating that "include the signature" means that each party should cosign the petition. The Commission further stated:

> Every Commission decision is an order of the Commission, whether that decision adopts a settlement or not. Any party individually has the right to file a petition for modification to a Commission decision, with or without the signatures of other parties. The strongest petition for modification filed by a party to a settlement seeking to modify the settlement therein adopted, however, is one that is cosigned and filed by all parties to the original settlement. We encourage a party who seeks modification of a decision to file the petition cosigned by all parties to the original settlement. Alternatively, within the petition, the petitioner should explain to the best of its knowledge why any original settling party failed to jointly file the petition. (D.95-02-025, 1995 Cal. PUC Lexis 76, *9-10.)

Southwest's polls do not constitute written subscription to the ORA-Southwest settlement by the original settling parties under the Commission's standards articulated in D.95-02-025. The original settling parties did not co-sign the application or the ORA-Southwest Settlement, nor is there any explanation why any original settling party failed to jointly file the application.[5]

[5] In D.95-02-025, two of the parties signed a letter stating they had received advanced copies of the petition, had reviewed it, had no objection to the requests specified therein, and had no objection to ex parte approval of the requested rate increases. The Commission accepted this method of approval, noting that the petitioners complied with one reading of D.94-03-014.

As explained in D.98-07-031, this case is more akin to Application of GTE California, Inc., D.96-05-037, 1196 Cal. PUC Lexis 652 (1996), where the Commission interpreted a stipulation as preventing GTE California (GTEC) from seeking a modification of a Commission decision. In that case, GTEC, like Southwest, argued that the Commission has the power to modify its prior decision, including decisions based on settlements. Although the Commission does have this authority, in D.96-05-037 we also noted that we have articulated policies that favor settlement, so that any alteration to a decision based on a settlement must be made only after careful consideration of the specific provisions of the agreement. In the instant case, the Commission acted entirely within its authority in dismissing Southwest's application, since Southwest failed to obtain written consent of the signatories to the original settlements, as is required by those agreements.

2. **The Commission Was Not Required to Hold a Hearing to Inquire As to the Cause of the Cost Overruns Prior to Dismissing Southwest's Application.**

As Southwest acknowledges in its application for rehearing, the Commission has discretion under Rule 47(h) to dismiss Southwest's application for modification without a hearing (Southwest Application for Rehearing at 10). Contrary to Southwest's claims, the Commission was not required to hold a hearing to inquire as to the causes of the cost overruns prior to rejecting

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However, given the Commission's further clarification of the rule articulated in D.94-03-014, and given the fact that Southwest's "polls" do not include the same type of information as the Household Goods letters, Southwest's arguments that the Commission should accept the polls as written subscription to the modification are not convincing. Similarly, the facts of Application of PacificCorp, also cited by Southwest as an example where the Commission approved a modification to a settlement without written consent of all settling parties, are hardly congruous to the facts in the instant case. There, PacifiCorp filed an application for a modification of a decision which had adopted an all-party settlement between DRA and PacifiCorp. PacifiCorp merely sought to eliminate the requirement that it file semiannual demand-side management reports with the Commission, a requirement which had been eliminated for other California utilities. In addition, the DRA-PacifiCorp settlement did not include language which specifically provided that no changes may be made to the settlement without the written subscription of all parties.

Southwest's application. We find unpersuasive Southwest's arguments that its due process rights were violated when we dismissed Southwest's application for modification without a hearing. Southwest's reliance on Sokol v. Public Utilities Commission, 65 Cal.2d 247, 254 (1966) in this regard is misplaced. That case discussed the due process rights of an individual to present views at a hearing prior to the institution of agency action affecting his substantial rights (the Commission had terminated an individual's telephone service pursuant to a request by the police prior to holding a hearing on the matter). Sokol does not support Southwest's claim that the Commission violated Southwest's due process rights in dismissing its application for modification of a prior Commission decision without a hearing.

Southwest's assertion that the Commission erred by failing to comply with Rule 51.7 is also unavailing.[6] Southwest argues that once the Commission rejected the ORA-Southwest settlement, it should have sent the matter back to the parties or held a hearing. Southwest's argument assumes that it had the necessary consent of the other parties in order to seek modification of the Commission's prior decisions. As explained above, Southwest did not have this authority from the original settling parties. The Commission had the authority to dismiss Southwest's application pursuant to Rule 47(h), notwithstanding the settlement reached by ORA and Southwest.

The Commission has articulated a clear policy to decline to exercise its discretion to modify its own decisions where to do so would dishonor a previous settlement agreement. (Application of GTE California, Inc., 66 CPUC2d

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[6] Rule 51.7 provides: "The Commission may reject a proposed stipulation or settlement without hearing whenever it determines that the stipulation or settlement is not in the public interest. Upon rejection of the settlement, the Commission may take various steps, including the following: (1) Hold hearings on the underlying issues, in which case the parties to the stipulation may either withdraw it or offer it as joint testimony, (2) Allow the parties time to renegotiate the settlement, (3) Propose alternative terms to the parties to the settlement which are acceptable to the Commission and allow the parties reasonable time within which to elect to accept such terms

280, 282.) The settlement agreements approved in D.94-12-022 and D.95-04-075 precludes Southwest from seeking modification absent consent of the other parties to the settlement agreements. None of Southwest's arguments demonstrate legal error in the Commission's decision to dismiss Southwest's application and reject the ORA-Southwest settlement.

3. The Commission Did Not Modify the Original Settlements, and Therefore Did Not Violate Public Utilities Code Section 1708.

Southwest next claims that the Commission modified D.95-04-075 in a manner neither requested nor desired by any of the parties, by imposing a deadline for completion of construction, whereas the original settlement approved by that decision imposes no deadline.[7]

Apparently, Southwest refers to that part of the decision where the Commission notes that Southwest is already a year behind the schedule adopted in D.95-04-075, and states, "... Southwest should take all steps necessary to ensure that it completes its Northern California expansion within one year of the schedule contemplated in the stipulation approved in D.95-04-075." (D.98-07-031, mimeo at 16.) Southwest construes this statement as a modification to the Settlement adopted by D.95-04-075, arguing that this modification was made without a hearing required by section 1708 of the Public Utilities Code.[8]

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or to request other relief."

[7] Southwest notes at this point that the Original Settlement provides that "[a]ny party may withdraw from this Stipulation if the Commission modifies, deletes or adds any term." D.91-12-022, App. A at 23. Similarly, the CPCN Settlement states: "Southwest may withdraw from this stipulation if the Commission modifies, deletes or adds any term to the stipulation or the order adopting the Stipulation." D.95-04-075, App. A at 11. Southwest claims that by modifying the Original Settlement and the CPCN Settlement to impose a date certain by which Southwest must complete construction of the Expansion Project, the Commission has triggered these two contractual provisions, giving Southwest the option of withdrawing from them if it chooses to do so. As we find no such modification has taken place, however, we obviously disagree with Southwest's claim on this point.

[8] All code sections refer to the Public Utilities Code, unless otherwise stated.

Southwest's assertion that the Settlement adopted by D.95-04-075 contemplates no deadline for the completion of construction, however, is factually incorrect. According to the terms of that agreement, Southwest was to have provided an updated construction planning schedule to the Commission for the purpose of identifying the proposed phasing of the project, and the respective schedule for each phase. (See D.95-04-075, Appendix B.) Southwest's amended application, filed in that proceeding on May 27, 1994, indicates that Phase I of the project would be completed in 1995, Phase II in 1996, and Phase III in 1997. Furthermore, while the Commission urged Southwest to complete the project within one year of that schedule, the ordering paragraphs only instruct Southwest to proceed with all deliberate speed to fulfill its obligations set forth in D.95-04-075 and D.94-12-022. Southwest's argument that this constitutes a modification of those decisions is unconvincing and fails to demonstrate legal error in our decision.

4. **Southwest's Claim That the Commission Erred by Mischaracterizing the Cause of the Cost Overruns is Without Merit.**

Southwest argues that the Commission goes outside the record in making the following statement about the ORA-Southwest settlement: "[W]hile arguably less onerous to Southwest's present and potential customers than the application itself, [the ORA-Southwest settlement] continues to propose shifting the major portion of any cost overruns and planning errors committed by the utility from its shareholders to its ratepayers." Southwest argues that there is no basis in the record for the Commission to state that the cost overruns were caused by planning errors, and that the only possible source for this statement is the off-the-record statements made by Truckee representatives.

Southwest's argument is based on supposition and fails to state grounds for legal error. The reasons for the cost overruns do not form the basis for

the Commission's decision to dismiss Southwest's application and reject the ORA-Southwest Settlement. In fact, Finding of Fact number 15 specifically states: "It is not known if the cost overruns were the result of changes in governmental regulations, or unforeseen changes in construction practices, or excusable clerical errors in excess of the 10% contingency, or simply errors in Southwest's judgment." (Decision 98-07-031, at 18.) The Commission acted within its authority in dismissing the application notwithstanding the causes of the cost overruns experienced by Southwest. We find Southwest's argument without merit and irrelevant to the Commission's exercise of authority in this regard.

5. Southwest's Claim That the Commission Erred by Failing to Comply With its All-Party Settlement Rule is Without Merit.

Southwest argues that the Commission failed to comply with its all-party settlement rule articulated in In the Matter of the Application of San Diego Gas & Electric Co., D.92-12-019, 46 CPUC2d 538 (1992), in analyzing the ORA-Southwest settlement agreement.[2] Since Southwest and ORA were the only active parties to the instant proceeding, Southwest claims that the Commission should have analyzed the ORA-Southwest settlement under the criteria articulated in San Diego Gas & Electric and should have abstained from performing an independent public interest analysis of the settlement.

In making this argument, Southwest completely ignores the fact that the ORA-Southwest settlement is an attempt to modify two prior settlements, which the parties agreed may only be modified by a writing subscribed by all the parties. While it is true that ORA and Southwest were the only active parties in

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[2] In that case, the Commission set forth four criteria to consider in approving all-party settlements: (1) the proposed settlement commands the unanimous sponsorship of all active parties to the instant proceeding; (2) the sponsoring parties are fairly reflective of the affected interests; (3) no term of the settlement contravenes statutory provisions or prior Commission decision; and (4) the settlement conveys to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

A.97-07-015, Southwest cannot expect the Commission to evaluate the ORA-Southwest Settlement in a vacuum, as if the previous all-party settlements did not exist. None of the cases cited by Southwest involve similar attempts by a petitioner to modify prior settlements approved by the Commission. We do not find that the criteria used by the Commission in evaluating all-party settlements apply to the circumstances in this case, and we accordingly find Southwest's argument without merit.

6. Southwest's Claim that the Commission Violated the Due Process Rights of the Parties by Violating Ex Parte Communication Rules is Without Merit.

Southwest claims that the Commission violated due process rights of the parties by providing preferential treatment to the Town of Truckee in its communications with the Commission. Southwest argues that since Truckee had a financial interest in the proceeding and was an active participant, the Commission should have treated Truckee as a party, subject to the same ex parte rules as Southwest and ORA. According to Southwest, by failing to treat Truckee as a party, the Commission engaged in secret communications with Truckee representatives, to which ORA and Southwest could not respond. Southwest further claims that this "pervasive inequality in treatment so tainted the Commission's process in this proceeding as to make the decision that was based on that process wholly defective." (Southwest Application for Rehearing, at 28.)

The Commission's ex parte rules in Article 1.5 of its Rules of Practice and Procedure apply only to parties.[10] The Town of Truckee was not a party to the instant proceeding, and therefore the Commission did not commit legal error by not subjecting the Town of Truckee to its ex parte rules. Southwest

[10] As this proceeding was filed before January 1, 1998, and as there was a prehearing conference prior to that date, the Commission's pre-SB960 Rules of Practice and Procedure apply.

claims that regardless of the Commission's Rules of Practice and Procedure, section 1701.1(c)(4) applies the rules of ex parte communications to any person with a financial interest in a matter before the Commission, an agent or employee of a person with a financial interest, and a representative acting on behalf of any civic, environmental, neighborhood, business, labor, trade, or similar organization who intends to influence the decision of a Commissioner on a matter before the Commission. Southwest argues that the terms of 1701.1 became effective on January 1, 1998 and are applicable to all proceedings pending on that date. As such, Southwest claims that the representatives of Truckee should have been made a party subject to the ex parte rules set forth in 1701.1.

Southwest is relying on a statutory rule which applies only to matters that go to hearing. As this matter did not go to hearing, section 1701.1, by its own terms, does not apply. Therefore, the Town of Truckee was not required to be made a party in this proceeding under the provisions of 1701.1, nor was it required to be made a party under the Commission's Rules of Practice and Procedure. As such, there was no requirement to report ex parte communications with the representatives of Truckee.

Furthermore, Southwest's claims that the Commission held improper communications with Truckee which "created the appearance of impropriety" are baseless. At Southwest's request, Legal Division staff reviewed the formal files in this proceeding to make sure that all ex parte notices and correspondence were in the files. Letters to the Commissioners from Truckee representatives, and from citizens of Truckee, as well as copies of letters from the Commissioners in response to those letters are in the files. Contrary to Southwest's claims, in reviewing Notices of Ex Parte Communications filed by Southwest, Southwest representatives did indeed have the opportunity to respond to the alleged "misrepresentations" made by Truckee representatives at the public conferences. When the Commission imposed a ban on ex parte contacts on June 4, 1998, a copy

of the ALJ's ruling memorializing the ban was sent to the representatives of Truckee. Moreover, representatives of the Town of Truckee indicated to the Commission that they had been abiding by the ban. Contrary to Southwest's allegations that the Commission tolerated secret communications, the record reveals that every effort was made by the Commission and its staff to disclose communications they had with all parties interested in this case.

Southwest's claims that the Commission engaged in secret communications and violated the due process rights of the parties are unsubstantiated and fail to demonstrate legal error in the decision. While D.98-07-031 noted the public's opposition to Southwest's application, the Commission's decision does not rest upon any of the lobbying efforts of the people from Truckee or Southwest. Instead, we denied Southwest's application because we did not want to dishonor the previous settlements which we had already approved in final orders.

III. CONCLUSION

As none of Southwest's allegations of legal error have merit, Southwest's application for rehearing should be dismissed.

IT IS THEREFORE ORDERED that:

1. Southwest's application for rehearing of D.98-07-031 is denied.
2. This proceeding is closed.

This order is effective today.

Dated January 20, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners