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Decision 99-06-093 June 24, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ARCO Products Company, Mobil Oil Corporation, and Texaco Refining and Marketing, Inc., Complainants, vs. SFPP, L.P., Defendant.	Case 97-04-025 (Filed April 7, 1997)

ORDER GRANTING REHEARING OF DECISION 98-08-033

I. SUMMARY

This order grants rehearing of Decision (D.) 98-08-033, referred to as the "Decision." Rehearing will reconsider the public utility status of the Sepulveda Line, the proper ratemaking treatment of partnership tax expenses, and calculation of environmental costs. Because the Decision's findings on these issues supported its ultimate conclusion, the rehearing will reconsider that conclusion as well. This order also comments on how the burden of proof should be applied, notes certain minor errors contained in the Decision, and briefly reviews contentions raised in the application for rehearing that do not indicate error.

II. BACKGROUND

SFPP, L.P. (SFPP) operates a network of pipelines for the transportation of refined petroleum products, such as gasoline, diesel and jet fuel.

Most of this network provides public utility service and is economically regulated[1] by both this Commission (CPUC) and the Federal Energy Regulatory Commission (FERC). Small portions of SFPP's network were not built to provide utility service to the public and, therefore, remained unregulated.

SFPP's rates were last reviewed by this Commission in Application (A.) 91-12-034. In that application, SFPP requested a 9% rate increase. No party protested A.91-12-043, which was reviewed on the basis of 1991 pro forma and recorded earnings. In D.92-05-018, the Commission authorized SFPP's requested 9% rate increase. (Application of SFPP, L.P. (Increased Transportation Rates) [D.92-05-018] (1992), abstracted at 44 Cal.P.U.C.2d 200.)

In recent FERC proceedings, that agency determined certain SFPP rates were unreasonable, but that others were not subject to challenge. FERC also found that the unregulated "Watson Enhancement Facilities" and "Sepulveda Line" should be made subject to FERC jurisdiction. A second round of complaints challenging SFPP's inter-state rates is now pending before FERC.[2]

In this proceeding, Complaint (C.) 97-04-025, Complainants[3] alleged that SFPP's intra-California rates were too high, and therefore unreasonable. The complaint also alleged that the Sepulveda Line and the Watson Enhancement Facilities were used for public utility service on in-state shipments and should be

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[1] The safety of liquid pipelines such as crude oil and products pipelines is regulated by a number of different agencies, including the State Fire Marshall.

[2] FERC decided a series of complaints filed prior to August 7, 1995 in Texaco Refining and Marketing, Inc. v. SFPP, L.P., etc. (1999) 86 F.E.R.C. ¶ 61,022. That decision reviewed SFPP's rates under the terms of the Energy Policy Act of 1992. Texaco Refining and Marketing, Inc. v. SFPP, L.P. (1997) 80 F.E.R.C. ¶ 61,200, rehearing denied Texaco Refining and Marketing, Inc. v. SFPP, L.P. (1997) 81 F.E.R.C. ¶ 61,388, found that FERC had jurisdiction over interstate shipments on the Sepulveda Line. A FERC administrative law judge found that the Watson Enhancement Facilities were FERC-jurisdictional in SFPP, L.P., etc. (1997) 80 F.E.R.C. ¶ 63,014. FERC's procedural order on complaints filed after August 7, 1995 appears in Texaco Refining and Marketing, Inc. v. SFPP, L.P. (1999) 86 F.E.R.C. ¶ 61,035.

[3] ARCO Products Company, Mobil Oil Corporation, and Texaco Refining and Marketing Inc. instituted this proceeding and are referred to as "Complainants."

regulated by the Commission. The Decision, Arco Products Company, et al. v. SFPP, L.P. [D.98-08-033] (1998) __ Cal.P.U.C.2d __, found that Complainants did not prove their case, except with respect to the Watson Enhancement Facilities. Thus, the Decision dismissed the bulk of the complaint and ordered SFPP to file rates for Watson Enhancement Facilities.

Complainants filed an application for rehearing of the Decision on September 8, 1998. SFPP responded to this application on September 23. In addition, SFPP's proposed tariff for the Watson Enhancement Facilities has been vigorously protested, and a number of rounds of comments and replies have been filed with Energy Division staff.

III. DISCUSSION

A. Public Utility Status of the Sepulveda Pipeline.

The Sepulveda Line runs 3.8 miles, from Sepulveda to Watson. Watson is the "origination point" of SFPP's "West Line," which is subject to CPUC and FERC jurisdiction. The West Line extends 400 miles from Watson to Arizona. Currently, Texaco and GATX own storage tanks and pumping facilities at Sepulveda, which they use to move the product through the Sepulveda Line to the Watson origination point. GATX is a public terminal and its facilities handle product for a number of different companies. There appear to be about ten such shippers. SFPP charges $0.05 per barrel for transportation over the Sepulveda Line.

Originally, the Sepulveda Line was constructed pursuant to an agreement between SFPP's predecessor and GATX , Texaco, and another products company, Champlain (later Ultramar). That agreement was entered into in 1982. It expired in 1992. SFPP has continued to operate the Sepulveda Line without submitting the $0.05 per barrel transportation charge for review or approval by the Commission. As discussed above, FERC recently found that the Sepulveda Line was subject to its jurisdiction and now regulates the charges for inter-state

shipments using that line. However, intra-California shipments remain unregulated.

The Decision found that the Sepulveda Line was not part of SFPP's public utility pipeline system because it had not been "dedicated to public use." After reviewing the law of dedication, the Decision concluded dedication could only be found if it was demonstrated that SFPP had an "unequivocal intent to serve the public." The Decision held that "[e]vidence of that in text is missing in this case." ARCO Products Company, et al. v. SFPP, L.P. [D.98-08-0330], supra., at p. 14 (mimeo.).)

The Decision's findings on dedication rely on the principle that dedication is determined by looking for an unequivocal intent to serve the public. However, the Decision does not explain that this intent can be inferred from a company's actions and need not be explicit. (Cf., Yucaipa Water Dist. No. 1 v. Public Utilities Com. (1960) 54 Cal. 2d 823, 827.) Also, while it acknowledges that the public served must be indefinite, it does not clarify that the dedication requirement is met "not necessarily by service to all of the public, but to any limited portion of it, such portion, for example as could be served by [the utility's] own system, as counterdistinguished from [the utility's] holding [its]self out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them." (Van Hoosear v. Railroad Com. (1920) 184 Cal. 553, 554 (emphasis added).)

Moreover, the record of this case contains facts suggesting dedication may have occurred. While the Sepulveda Line was built for Texaco GATX and Champlain, it appears to be available now to all of the terminals and products companies that have access to it. Thus, SFPP appears to be providing service to the portion of the public that is capable of receiving service on the Sepulveda line. In particular, GATX is a public terminal that stores and transports products for others. There appears to be no restriction on GATX's customers' access to the Sepulveda Line. The Decision acknowledges that no one has ever been denied

service on the Sepulveda pipeline, and that SFPP's own marketing brochures indicate the Sepulveda line is available to products shippers as an inbound gathering system. Moreover, the Sepulveda Line could be characterized as an extension of the West Line rather than as a separate line.

Given these facts, the Decision's unelaborated conclusion that evidence of intent to serve the public is "missing" likely constitutes error under a correct formulation of the dedication test. Therefore, rehearing will be granted to reconsider the issue of dedication in light of the principles set out above.

B. Rates for the Watson Facilities.

The Decision determined that the Watson Enhancement Facilities were public utility facilities and that the charges for the use of those facilities should be reviewed and approved by the Commission. The Decision ordered SFPP to file tariffs covering those facilities for review. The Decision adopted that approach because there was insufficient evidence to assess a proper charge. (ARCO Products Company, et al. v. SFPP, L.P. [D.98-08-033], supra., at p. 16 (mimeo.).) The application for rehearing claims that given this lack of evidence the Decision erred by not requiring SFPP to provide service on the Watson Enhancement facilities for free. This contention does not take into account the fact that evidence indicated "small" but unquantified costs associated with the Watson Enhancement Facilities. (Ibid.) It was proper to order further proceedings to determine the correct rate in those circumstances.

SFPP filed its Advice Letter No. 10 on October 6, 1998. The advice letter was protested, and numerous rounds of comments and replies have now been filed in the advice letter docket. Staff indicates that the Advice Letter and protests raise issues that are more appropriately addressed in a formal proceeding rather than by advice letter. Since rehearing is being granted in any event, we will order the correct rate for the Watson Facilities to be determined in that forum. Since SFPP continues to charge unreviewed rates for service on the Watson

Enhancement Facilities, we will consider appropriate ways to track those charges and make them subject to refund when further proceedings convene. We will also consider whether or not it would be appropriate to charge a separate rate for Watson Facilities or roll the costs of the Watson Facilities into SFPP's general rates. Since rate issues relating to the Sepulveda Line—if we find it jurisdictional—could be similar, we will consider them as well, if necessary.

C. Tax Issues.

The Decision found that an expense called a "tax allowance" of $5.4 million should be included among SFPP's expenses for the purpose of determining if SFPP's rates were reasonable. The allegation that SFPP's rates were too high relied on Complainants' calculation of revenue and expenses for a pro forma 1996 test year. SFPP challenged that calculation, asserting, among other things, that Complainants understated SFPP's expenses by not making any provision for the payment of tax on the income SFPP generated.

SFPP itself does not in fact pay tax on the income it generates. This is because SFPP is organized as a limited partnership.[4] However, this does not mean that income generated by SFPP is tax-free. The income SFPP generates is taxable in the hands of SFPP's owners, regardless of the amount of cash SFPP actually distributes to them. The amount of tax paid on income SFPP generates depends on the tax situation of each of its owners—including the possibility that the tax obligation may passed on to a further, indirect, owner of SFPP or, ultimately, that the income might be non-taxable.[5]

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[4] This tax treatment is the result of a traditional legal distinction between corporations and partnerships. Corporations are legally considered to be separate entities that receive income in their own right, and therefore pay tax on it. On the other hand, partnerships were traditionally considered to be agglomerations of individual interests rather than separate entities. Thus income generated by a partnership is traditionally attributed to the partners, who each pay tax on it.

[5] This discussion refers to the "initial" tax liability that accrues when the income is generated by the utility. When a utility that is a corporation earns income, it pays

Unfortunately, SFPP has a complex ownership structure, making it extremely difficult to determine how much tax is paid on the income it generates, and by whom.[6] SFPP's ultimate owners are removed from the actual operating utility and ownership interests trade on the NYSE. If we assume that no tax will be paid on income generated by SFPP when we establish its rate of return, we will run the risk that for some owners, we will have effectively reduced their rate of return.

The Decision held that SFPP should be allowed to include the $5.4 million "tax allowance" in its expenses for ratemaking purposes to prevent this result. This "tax allowance" was calculated using the corporate tax rate. Although there is logic to this approach, the Decision improperly concludes that this approach must be adopted in order to comply with an established "tax allowance policy." The Decision incorrectly reads Application of SFPP, L.P. (Increased Transportation Rates) [D.92-05-018], supra, to establish such a policy. When we approved SFPP's 9% rate increase in 1992, we accepted a rate of return calculation that included an expense item for taxes in the amount of $6,281,000. At the time, SFPP was a master limited partnership that owned SFPP's two predecessor pipelines. However, Application of SFPP, L.P. (Increased Transportation Rates), [D.92-05-018], supra, was decided on an *ex parte* basis and contains no discussion of tax questions. Thus, no conclusion can be drawn from its

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tax on it. Then, when it distributes revenue to its owners, they pay a "second level" of tax on that income. Generally partnerships only have one level of taxation. This occurs when the owners pay tax on the partnership income attributed to them. However, in partnerships like SFPP it cannot be assumed that there will be no initial level of taxation. With the blurring of the distinction between corporations and partnerships, tax may be paid by a partnership's immediate owners, and then another level of tax may be paid by ultimate owners when they receive distributions of profits from the immediate owners.

[6] SFPP itself is owned by its general partner which owns 1%, and a "Master Limited Partner" which owns the remaining 99% of SFPP as a limited partnership interest. The Master Limited Partner is owned 44% by SFPP's general partner and 56% by investors.

determination that the total expense amount was reasonable. We generally do not scrutinize applications that are not contested, and have stated this policy explicitly in Re: Commission's Rules of Practice and Procedure [D.95-01-015] (1995) 58 Cal.P.U.C.2d. 480.

In this respect, the Decision also improperly declines to consider other approaches to this tax-related ratemaking problem on the grounds that a policy has been established already. There are certainly other ways to deal with this problem. The approach adopted by FERC does not impute a tax allowance at the corporate rate. Instead, it looks to the tax situations of the owners of a limited partnership. (Lakehead Pipeline Co. (1996) 75 F.E.R.C. ¶ 61,181.) Since we have not established a policy in this area, it was error to conclude that consideration of such alternatives was precluded.

Finally, the Decision improperly concludes that Southern Cal. Gas Co. v. Public Utilities Com. (1979) 23 Cal.3d 470, 477, need not be considered when determining whether or not to allow a partnership to claim a "tax allowance" for ratemaking purposes. That case holds that the Commission may not take into account "taxes the utility has not actually paid." The Decision contends that case only applies to tax benefits resulting from the "investment tax credit" provisions of federal tax law and does not have general application, especially in cases involving partnerships.

Although we believe the use of a tax allowance is likely to be permissible under Southern Cal. Gas Co. v. Public Utilities Com., supra.,[7] the

[7] Contrary to the application's claims, we do not believe the relevant cases prevent this result. In Income Tax Expenses for Ratemaking Purposes (1984) 15 Cal.P.U.C.2d 42, we adopted a similar approach for utilities filing consolidated returns with non-utilities. In such cases the utility's actual tax was affected by the performance of affiliate entities. We determined the correct approach was to assume that the utility would pay tax on a stand-alone basis and use that amount of tax to set rates. We rejected the contention that the allowance for income tax be determined using the best estimate of tax actually paid. (15 Cal.P.U.C.2d 49.) The key factor in the court cases appears to be the effect of tax consequences on the rate of return. Where tax consequences have the effect of reducing the rate of return, it may well be permissible to raise that return.

justification provided in the Decision does not withstand close scrutiny. The California Supreme Court cases on tax issues establish general principles that cannot be distinguished based on factual differences between the tax rules involved in those cases and the rules involved here. In Southern Cal. Gas Co. v. Public Utilities Com., supra., the Court reviewed a decision where the Commission concluded that it was "required by California law to pass [tax benefits] on to the ratepayers as fully and immediately as possible." The Court stated that it "endorsed" the Commission's position, explaining at pages 476-477 (citations omitted):

> " 'The basic principle [of ratemaking] is to establish a rate which will permit the utility to recover its cost and expenses *plus* a reasonable return on the value of property devoted to public use.' (Italics added.) . . . It is thus elementary regulatory law that the 'return'—i.e., the profit—of the utility is calculated solely on the rate base—i.e., the capital contributed by its investors; the utility is not entitled to earn an additional profit on its expenses, but only to 'recover' them on a dollar-for-dollar basis as part of the rates." . . . Permitting rates to be set on the basis of taxes the utility has not actually paid, this court has reasoned, in effect forces the ratepayers to contribute capital to be used for utility expansion.

In light of these considerations, we conclude that we need to consider the issue more carefully before we can determine the correct approach to tax allowances. Since we have no established policy in this area, we believe it is appropriate to consider alternatives, including the FERC approach, and to consider what approaches are consistent with the Southern Cal. Gas line of cases. Therefore, we will grant rehearing to reconsider the Decision's determination to include a $5.4 million tax expense in SFPP's ratemaking expenses.

D. Environmental Costs.

The Decision concluded that environmental costs in the amount of $2.8 million should be included in SFPP's expenses. Complainants' calculation of SFPP's expenses made no provision for environmental costs. SFPP asserted that its California operations incurred $3.8 million in environmental expense in the test year 1996, and that 75% of that expense should be allocated to CPUC-jurisdictional intrastate pipeline services. SFPP proposed a 75% allocation because it had used a 75% allocation for property tax expenses. Although Complainants challenged the allocation method, Complainants did not propose a different allocation. The Decision found it was more likely that SFPP spent $2.8 million on environmental expense than it was that SFPP spent $0.

The record contains evidence indicating why the $2.8 million amount proposed by SFPP could be inaccurate. It appears that SFPP has allocated 90% of its environmental costs to California, and only 10% to its extensive operations in Oregon, Nevada, New Mexico and Texas. Further, evidence indicates that a large portion (Complainants allege 39%) of the environmental expense claimed by SFPP related to terminals and were not properly attributable to pipeline operations.

This evidence suggests that some adjustment to SFPP's proposed $2.8 million environmental expense is likely proper. We are not limited to adopting only those cost figures that are proposed by the parties, unless the record provides no basis for making an adjustment. Where the record contains information that would allow us to exercise expertise to adjust a possibly inflated proposed cost estimate, we should do so. Therefore, we conclude that the Decision's conclusion that only $2.8 million or $0 should be allocated to environmental expenses is in error. Rehearing should be granted to consider what adjustments to SFPP's proposed environmental cost are proper.

E. Other Issues.

Review of the Decision indicates other statements that should not be relied upon because they appear to be error. The Decision appears to establish a new "rule" for deciding motions to dismiss complaint cases challenging the reasonableness of rates. (ARCO Products Company, et al. v. SFPP, [D.98-08-033], supra, at pp. 5-6 (mimeo).) The method used to evaluate this defendant's motion to dismiss seems proper, but it should not be elevated to the status of a "rule" or a "presumption" that is generally applicable.

Also, it may not have been proper to speculate about the judicial review of this proceeding. The case is a complaint challenging the reasonableness of rates. Under the applicable version of Public Utilities Code section 1757.1, such cases do not appear to be "adjudicatory proceedings" that may be reviewed in the Court of Appeal. (Stats. 1996, ch. 855, §8, reprinted in Historical Note, 57A West's Ann. Pub. Util. Code, (1999 Pocket Part), §1757.1.) Despite the application's contentions, which confuse the classification provisions of Senate Bill 960, enacted September 23, 1996 with the judicial review provisions of Senate Bill 1322, also enacted September 23, 1996, we are not required to split this proceeding into component parts simply because aspects of a different nature are being decided. The statute bases judicial review requirements on the nature of the proceeding as a whole. In this respect, the discussion of how courts might address this matter seems speculative, and should not have been included in the Decision.

F. Military Revenue.

The application for rehearing contends that the Decision's approach to military revenue is in error. The application insists that the danger of cross-subsidization between military shipments and regulated shipments is sufficient to require SFPP to credit the revenue generated by shipments over military-exclusive pipelines to its overall revenue. The application also contends that Re: San Diego

Pipeline Co., etc., (1971) 71 Cal.P.U.C. 832 is applicable because military shipments use public utility facilities, as they did in that case.

However, these claims miss the point. The fact that the military uses public utility facilities for part of its shipments does not require the Commission to apply San Diego Pipeline Co., etc., supra, to non-jurisdictional revenue. In that case, the utility involved asserted that its total military revenue should not be considered for ratemaking purposes. In addition, the military paid a reduced rate for service over the public utility system. Here, on the other hand, revenue from military shipments over the public utility portion of SFPP's system is included in revenue and SFPP's witnesses testified that the military pays close to the tariffed rate for transportation on the public utility portions of SFPP's pipeline. On this basis, the Decision was correct to conclude that this evidence does not demonstrate that the potential for cross-subsidization is significant enough to require non-jurisdictional revenues to be included in rates.

G. Burden of Proof to be Used on Rehearing.

Since further proceedings in this case will occur, the burden of proof, which Complainants discussed extensively in their application for rehearing, should be clarified. In complaint cases challenging the reasonableness of rates, the Commission "has long held that the burden of proof rests upon the complainant to show by clear and satisfactory evidence that the...rates complained of are unreasonable...." (BBD Transportation Co., Inc. v. Pacific Southcoast Freight Bureau, et al. [D.82645] (1974) 76 Cal.P.U.C. 485, 508.) Recent cases describe the amount of evidence required to meet this burden as a "preponderance." (City of Long Beach v. Unocal California Pipeline Company [D.93-12-015] (1993), abstracted at 52 Cal.P.U.C.2d 317.)

There is no need to modify this approach by borrowing evidentiary rules from civil litigation practice. The Decision explained it would resolve this case using the following approach:

> If complainants' evidence is sufficient to outweigh the evidence against it that defendant has presented, complainants will prevail; otherwise defendant will prevail. Defendant did not need to present its own cost of service study to carry its burden of production. It was sufficient for defendant to produce evidence that cast doubt on complainants' evidence.

(Arco Products Company, et al. v. SFPP, L.P., supra, __ Cal.P.U.C.2d at p. __, D.98-08-033 at p. 18 (mimeo).) This statement contains two principles: (i) if SFPP successfully rebutts Complainants' claims, Complainants will not prevail, and (ii) in order for defendant to prevail, its rebuttal needs only to be successful; it does not need to take a particular form, i.e., that of a cost of service analysis.

The application for rehearing claims that rules of evidence applicable in civil litigation required us to allow Complainants to prevail unless SFPP made a positive showing that its rates were reasonable. According to the application, once a complainant has proven its prima facie case, a rule of evidence shifts the "burden of production" to the defendant utility. The application also contends that a "rule of convenience" requires a shift in the burden of proof when one party makes a "negative averment" and the other party has "peculiar knowledge" of that averment because such "negative averments" must be considered true unless they are disproved.[8]

We disagree with these contentions. The application incorrectly assumes that by meeting their burden of production with expert testimony, Complainants did enough to establish a prima facie case. As the Decision explains, this assumption is incorrect. (ARCO Products Company, et al. v. SFFP, L.P. [D.98-08-033], supra. at p. 17 (mimeo).) The Decision properly placed the burden of proving that rates were unreasonable on Complainants in accordance with our

[8] An "averment" is a basic statement of an actual fact, similar to a premise. An averment is often defined as being the opposite of a conclusion or a statement of a fact that has been derived from other facts. (Black's Law Dict. (4th ed., 1957, p. 172.) A negative averment is a statement that a certain fact is or was not the case, e.g.: "The utility does not pay federal income tax."

longstanding procedure. This procedure reflects the fact that rates are often established in proceedings where the utility bears the burden of proof. We also have authority to investigate rates on our own motion if we determine this is necessary. In this context we have determined the correct policy is to place the burden of proof on the party seeking to disturb the established rate scheme.

The contention that a different procedure for allocating the burden of proof is used in civil trials does not indicate that our longstanding procedures should be changed. In fact, rules of evidence allow courts discretion to allocate the burden of proof based on a number of factors, including public policy. "In determining the incidence of the burden of proof, 'the truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.'" (Webster v. Trustees of Cal. State University (1993) quoting Cal. Law Revision Com. Com., 29B West's Ann. Evid. Code, § 500 (1966 ed.), p. 431, quoting from 9 Wigmore, Evidence (3d ed. 1940) § 2486, p. 275.)

In addition, it does not appear that the rule relating to negative averments stated in the application reflects current law. Witkin's discussion of negative averments indicates that California law no longer contains such a rule. The presumption contained in the former Code of Civil Procedure was not incorporated in the Evidence Code when it was enacted in 1965. The cases cited in the application mostly predate this change in the law. Witkin also criticizes the position taken in the application, stating that, "the supposed rule is not helpful and could be misleading." (1 Witkin, Cal. Evidence (3d ed., 1986) Burden of Proof, §135, pp. 118-119.)

Nevertheless, the application claims the Decision's approach to evidentiary issues was unfair and unreasonably stringent because SFPP had "exclusive access" to the cost data complainants needed to prove their claim, and SFPP was able to win this case simply by "casting doubt" on Complainants' evidence. These claims exaggerate the stringency of the burden Complainants

must meet. The claim that utilities have "exclusive knowledge" of their own financial information does not account for Complainants' ability to obtain information through discovery. Although the application states that Complainants had no ability to obtain information about SFPP other than by consulting publicly filed documents, the assigned administrative law judge allowed for discovery to take place with no cut-off date, and provided for discovery disputes to be resolved prior to the hearing.

Similarly the claim that SFPP won this case simply by "casting doubt on complainants' evidence" makes too much of unfortunate wording in the Decision. The application understands the Decision to have required Complainants to "prove their case beyond any doubt—whether reasonable or not." (Application, at p. 14.) However, the Decision's actual analysis of litigated issues indicates that the rebuttal provided by SFPP accomplishes more than merely creating unreasonable doubt. By weighing the Complainants' evidence against SFPP's rebuttal we properly decided this case. This approach is not "tantamount to taking away a customers right to file a complaint." (Application, p. 13.)

We do note however, that Complainants insist that SFPP be required to prove those facts that it introduced in the nature of "affirmative defenses." Complainants made this claim after the assigned ALJ resolved this case, adding it to their critique of his proposed decision. (Cf., Pub. Util. Code, § 311.) At that time, we concluded such a claim was being made too late in the process. Since we are granting rehearing, however, the assigned administrative law judge should determine if this contention has merit. In addition, many of the application's claims that SFPP should be required to prove certain points seem to result from Complainant's lack of information derived from discovery. The administrative law judge assigned to the rehearing should determine if further discovery is warranted.

H. Further Proceedings.

Several of the matters to be considered on rehearing bear on the Decision's ultimate conclusion. The Decision dismissed the complaint because its revenue and expense calculations, when rebutted by SFPP, failed to demonstrate that SFPP's rates were too high. The rehearing will reconsider two issues relating to SFPP's expenses. If we determine the Sepulveda Line is jurisdictional, the rehearing may consider revenue from the Sepulveda Line, as well, conforming with the Decision's treatment of Watson Enhancement Facilities revenue. (Cf. ARCO Products Company v. SFPP, L.P. [D.98-08-033], supra., at p. 22 (mimeo.).) Since we will reconsider items that have a direct bearing on the Decision's ultimate conclusion, we must also reconsider that conclusion.

When rehearing is convened, the assigned administrative law judge should determine the extent of the issues to be considered on rehearing. The assigned administrative law judge should also determine whether matters can be decided on the basis of the existing record, whether the record needs further development, and whether further discovery should be allowed. Further proceedings should be conducted following our usual procedure, with consideration of the issue of affirmative defenses, as discussed above. Finally the judge should consider burden of proof issues with respect to any new rates that are being litigated under the procedure set out in City of Long Beach v. Unocal California Pipeline Company [D.94-05-022] (1994) 54 Cal.P.U.C.2d 422, rehearing denied City of Long Beach v. Unocal California Pipeline Company [D.96-04-061] (1996) 66 Cal.P.U.C.2d 28.

THEREFORE, IT IS ORDERED that:

1. Rehearing of D.98-08-033 is granted to consider issues of tax expenses, environmental expenses, dedication, and rates of newly jurisdictional facilities consistent with the discussion portion of this opinion.

2. The assigned administrative law judge shall convene a prehearing conference to address the scope and procedure appropriate for rehearing, consistent with the discussion portion of this opinion.

This order is effective today.

Dated June 24, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners