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Decision 99-11-023 November 4, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Western Gas Resources-California, Inc., for a Certificate of Public Convenience and Necessity to Provide Public Utility Gas Transmission and Distribution Services Through the Use of Certain Existing Facilities and to Construct Additional Interconnection Facilities.	Application 99-04-010 (Filed April 13, 1999)

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OPINION DISMISSING WITHOUT PREJUDICE WESTERN GAS RESOURCES-CALIFORNIA, INC.'S APPLICATION FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

I. Summary

In its application for a Certificate of Public Convenience and Necessity (CPCN), Western Gas Resources-California, Inc. (WGRC) requests[1]: (1) a direct interconnection to Pacific Gas and Electric Company's (PG&E's) backbone transmission pipeline of a currently existing proprietary network of pipelines that WGRC has an option to purchase; (2) the right to serve noncore customers within PG&E's current service areas and potentially to compete for core customers as well; (3) the right to serve its customers without an obligation to provide universal service within an exclusive service area; (4) the right to charge unregulated rates (*i.e.*, whatever the market will bear) that apparently have no public program component; (5) the allowance of deviations from PG&E's filed tariffs, or, alternatively, revision of PG&E's filed tariffs and Commission-approved rate structures for WGRC's customers; and (6) a waiver of the affiliate transactions rules for its benefit. PG&E has moved to dismiss the application and a related complaint on multiple grounds.

We have considered the arguments of all parties and assumed that all facts, except ultimate facts, stated in the application are true. We conclude that the CPCN requested by WGRC would be out of compliance with our natural gas local transmission and distribution policy at present. As a matter of policy, we determine that we should not change our natural gas local transmission and distribution policy at this time within the context of this case. We see no purpose

[1] The listing of WGRC's requests is not exhaustive. WGRC makes several other requests as well, such as for authority to construct odorization facilities.

in proceeding to a hearing in order to deny the certificate on this same basis. We dismiss the application without prejudice either to refiling at this time, after substantial amendment so that the request conforms to our current policy, or to refiling at a later date, if our ongoing investigation into restructuring the natural gas industry reaches a conclusion with regard to local transmission and distribution competition that would allow the type of competition in which WGRC wishes to engage.

II. Background

The instant application[2] was filed on April 13, 1999 and calendared pursuant to Administrative Law Judge (ALJ) Resolution 176-3014 on April 22, 1999. A Prehearing Conference was held June 8, 1999, at which time the ALJ, in consultation with the Assigned Commissioner, ruled that discovery and further proceedings would be in abeyance pending the outcome of motions to dismiss the complaint and application. PG&E had filed these motions and a protest on June 4, 1999. WGRC and other parties[3] responded to the protest or opposed those motions on June 22, 1999. PG&E filed a reply to the responses and oppositions on July 8, 1999 and oral argument was held on July 12, 1999. Additionally, WGRC filed several pages of relevant citations on July 12 and PG&E, at the ALJ's request, submitted a case it had previously relied upon without citation.

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[2] The related Complaint 99-04-004 was filed April 6, 1999.

[3] The other parties responding to the motion to dismiss are Calpine Corporation, which owns part of the pipeline network at issue, the Commission's Office of Ratepayer Advocates (ORA), Southern California Gas Company (SoCalGas), and the Coalition of California Utility Employees (CCUE). Although Aera Energy LLC petitioned to intervene on June 18, 1999, it did not respond to the motion to dismiss.

All parties agree that this is an unusual proceeding, although they have different reasons for the characterization. WGRC avers that it intends to purchase a proprietary pipeline – the Steelhead Pipeline System (SPS) and specific capacity rights on the Sacramento River Gas System (SRGS) from Aera Energy LLC (the portion not owned by Calpine Corporation). It has applied for a CPCN in order to operate the SPS and its interest in the SRGS as a public utility, providing local transmission and distribution services for delivery primarily to noncore customers in competition with PG&E in the counties of Contra Costa, Sacramento, Solano, Sutter and Yolo.[4] WGRC asserts that it is clearly in the public interest to make use of underutilized proprietary pipelines already in place.

Among other requests in its application, WGRC asks specifically for: (1) the authorization to construct a direct interconnection between PG&E's backbone transmission pipeline[5] and a currently existing proprietary network of pipelines that WGRC has an option to purchase; (2) the right to serve noncore customers within PG&E's current service area and potentially to compete for core customers as well[6]; (3) the right to serve its customers apparently without an obligation to

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[4] Local transmission service is loosely defined as the intrastate gas transportation system that functions at a lower pressure than the backbone system, and transports gas from that backbone system to the distribution system and directly to some customers. The distribution system has an even lower pressure and smaller pipe diameter. The system WGRC wishes to purchase ranges in size from 2 to 10 inches (App., p.13).

[5] The backbone transmission system consists of Lines 300, 400, 401 and Line 2. This large diameter high pressure pipe is primarily used to move gas from interstate pipelines to local transmission systems.

[6] Public Utilities Code §1001, second paragraph, provides that once a CPCN is issued, a gas corporation can build any extension within its service territory necessary in the ordinary course of its business. See also, WGRC's Comments of September 22, p.3 fn.10.

Footnote continued on next page

provide universal service within an exclusive service area; (4) the right to charge unregulated market-based rates apparently without a public program component; (5) the allowance of deviations from PG&E's filed tariffs, or, alternatively, revision of PG&E's filed tariffs for WGRC's customers and a favorable Operating and Balancing Agreement for WGRC; and (6) the waiver of the affiliate transactions rules for its benefit.

WGRC claims that the Commission's evolving policy on competition in previously regulated industries shows that this CPCN application should go to hearing and be granted. PG&E disagrees that Commission policy has reached the stage of granting CPCNs authorizing competition in local transmission and distribution in the natural gas industry. ORA agrees that a hearing on the merits should be held and that the Commission can change its policies in that context. Calpine believes that a hearing is necessary and a CPCN desirable. SoCalGas and CCUE, noting the high-load noncore targets of the application and the market-based rates, believe that the application should be dismissed and, if the Commission wishes to consider whether to introduce competition into local transmission and distribution, recommend that should be done in a Rulemaking or Investigation proceeding.

Although in the text of its comments WGRC characterizes its application as involving transmission only, this is not an accurate characterization.

III. Discussion

A. Legal Standard for a Motion to Dismiss an Application

Although the Rules of the Commission clearly contemplate the use of a motion to dismiss in the context of an application,[7] no standard is set forth. Nor have we found a single articulated standard in other Commission application proceedings. Applications have been dismissed on policy grounds (*Application of Southern California Edison for an Order Under Section 701 of the Pub. Util. Code Granting Authorization to Establish Pilot Program for Reselling Bilateral Forward Purchases into the PX and ISO*, D. 99-07-018, *July 8, 1999*),[8] to husband limited resources (*In the Matter of the Annual Depreciation Application of Roseville Telephone Company*, D. 99-04-046, 1999 Cal.PUC LEXIS 188), to avoid conflict with statutory policy (*Application of Southern California Gas Company to Unbundle Core Interstate Pipeline Transportation*, D. 98-12-071, 1998 Cal.PUC LEXIS 1017); to avoid inefficiency (*In the Matter of the Application of Southern California Edison Company for a Finding of Reasonableness for the Ratepayer Expenditures for the ENVEST Pilot Program*, D. 98-10-047, 1998 Cal.PUC LEXIS 811) and for many other reasons.

Rather than creating an inflexible standard within the context of one case, we simply acknowledge that in order to dismiss the application without hearing any evidence, the applicant's due process rights must be considered. We

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[7] "A motion to dismiss (other than a motion based upon a lack of jurisdiction) **any proceeding before this Commission**, which is based upon the pleadings or any matter occurring before the first day of hearing may only be made upon five days' written notice thereof..." (Rule 56, in pertinent part, emphasis added.)

[8] In this case, the Commission determined that a pilot program proposed by Southern California Edison would be out of compliance with the Commission's Preferred Policy Decision, Federal Energy Regulatory Commission orders and Assembly Bill 1890, all regarding electric restructuring.

look for guidance to the Commission's standards with respect to dismissing a complaint.

On a motion to dismiss a complaint, the legal standard against which the sufficiency of the complaint is measured is whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law. (*E.g., MCI Telecommunications Corp. v. Pacific Bell*, D.95-05-020, 59 CPUC2d 665, 1995 Cal.PUC LEXIS 458, at p. *29-*30, *citing Burke v. Yellow Cab Co.* (1973) 76 CPUC 166.) In addition, the Commission may properly take official notice of, and consider, the files and records of court and Commission proceedings in ruling on a motion to dismiss. (*E.g., Upper Kern Island Water Ass'n v. Kern Delta Water District*, D.91-05-019, 40 CPUC2d 65, 1991 Cal.PUC LEXIS 244, at p. *14; *City of El Monte v. San Gabriel Valley Water Co.*, D.87-09-065, 25 CPUC2d 393, 1987 Cal.PUC LEXIS 238.)

By assuming that the facts as alleged in the application are true for the purposes of deciding whether to grant a motion to dismiss, we assume that the applicant will be able to prove everything the applicant alleged in its application to the Commission in order to gain a CPCN[9]. We do not accept as true the ultimate facts, or conclusions, that Applicant alleges, for instance, that granting the CPCN would be in the public interest. After accepting the facts as stated, the Commission then merely looks to its own law and policy. The question becomes whether the Commission and the parties would be squandering their resources by proceeding to an evidentiary hearing when the outcome is a foregone conclusion under the current law and policy of the Commission.

[9] We note that the applicant here has not chosen to amend the application in any respect.

It is true that the Commission may change its policy within the context of an application or complaint. However, clearly it is up to the Commission to decide if it wishes to do so. It can make that choice at the outset of the case in response to a motion to dismiss.

B. The Current Commission Policy with Respect to Local Transmission and Distribution of Natural Gas [10]

1. Current Natural Gas Competition Policy

In closing the docket in Rulemaking (R.) 98-01-011 on July 8, 1999, the Commission has just completed a thorough exploration of promising options for the restructuring of the gas industry.[11] This was the first phase of a process that was purposefully slowed down by the Legislature; it is unfolding within the context of a legislative directive to delay any actual restructuring that might affect core recipients until January 1, 2000. (Pub. Util. Code §328[12].) This

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[10] We focus here primarily on two aspects of our policy, exclusive service territories with a service obligation to both core and noncore and regulated averaged rates, because we view these as significant enough to determine this matter. Our lack of discussion of other policies bearing on local transmission and distribution should not be viewed as in any way significant.

[11] This process was originally begun in *Rulemaking on the Commission's Own Motion to Assess and Revise the Regulatory Structure Governing California's Natural Gas Industry*, Rulemaking No. 98-01-011, 1998 Cal.PUC LEXIS 119; 185 P.U.R.4th 49. The entire industry was asked to respond to questions arising from a report produced by the Strategic Planning Division of the Commission, including the questions: What reforms to California's regulatory policies governing its natural gas marketplace are necessary? What are the industry's and other stakeholders' priorities for natural gas reform in California?

[12] We note that the Governor signed AB 1421, repealing §328 and replacing it, while this decision was in the comment period.

investigation involved many participants in the gas industry,[13] and resulted, on July 8, 1999, in Decision (D.) 99-07-015. Significantly, this decision does not identify competition in local transmission and distribution as a promising option for further study as to its costs and benefits at this time. We take official notice that no party considered competition in local transmission and distribution enough of a priority to make it the subject of testimony in R. 98-01-011. Hence, the Commission's pre-existing policy with respect to local transmission and distribution in the natural gas industry remains undisturbed by R. 98-01-011.

Applicant contends that the Commission's policy promoting competition compels us to consider and grant this CPCN. We agree that "[t]he Commission's goal is to promote competition in all areas of utility services." (*Order Instituting Rulemaking on the Commission's Own Motion to Consider the Line Extension Rules of Electric and Gas Utilities*, D.99-06-047, slip op. at p. 6, Findings of Fact No. 1, 1999 Cal.PUC LEXIS 305, *LEXIS at p. 9.) Moreover, we agree that the Commission has decisively allowed competition in the procurement of gas supplies, the interstate transportation of gas to California, to noncore customers and core aggregators, and gas storage. However, it is the Commission's duty as a policymaking body to determine how and when to promote competition in a particular area of utility services. The time to consider competition in local gas transmission and distribution in a CPCN application has not yet arrived.

[13] We take official notice that active participants included Calpine Corporation, the alleged potential recipient of WGRC's services at its proposed electric generation plant and the residual owner of the pipeline WGRC wishes to buy an interest in. Additionally, WGRC's attorney appears on the Information Only service list.

In all cases, we have considered the broad implications of expanding competition before entertaining an individual company's CPCN.[14] Without elaborating the history here, we note that gas storage first opened to competition after an investigation (I.87-03-036), and legislative encouragement (AB 2744, Chapter 1337 of the California Statutes of 1992, discussed in *Re Natural Gas Procurement and System Reliability Issues,* D.93-02-013, 48 CPUC2d 107, 126.) In D.93-02-013, the Commission found that a permanent program of unbundled gas storage service was necessary to meet the needs of noncore customers and to harmonize storage service with previously adopted policies and programs for unbundled gas supply and interstate transportation service. Incremental rates and a "let the market decide" policy were adopted for construction or expansion of new storage facilities.[15] It was not until this policy was fleshed out that the Commission processed the first application for a CPCN from an independent gas storage company. (*Application of Wild Goose Storage, Inc. for a Certificate of Public Convenience and Necessity to Construct Facilities for Gas Storage Operations,* D.97-06-091, 1997 Cal.PUC LEXIS 503.)

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[14] The telecommunications business has been opened to competition. This has occurred as a result of (1) technological developments that do not appear to exist in the natural gas business; (2) state and federal legislation, which expressly opened local telecommunications markets to competition; and (3) substantial regulatory energy and resources devoted to exploration of issues related to such competition, including how the state will meet its universal service policies, how this competition will work, whether the new rules create stranded costs, and other matters. Therefore, CPCNs are considered without delay in that industry.

[15] However, natural gas utilities had to continue to operate and expand storage on behalf of core customers, but did not need to expand facilities to provide firm noncore service unless customers guaranteed recovery of costs. While core customer benefits were found, a hierarchy of customer interests in the event of constraints on storage capacity was adopted, placing the core interests highest.

Similarly, before letting the market decide concerning how much interstate pipeline capacity was needed, the Commission initiated an investigation and set up some guidelines for competition. (See *Order Instituting Investigation On the Commission's Own Motion Into The Interstate Natural Gas Pipeline Supply and Capacity Available To California*, D.90-02-016, 35 CPUC2d 196, 250.) At that time, the Commission went on to conclude that its support for any project would "depend on a commitment from any new pipeline project owner ... that such a dedicated facility shall not be extended or expanded to bypass LDCs." (Id., p. 243.)

The Commission has also expanded competition when there has been a settlement among numerous parties representing differing interests. Through approval of PG&E's Gas Accord settlement agreement in Decision 97-08-055, the Commission allowed firm, tradable capacity rights on PG&E's backbone transmission system. Moreover, the Gas Accord requires that on system end users, including noncore users, bypassing its local transmission system must still pay the tariff rate associated with it (Gas Accord §II H.(1)(a), (e) and (f) as well as §II I.(8)(b)[16]) and WGRC in its complaint decries just this provision. Here, there is no all-party settlement.

In a recent case, the Commission did not facilitate competition between two electric distribution services providers within a single service territory. In *Richard K. Parry, Complainant, vs. Southern California Edison Company (U 338-E), Defendant*, D.98-02-027, 1998 Cal.PUC LEXIS 281, despite the substantial cost savings for the customers for whom a developer was seeking this

[16] The Gas Accord does allow for discounting to prevent uneconomic bypass of PG&E's distribution and transmission systems and to encourage business retention and business attraction. Gas Accord § III(8).

proposed distribution competition, the Commission adhered to its long-standing policy, reiterating that: "[h]istorically, ... allowing customers to pick and choose a public utility was not considered in the interest of all the public involved in the utility's service area and was considered inconsistent with the principle of regulation in the public interest (see *Clara Street Water Company v. Park Water Company* (1948) D.41682, 48 CPUC 154, 158)." The Commission concluded:

> "The mere existence of a rate differential between a customer's current electric supplier and a neighboring supplier, however significant the difference may be, is not a reason to modify the current supplier's service territory.
>
> "Current law and Commission policy does [sic] not allow customers to pick the utility that distributes electricity to their homes and businesses." (See D.83-01-005, *California Water Service Co.*, 10 CPUC 2d 690, 697; D.41682, *Clara Street Water Company* (1948) 48 CPUC 154, 158.) *Parry v. SCE*, D.98-02-027, Conclusions of Law 1, 2, slip op. at p. 4.

However, ten months later, the Commission decided to consider electricity distribution competition in an industry-wide proceeding, *Rulemaking on the Commission's Own Motion to Solicit Comments and Proposals on Distributed Generation and Competition in Electric Distribution Service*, R. 98-12-015, filed December 17, 1998. The draft decision in the rulemaking proposes a study and report on the issue of electricity distribution competition and we now wish to study gas distribution competition as well.

A study of natural gas distribution competition is appropriate at this time, as the instant case indicates. Just as we are doing with the issue of electricity distribution competition, we will refer the issue of gas distribution competition to the Commission's Division of Strategic Planning and Energy Division for study. In addition to PG&E's combined services, the potential for competitors to

combine gas and electricity services show that it makes sense to consider these issues in tandem. Moreover, in AB 1421, now law, we have the thoughts of the Legislature on issues such as the continuation of service areas in which gas corporations must provide bundled service to the core. If, after the study, the Commission determines that an investigation or rulemaking is warranted, most likely it will take place after the most viable restructuring options are identified in D.99-07-015 and a report is made to the Legislature. The context for competition in the distribution of natural gas will be known.

2. WGRC's Interpretation of Our Current Gas Distribution Competition Policy is Incorrect

Much of WGRC's argument relates to transportation competition, not distribution competition. WGRC argues that certain language in the Commission's decision approving the Sempra-Enova merger (*Joint Application of Pacific Enterprises, Enova Corporation, Mineral Energy Company, B Mineral Energy Sub and G Mineral Energy Sub for Approval of a Plan of Merger of Pacific Enterprises and Enova Corporation With and Into B Mineral Energy Sub ("Newco Pacific Sub") and G Mineral Energy Sub ("Newco Enova Sub"), the Wholly Owned Subsidiaries of A Newly Created Holding Company, Mineral Energy Company*, D.98-03-073, 1998 Cal.PUC LEXIS 1; 184 P.U.R.4th 417) supports its position that the Commission has already embraced gas distribution level competition and is ready to deal with individual CPCNs. (WGRC Opp., pp. 26-27.) We do not agree.

In D.98-03-073, we did order SoCalGas to sell its options to acquire the Kern River and Mojave pipelines in the year 2012 as integral to allowing its merger with SDG&E. We recognized that the threat of construction of gas transportation facilities that would enable customers to bypass the SoCalGas system—that is, the threat of potential entry by a competitor into SoCalGas's monopoly area — had beneficial effects for consumers, both core and noncore.

Since SDG&E would no longer be a competitive threat after the merger, we ordered SoCalGas to sell its options to buy the Kern and Mojave pipelines in 2012 to retain some competition. We did not order the construction of a competing distribution pipeline inside SoCalGas' exclusive service territory.[17]

We continue to believe generally that appropriate opportunities for competition should be supported, not eliminated. While we understand why WGRC might see a signal here for openness to a CPCN for local transmission and distribution competition, we do not choose, prior to a broad look at local intrastate transmission and distribution competition, to start granting CPCNs on a piecemeal basis for competing local distribution companies.

WGRC, Calpine and ORA also cite *Application of Mather Field Utilities, Inc., for a Certificate of Public Convenience and Necessity for Its Gas Utility Distribution System at Mather Field, California,* D.97-04-084, 1997 Cal.PUC LEXIS 348, in which the Commission granted a small company a CPCN for gas distribution service to the former Mather Air Force Base in Sacramento County. While Mather concerns competition in that two companies wished to serve the same area, it is quite different from the situation here. Although PG&E had claimed that this area was in its exclusive territory, the Commission held that PG&E's CPCN did not authorize it to serve a federal enclave, that PG&E had never served the area, and that, in any event, PG&E did not own the pipeline that could serve the area. The Commission therefore granted an *exclusive* franchise to Mather Field Utilities to serve the previous military installation, excluding a

[17] The Commission continues to oppose interstate pipeline extensions that bypass local distribution companies in their service territories unless specific conditions are met. See, e.g., Notice of Intervention and Protest filed April 8, 1999 in *Questar Southern Trails Pipeline Co.* FERC Docket Nos. CP99-163-000, 165-000 and 166-000.

hospital the Commission held would continue to receive service from PG&E[18]. Thus, the holding of Mather champions the creation of exclusive service areas with a universal service obligation.

None of the many other cases cited by WGRC hold that competition in gas local transmission and distribution is our policy.[19] As examples, *Re Pacific Gas and Electric Company*, D.90-12-119, 39 CPUC2d 69 concerned interstate pipelines, and *Re Pacific Gas and Electric Company*, D.96-09-014, 67 CPUC2d 665, 668 (1996) approves an agreement for connection service, not transportation service, that benefits the local distribution company by increasing the service it provides to a refinery. *Re Structure of Gas Utilities' Procurement Practices*, D.95-07-048, 60 CPUC2d 519, ordered natural gas local distribution companies (LDCs) to unbundle interstate transportation costs and services from core

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[18] See Conclusions of Law 5 and 8.

[19] Many cases cited by WGRC do not even concern gas. Notably, we have not yet granted any CPCNs for electricity distribution competition between investor owned companies. Irrigation districts are different; they have a statutory right to sell their excess power and the Commission can reconfigure a utility's service area to avoid duplication. More importantly, it must be emphasized that gas and electric industry deregulation will not necessarily proceed down identical paths. If for no other reason, electricity and gas have different physical characteristics that may give rise to different treatment. Therefore, what we have and have not said with regard to electric industry deregulation cannot willy nilly be applied to the gas industry. We insist upon retaining our prerogative to craft a local transmission and distribution competition policy in the gas industry that might be different from that in the electric industry.

In citing cases in which telecommunications utilities were ordered to allow access to their fiber optic cables, WGRC does not acknowledge the physical distinctions between gas and a data signal. Other cases involve oil pipelines competing with other forms of oil transport (*City of Long Beach v. Unocal California Pipeline Company*, D. 94-05-022, 54 CPUC2d 422 (1994)) or a submetered water and sewer system serving an entire mobilehome park. (*Re MHC Acquisition One, LLC*, D.98-12-077, 1998 Cal.PUC LEXIS 921 (1998).)

customers' rates, thereby increasing opportunities for competition for the procurement of gas but not for the distribution of gas.

We do not believe that it is advisable now to grant a CPCN for local transmission and distribution to one company in the midst of PG&E's service area, at market-based rates without a framework for dealing with competition on this level of the industry as a whole. We do not repudiate our goal of promoting competition. However, we reject the request to jettison our measured and thoughtful approach to achieving that goal.

3. Crucial Elements Of Current Local Gas Distribution Policy In Conflict With WGRC's Application

Our gas industry decisions have consistently reiterated certain critical elements of our policy with regard to the gas industry's local transmission and distribution network. We focus in this decision on two of these elements. The first is a preference for an exclusive service territory within which a utility has an obligation to serve all core and noncore loads. The second element is the use of regulated rates that allow for a fair return on the investment of the utility, the support of public programs, and geographically averaged costs for consumers in the service area. Because WGRC asks for a CPCN free of these two critical elements, it seeks a CPCN in conflict with our current local transmission and distribution policy for the gas industry.

a) Exclusive Service Territories in Which the Utility has an Obligation to Serve

The policy reasons for preserving exclusive territories remain a strong counterweight to our goal of promoting competition. These include

avoidance of duplication of facilities,[20] accountability for universal service, safety and reliability, and economies of scale and scope for the core in need of a vital service. It is these policies that are in the public interest that we wish to protect, not exclusive territories per se.[21]

(1) Exclusivity and Competition

The Commission has long recognized that exclusive service areas for gas distribution services preserve these public policy objectives, and has always reconfigured service areas to retain the benefits of exclusivity. In 1961, the Commission approved a Service Area Agreement between Southern California Gas Company (SoCalGas) and PG&E, which established service area boundaries in Kern County, and provided that neither utility would serve customers in the other's service territory without consent. (D.62681, 59 CPUC 134.) Later, in 1985, as the market for natural gas in Kern County grew, PG&E began to provide service to some of the new customers. The Commission issued an interim decision barring PG&E from providing such service, and directed the parties to try to work out a new service area agreement.[22] Eventually, the

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[20] We do not reach an issue not presented, which is, would a CPCN be viable for an exclusive territory where PG&E does not currently have a local transmission and distribution system built?

[21] The U.S. Supreme Court recognized these values in *General Motors Corp. v. Tracy* (1997) 519 U.S. 278, 136 L.Ed.2d 761, at 784, wherein it noted that all 50 states regulate the local distribution of gas to avoid jeopardizing the local distribution companies' ability to serve the captive market of small-quantity users, and that Congress has acquiesced in "the States' power to regulate even if such regulation resulted in an outright prohibition of competition for even the largest end-users" citing *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n* (1951) 341 U.S. 329, 336-337, 95 L.Ed. 993.

[22] D.85-06-114, 18 CPUC2d 133.

Commission set new service area boundaries.[23] The utilities were not allowed to compete to provide services within the same area. In 1997, the Commission again reaffirmed that the utilities were to serve exclusive service areas in Kern County.[24]

Nevertheless, we agree with Applicant, ORA, and Calpine that there is no absolute right to an exclusive territory free of competition. While there is no constitutional right to be protected from competition, (*Ventura County Waterworks Dept. v. Public Utilities Commission* (1964) 61 C.2d 462, at p. 464, 1964 Cal.PUC LEXIS 216), "(e)xclusivity, or freedom from competition, traditionally has been a part of certificates granted by the Commission." (*Mather Field Utilities, Inc.*, D. 97-04-084, 1997 Cal.PUC LEXIS 348 at * LEXIS p. 29.)

This preservation of exclusive territories has not, and does not, mean that exclusivity is an inviolate right of the incumbent. Indeed, if a utility cannot, has not, or does not choose to serve a part of its exclusive service territory adequately, the Commission can, and has, carved out part of that territory, allowing it to be served by another provider. (*Re Southwest Gas Corporation*, D.88-12-090, 30 CPUC 2d 361, 380; *Re Pacific Gas and Electric Company* (1986) D.86-01-025, 20 CPUC2d 210, 213.) Additionally, where there has been an unserved area within an exclusive service area, that area may be awarded as another utility's exclusive service area. (*Mather Field Utilities, Inc.*, D.97-04-084.)

There is no allegation in the Application that PG&E cannot, has not or does not choose to serve all existing and potential customers in its

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[23] D.86-01-025, 20 CPUC2d 24 and 86-05-008, 21 CPUC2d 99.

[24] *'Request for Revisions to Service Areas in Kern County (McAllister Ranch)* Resolution G-3197 (Feb. 5, 1997).

exclusive service territories.[25] As we stated in *Mather*, competition, or non-exclusivity, normally becomes an issue only after a competing entity has applied for a certificate to serve an area already being served by a certificated utility. It is at that time that the Commission determines whether the public interest would best be served by shifting the franchise to the new competitor, and it usually examines the record of the certificated utility before doing so. The application is insufficient here, but more importantly, the application does not seek to take over as an exclusive provider.

WGRC has not cited any cases in which two companies in good standing simultaneously serve the same area with natural gas local transmission and distribution. In *Ghriest v. Railroad Com.* (1915) 170 Cal. 63 (*see* WGRC Opp., p. 13-14), the Court did uphold the grant of a CPCN over the objection of the incumbent. However, this case supports PG&E's position that such competitive CPCNs are granted only when there is an allegation and showing that the incumbent is not doing its job. In *Ghriest*, the service provided by the incumbent had been so poor that "frequently it happens that the electric lights become so dim that it is impossible to read by them, and in many instances the light is reinforced by the use of oil lamps." (*Pacific Light and Power Corp.* (1913) D.1020, 3 Cal.R.R.C. 761.)[26]

Ventura County Waterworks v. Public Utilities Com. (1964) 61 CPUC2d 462 (WGRC Opp. p. 13) is also distinguishable. That case involved

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[25] The curtailment of certain noncore customers is an expected occurrence and one of the foundations of the reduced rates they receive. Assuming the facts alleged in the application are true, we do not find that they are sufficient to rise to the level of a showing that PG&E cannot serve its customers adequately.

[26] Similarly, *San Diego and Coronado Ferry Co. v. Railroad Com.* (1930) 210 Cal. 504, 512, was about inadequate service, in that case by a ferry boat operator.

service to an area that, at the time, was not served by any company. The Commission did not discuss having *both* of the two interested businesses provide service, and when the Commission awarded the CPCN to the original applicant, the other contestant withdrew its opposition. (*Camino Water Co.* (1964) D.67927, 63 CPUC 386.)

The irrigation district cases[27] cited by WGRC concern electric distribution, not gas. Moreover, there is statutory authorization, not present here, for allowing such competition in extremely limited circumstances. (See Pub. Util. Code §§ 8101, 8104.) Finally, our pronouncements in these cases are not in conflict with our discussion here. In the *Modesto Irrigation* case, we disapproved a 25-year contract that would have prohibited competition. We said:

> "We have already stated on numerous occasions that the policy of the Commission is to promote competition where it is economic and would not unduly compromise other public policy objectives. In light of current circumstances and the State Legislature's recent commitments to promote competition in the electric industry, we cannot find that an agreement to restrict competition for many years would best serve the interests of the state. The agreement is in that way incompatible with the public interest." *Modesto Irrigation*, D.98-06-020, slip op. at pp. 9-10, 1998 Cal.PUC LEXIS 458 at *15. (Emphasis added.)

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[27] Resolution E-3528 (April 23, 1998), *Re Patterson Water District* (but the Commission explicitly found that Res. E-3528's language about duplication creating a competitive check is dicta in *Re Patterson Water District*, D. 99-03-062, Resolution E-3549), *Re McAllister Ranch Irrigation District, Application of PG&E for Authorization to Sell Electric Distribution and Transmission Facilities Serving the Cities of Ripon, Escalon, Riverbank and Oakdale and Surrounding Rural Areas to the Modesto Irrigation District Pursuant to the Public Utilities Code Section 851 and for Approval of Service Area Agreement Under Public Utilities Code Section 8101. (Electric) (U 39 E)*, D.98-06-020, 1998 Cal.PUC LEXIS 458, at *LEXIS 15.

We made no pronouncement on shorter term delays in competition in circumstances in which the Legislature has indicated it would prefer to move slowly in order to protect the core.

In the instant application, the CPCN as requested presents the possibility of unfair competition. There is no provision for contribution to public purpose programs such as California Alternative Rates for Energy (CARE), a low income assistance program that provides direct assistance to low income ratepayers so that they can afford their necessary utility service. Usually, the local distribution company collects funds for these programs through a nonbypassable element in rates. If WGRC does not include this component in its rates, and does not want its customers paying these fees to PG&E, then its competition with PG&E might well be unfair, and would controvert our public policy of collecting these funds.

Thus, granting a CPCN for local transmission and distribution of natural gas in a non-exclusive territory without a service obligation to both the core and noncore at unspecified market rates without a public purpose program contribution would unduly compromise public policy objectives at this time.

(2) Exclusivity and Duplication

Applicant asserts that this case is unusual in that duplication of facilities is not a cost or environmental concern because the pipeline is already in the ground. We recognize that WGRC, or whatever company ultimately owns the SRS and SGRS pipelines, may be uniquely well-situated to compete eventually, because streets will not need to be dug up for competing gas pipes. This is indeed unusual. But the instant CPCN is sought not only for a discrete pipeline already in the ground, but for a larger five county area. (WGRC App., Ex. D, map of Aera's existing pipeline). By granting it, we open the door for

WGRC to expand later by building duplicate facilities, without the need to seek explicit permission first. This Commission has held that certificates granted under Pub. Util. Code §1001 provide authority to construct. (*Re Pacific Gas and Electric Company* (1986) D.86-01-025, 20 CPUC2d 210, 219.) Gas utilities with CPCNs can thus construct many new facilities without advance Commission approval, particularly if they will cost less than $50 million. (Pub. Util. Code, § 1091.) Thus, there is still a concern inherent in this application regarding the potential for duplicative facilities.

In the larger context of local transmission and distribution competition, avoidance of duplicative facilities is a major consideration not only for environmental reasons, but for cost reasons. In the electricity context, in *PacifiCorp v. Surprise Valley Electrification Corp.*, D. 95-10-040, 62 CPUC 2d 135, at p. 139, we said: "[f]rom the inception of the Commission, a feature of its regulation has been the Commission's early determination that direct competition in the same geographic area where it would involve duplicating service facilities would be contrary to the public interest. It results in an unnecessary burden on the ratepayers of both utilities."

Here, the fact that WGRC has pipes in the ground does not necessarily avoid the duplicative cost problem. If WGRC has no exclusive universal service obligation, PG&E may be forced to construct a duplicative expansion of its system even if WGRC has a CPCN. For instance, if WGRC does not serve a hypothetical housing compound next to Calpine's proposed electricity generation plant, PG&E may have to lay parallel pipe to serve it.

(3) Exclusivity and Rates

Moreover, this application, which does not seek an exclusive territory, raises the specter that the economic advantages for core consumers protected by exclusive territories will be at risk. PG&E points out that, under a

CPCN arising from this application, WGRC would be authorized to serve any existing PG&E customer, any new industrial or power plant customer, and any new residential development and to charge market-based rates. However, PG&E would remain obligated to serve those customers with bundled service if WGRC chose to serve someone else, if the customer became dissatisfied with WGRC service, or if WGRC became insolvent. (See AB 1421.) Additionally, PG&E would continue to charge its ratepayers averaged rates. In other words, PG&E's ratepayers will have to bear the cost of that stand-by capacity,[28] perhaps including expansion and duplication of facilities, as well as the normal costs of the obligation to serve[29].

What has been colorfully termed "cherry-picking" or "cream-skimming" remains a concern in the local transmission and distribution context. WGRC has applied for a very favorable CPCN, one in which it chooses its customers, charges whatever it can without payment to the incumbent, supports no public programs, has no obligation to serve anyone it does not wish to serve, and relies on a parent company in another state, over which we have no jurisdiction, for its financial support. We have not yet determined how to mitigate the traditional disadvantages of allowing "cream-skimming," i.e., the erosion of economies of scale and scope for the core in need of a vital service, the lack of support for public interest programs for consumer and environmental

[28] Currently, there is no provision for separately charged stand-by rates only for those customers requesting that service.

[29] These include the costs of those who do not pay, pay slowly, and live in difficult terrain. It also includes the costs of PG&E's investment for infrastructure for anticipated growth, even if the anticipated new growth customers decide to contract with a competitor.

protection, and the increased potential for stranded costs and safety concerns.[30] We have noted similar concerns in our draft decision arising from the electricity distribution competition OIR, and, as we did there, we refer them to the staff for study.

Again, soon there may be balances and safeguards in place that will promote desired competition in local transmission and distribution within what has been an exclusive territory, while protecting the core and public policy objectives. While such competition might benefit both the core and the noncore, those balances and safeguards are not yet in place. Therefore, under current Commission policy, WGRC's application as written cannot be granted.

b) Regulated Rates

WGRC requests that it be allowed to charge market-based rates, and does not offer any estimate or range of what they might be. Regulated utilities are traditionally obligated to extend service at equivalent rates and "on a nondiscriminatory basis to customers within their service territories and to continue providing service once it has commenced. ...They must obtain advance Commission approval before any rate increases or tariff (contract) changes can occur.[31/] Rates are set on a uniform basis, by customer class, using average cost throughout the service area." (PG&E Protest at p. 27.) A uniform rate over a

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[30] We are not finding that there would be stranded costs, or safety problems. We simply note that the face of the application asks for market rates, no universal service obligation and specifically targets noncore facilities and the new electric generation facilities. Moreover, the application requests shared ownership of a pipeline with a company that only makes proprietary use of it, which we would not regulate.

[31] /The Gas Accord did give PG&E substantial ability to discount backbone and local transmission rates, subject to Commission approved floors and ceilings, but did not eliminate the rules against undue discrimination.

large customer base spreads the cost of differential investments in city and rural areas, creates a larger number of customers to share the costs of repairs from disasters and for disaster prevention, and allows a minimal impact on ratepayers, for providing public programs like low income assistance with utility bills.

PG&E has argued, "for assurance of recovery of infrastructure costs, PG&E's investors must rely on the regulatory compact. Under current ratemaking, these costs are amortized over the estimated physical life of the equipment and become part of PG&E's system-average rates. Unlike a normal business, PG&E cannot refuse to make these investments [to serve customers in difficult locations], and absent approval by the Commission, can neither require the customers whose loads are triggering these investments to enter into long-term contracts nor rapidly depreciate these investments to address potential market risks." (PG&E Protest at p. 27.) It may well be that the Commission gives the incumbent local distribution utilities these options in the future, in order to make way for local transmission and distribution competition. But that has not yet occurred.

The average cost approach equalizes the cost of an essential service within the service territory and within customer classes. It is not a market-based approach and therefore makes a traditionally regulated utility vulnerable to both uneconomic and economic bypass. The current core rate structure works in a regulatory setting in which exclusive service territories are the norm, and the noncore are still responsible for at least some portion of local transmission and distribution rates.[32] We have not yet determined if there is

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[32] Like ORA, we do not view the Gas Accord as an insuperable impediment to changing our policy on this or any matter covered by that settlement. Our decision approving that settlement made it quite clear that we retained the right to reshape it if it became necessary to do so. (*Application of PG&E*, D.97-08-055, Conclusion of Law 4, slip op. at

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another way to ensure that high cost core customers can obtain affordable gas services, or to fund public programs. We believe that such determinations are necessary before, or at least at the same time as, market-based rates for local transmission and distribution can be allowed. WGRC's request for market-based rates does not include any suggestions for how to deal with these issues.[33]

Regulated rates for natural gas local transmission and distribution remain the Commission's policy at this juncture, in order, among other reasons, to assure that the core does not unfairly carry the burden of these fixed costs of the utility with the obligation of universal service, including stand-by service to noncore users who may be bypassing the system. Our decisions indicate that we have long been concerned about the problems that competition can cause to the incumbent utility's core ratepayers. In *the Matter of the Application of Southern California Gas Company for Authority to Revise its Rates*, D.93-11-072, 52 CPUC2d 229, 193 Cal.PUC LEXIS 798, we denied rehearing but modified D.93-05-008. This case concerned the rate that SoCalGas could charge the City of Vernon for wholesale gas. The city wished to compete with SoCalGas for retail customers in the city, but did not have the distribution facilities to completely take over service. We held that since the city could not fully substitute for SoCalGas' distribution facilities, it was not entitled to a rate reflecting the elimination of any responsibility on the part of SoCalGas to serve the customers in that city.

126.) However, at present we see no need to decide whether the noncore can bypass PG&E's local transmission tariff entirely.

[33] WGRC does not indicate how, as a gas corporation, it can avoid compliance with § 739.1, which requires that the cost of low income customer assistance programs not be borne solely by any single class of customer.

> "If Vernon could maintain comprehensive distribution facilities at less cost than SoCalGas, it could outcompete SoCalGas on a fair competitive basis. But if Vernon had facilities more limited than SoCalGas, yet received a rate with no distribution cost allocation, Vernon would have a competitive advantage over SoCalGas, which would still need facilities to serve those not served by Vernon but would be unable to recover distribution costs from all customers in Vernon. This competitive advantage would be especially acute if Vernon served only the most lucrative commercial customers and thus prevented SoCalGas from using revenue from such customers to offset the cost of serving other customers whose revenues may not entirely cover the costs they impose on the utility.
>
> "Traditionally, utilities are expected to take the bad with the good, so that overall rates may be reasonable. (See, e.g., *Ewalt v. Midland Counties Pub. Serv. Corp.* (1918) 15 Cal. R.R.C. 355; see also Cal. Pub. Util. Digest Vol. 4, §§ 105-111, at p. 93.) Without imputing a bad faith intent to cherry-pick the best customers, D.93-05-008 simply recognizes that if Vernon did not serve all customers, yet received a rate which did not reflect the cost of distribution facilities to serve all customers, it would avoid the business risks associated with maintaining such comprehensive facilities. Since SoCalGas would need to maintain facilities to serve those not served by Vernon, its ratepayers would in effect bear the distribution facility risk instead of Vernon. This would not be fair, and would give Vernon a competitive advantage over SoCalGas. We do not feel compelled to create this possibility." (Id., p. 235.) 193 Cal.PUC LEXIS 798 at *Lexis 19.

Recognizing that it was implicitly holding that Vernon should wastefully create duplicative facilities in order to get the wholesale rate, the Commission noted that competition was not always beneficial and further stated:

> "To the extent that Vernon served customers now served by SoCalGas, Vernon would in effect idle some or all of SoCalGas' Vernon facilities. To the extent SoCalGas retained customers, it would preclude Vernon from using its comprehensive distribution facilities to their fullest potential. Yet even idle facilities must be paid for or written off. Having two complete systems to serve one set of customers increases the overall economic burden on

> society, even though it may theoretically allow some customers to obtain lower rates if one system has lower costs or seeks less return on its investment.
>
> "We have yet to determine the precise ratemaking treatment to be given SoCalGas' Vernon facilities if Vernon does construct a complete duplicative distribution system. As noted earlier, we cannot order Vernon to buy or otherwise acquire SoCalGas' facilities and do not intend to order SoCalGas to sell those facilities to Vernon. At this point, we simply do not know for certain whether, or to what extent, SoCalGas' facilities will be stranded, or rendered useless for utility purposes. Nor do we know who should bear responsibility for a result." [Footnote omitted.] (Id., p. 239.) 193 Cal.PUC LEXIS, *LEXIS at 31, 33.

Eventually, these parties settled their dispute. The point is that distribution competition is not always positive, and if introduced, it must be done in a manner that does the least harm possible to the incumbent utility's remaining ratepayers.

WGRC frequently states that this case is simply about whether it is in the public interest to dedicate underutilized pipelines to the public. In our view, that is an oversimplification. WGRC is seeking a CPCN to operate a gas local transmission and distribution system that would radically depart from our policy framework. WGRC does not want to serve all those in its proposed territory, nor does it want its customers to pay PG&E for bypassing the local transmission system nor does it want any type of regulated rate. We see no reason to consider an application for such a CPCN at this time.

C. Timelines Compel Dismissal Rather Than Amendment or Consolidation

Beginning just last year, the Commission now must function under stringent timelines aimed at closing dockets. Under Senate Bill (SB) 960, codified in Pub. Util. Code §1701 et seq., the Commission must act upon an application within 18 months. A complaint must be acted upon within 12 months. These

new timelines impel us to use our powers of dismissal when in the past we might simply have asked for repeated amendments, held a case in abeyance for a year or more, or consolidated it with a generic proceeding that might take two years or more to complete.

In addition to the challenge the timelines present, we do not think this application lends itself merely to amendment. Essentially, if the Applicant wishes to file an application conforming to our current policy, it will be seeking authorization for a substantially different business. Since there is no filing fee, there is no prejudice to the Applicant in filing a new application, as opposed to substantial amendments; at this juncture both courses of action require a longer wait for a final answer than WGRC would have liked. Given that we have seen no indication that WGRC has any interest in a CPCN for a gas local transmission and distribution business with an obligation for core and noncore service in an exclusive territory, operating with rates regulated for fair competition and charging for public purpose programs, we think dismissal is most appropriate in this case.

We will not consolidate this proceeding with a broader rulemaking, although we recognize that consolidation was once the best alternative. In 1984, Owens-Illinois filed a complaint requesting that the Commission order PG&E and SoCalGas to transport natural gas owned by Owens from the California border to its facilities within their service territories. The Commission instead opened OII 84-04-079, to investigate transportation of customer-owned gas by gas utilities and its impacts on the economy, the industry and remaining customers. It suspended a SoCalGas Advice Letter filing and consolidated it

with the OII, as well as consolidating the Owens-Illinois complaint.[34] Here, we are instead interpolating a study, so there is no rulemaking with which to consolidate at this time. It may be that one will follow, and at that time WGRC may wish to refile this application. At any time, WGRC may file an amended application.

Now that SB 960 is in effect, the Commission must dispose of cases promptly, even cases that demand a great deal of public participation, require lengthy investigations into alternative policies, and invoke public and Commission debate. Our solution has been to move quickly through those cases that can be handled quickly, and to break up other investigations into bite-size pieces. Distribution competition in the gas industry is quite a mouthful; it will stick in the craw of some, and demand that we chew over our alternatives carefully. The Commission cannot properly consider such a policy change without considering the many key issues related to whether such competition is in the public interest, including who has the default duty to serve, and how to deal with stranded costs, public programs, impacts on the environment, the core and other customers. We choose to consider these questions with the guidance of a study conducted by our Strategic Planning and Energy Divisions, most likely in light of the gas industry reform we recommend to the Legislature after the conclusion of I.99-07-003.

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[34] It is notable that this consolidated proceeding led incrementally to more and more competition in gas commodity supply. See D.85-12-102, 20 CPUC2d 6; D.86-12-010. Eventually, all gas customers became eligible to take commodity service from non-utility commodity suppliers, to be delivered over the incumbent LDC pipelines. The distribution itself was not opened to competition.

IV. No Hearing is Necessary At This Time

"The Commission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing." (Pub.Util. Code §1701.1(a) in pertinent part.) Here, the Commission initially determined that this proceeding required a hearing. (ALJ Resolution 176-3014, April 22, 1999.) After hearing argument on the motion to dismiss the application, we reverse that decision, and determine that no hearing is required, consistent with due process, public policy and statutory requirements.

Neither *PG&E v. Dow Chemical Company*, D.94-07-063, 55 CPUC2d 430 nor *Ventura County Waterworks, supra*, cited by WGRC, mandates a hearing in this case. In *Dow*, a case concerning these very same pipelines, we held that the owners of the pipelines needed a CPCN to distribute gas to companies that were unaffiliated with it and ordered it to cease and desist distribution and to apply for a CPCN. We did not hold that a CPCN would be granted for Dow to so distribute gas, let alone under the conditions of WGRC's application (i.e., no universal service requirement, market-based rates, no public purpose program charge). In *Ventura County Waterworks*, an evidentiary hearing was called for in order to resolve factual disputes about whether the district could provide better and more economical service than another company. Here, we are assuming that the facts, other than ultimate facts, are as WGRC states them. What we differ on is whether a CPCN can be granted on these facts under current Commission policy.[35]

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[35] To the extent that WGRC argues that an evidentiary hearing is necessary to allow it to show that the policy should change, we do not believe that due process, public policy or statutory law demand that we accede to its request for such a hearing. While an individual case may provide a forum for policy changes, we do not think it is the appropriate forum for considering the breadth of change requested here. There is no

Footnote continued on next page

While it true that we can hear applications and grant them subject to conditions, we are not compelled to do so. Here, the great distinctions between the business WGRC has requested and the type of business we believe current policy permits, convince us that, at this time, granting a hearing and conditioning a CPCN would be a fruitless effort. Again, we note that WGRC has not amended its application in any way.

At the oral argument, the ALJ ruled that the motion would be determined on the argument that day, the application including its supporting declarations, the protest, the motion papers not including their supporting declarations and those officially noticeable facts that were brought to the ALJ's attention. The facts submitted in declarations accompanying the motion papers were disputed, and were not considered. The disposition herein is a matter of law and policy; it is not a determination of fact. Because the application is disposed as a matter of law, no hearing is necessary.[36]

V. Conclusion

For the reasons explained above, we grant the motion to dismiss the application. As to PG&E's other arguments for dismissing the application, they

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evidence that WGRC could present that would "prove" in an adjudicative sense that the Commission should at this time abandon exclusive service territories with universal service obligations, and averaged rates including public program supplements. These are policy decisions based on legislative facts that should be presented in a forum open to all interested parties.

[36] WGRC has repeatedly cited Pub. Util. Code § 1002.5 as mandating the expeditious grant of CPCN's for the local transmission and distribution competition it proposes. However, that statute, enacted in 1990, was concerned with the need for interstate transmission capacity simultaneously addressed by the Commission in D.90-02-016, *Interstate Pipeline OII Decision* (1990) 35 CPUC.2d 196, 110 P.U.R.4th 486, 1990 Cal.PUC LEXIS 91. Moreover, it explicitly states the expeditious issuance follows a finding that it is in the state's best interest to do so. We do not make such a finding here.

are not reached. All of WGRC's arguments have been reviewed and considered and those not explicitly discussed above are found irrelevant to the basis upon which we are dismissing the application or found otherwise lacking in merit. This holding is without prejudice to a differently framed application concerning the same pipelines.

VI. Comments on Draft Decision

The draft decision of ALJ Biren in this matter was mailed to the parties on September 2, 1999, in accordance with Pub. Util. Code § 311(g) and Rule 77.1 of the Rules of Practice and Procedure. Comments were filed on September 22, 1999 and reply comments were filed on September 27, 1999. Some changes have been made in response to the comments of PG&E, WGRC, ORA and Calpine, including the wording of some findings of fact and conclusions of law. Most of the comments of WGRC, and ORA, and many of Calpine's comments evinced a different view of case law, Commission policy and the issues implicated by this application than ours. Thus, while various editorial changes have been made throughout the decision to clarify our views, no substance has been changed. We continue to believe that if WGRC was willing to operate under current Commission policy, e.g., to serve the core and the noncore in an exclusive service area, it would have amended its application to say so.

Subsequent developments since the release of the proposed decision have also been incorporated. Of major significance, in light of the draft decision in R.98-12-015, we have referred the issues raised by gas local transmission and distribution competition to a study, concurrent with that undertaken on electricity distribution competition. We have also noted the signing and passage of AB 1421, which mandates, among other things, bundled service for the core in a gas corporation's service area.

Findings of Fact

1. For the purposes of ruling on PG&E's motion to dismiss the application, we assume that the facts as set forth in Western Gas Resources-California, Inc.'s application herein are true, with the exception of ultimate facts.

2. The Commission's policy for the natural gas industry, at the present time, does not encompass competition in local transmission and distribution between public utilities operating under different rate structures with different service obligations.

3. The Legislature has expressed some of its views on unbundling distribution for the core in AB 1421.

4. The business for which the CPCN is requested in the Application does not comport with the Commission's policy.

5. Party and Commission resources will be wasted if this CPCN application, as submitted, goes to hearing.

6. It is not in the public interest to consider this application in this form at this time.

7. Further study and information gathering are needed on the issues raised by competition at the local transmission and distribution level of the natural gas industry.

Conclusions of Law

1. We should refer the issues raised by competition at the local transmission and distribution level of the natural gas industry to a study conducted by the Commission's Division of Strategic Planning and Energy Division.

2. We should undertake any study in light of the actions of the Legislature with respect to natural gas industry restructuring.

3. We should not consider changing Commission policy on distribution of natural gas in the context of this particular individual application.

4. We should grant PG&E's Motion to Dismiss the Application without Prejudice.

5. No hearing is necessary on this Application as currently written, in accordance with Rule 6.6 of the Rules of Practice and Procedure.

ORDER

IT IS ORDERED that:

1. The issues raised by local transmission and distribution competition in the natural gas industry, including but not limited to those discussed in this decision, shall be addressed in a CPUC staff study and report, which should include recommendations and draft legislation if necessary. Staff may conduct workshops, roundtables and other informal discussions in connection with this study. Copies of the report shall be served on the parties in the Gas Strategy Proceeding, I.99-07-003, including Western Gas Resources-California, Inc., as well as on the Legislature.

2. This application is dismissed without prejudice.

3. If Western Gas Resources-California, Inc. submits a new application requesting a Certificate of Public Convenience and Necessity for local transmission and distribution of natural gas prior to an authorizing statute or a Commission decision following our proposed study, it shall identify with precision the exact territory for which it seeks such a certificate and whether it is also willing to take on a universal service obligation for that territory, the rates it plans to charge and their relationship, if any, to public programs benefiting consumers. The inclusion of these specifications within an application shall not automatically result in the granting of a Certificate.

4. Application 99-04-010 is closed.

This order is effective today.

Dated November 4, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
CARL W. WOOD
Commissioners

I dissent.

/s/ JOSIAH L. NEEPER
Commissioner

I dissent.

/s/ JOEL Z. HYATT
Commissioner