

Decision 03-04-038

April 3, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Wild Goose Storage, Inc. to
Amend its Certificate of Public Convenience
and Necessity to Expand and Construct
Facilities for Gas Storage Operation

Application 01-06-029
(Filed June 18, 2001)

ORDER DENYING REHEARING OF DECISION (D.) 02-07-036**I. SUMMARY**

By this Order, the California Public Utilities Commission (“Commission”) denies the Application of Roseville Land Development Association (“Roseville”) for Rehearing of Decision 02-07-036 (“Decision”).

II. BACKGROUND

In Decision (D.) 02-07-036 (“Decision”), the California Public Utilities Commission (“Commission”) authorized Wild Goose Storage, Inc. (“Wild Goose”) to amend its certificate of public convenience and necessity (“CPCN”) in order to expand its gas storage facilities in Butte County by fifteen billion cubic feet and to connect the expanded facility to the major transmission gas pipeline owned by Pacific Gas and Electric Company (“PG&E”). The Decision also authorized Wild Goose to offer the additional storage capacity and related services at market-based rates. However, the Decision prohibited Wild Goose from engaging in any storage or hub service transaction with its parent company or any affiliate controlled by its parent company. It further required Wild Goose to comply with other reporting requirements as specified in the Decision. The Decision also committed the Commission to undertaking a thorough review of and potential revisions to its 1997 Affiliates Transactions

Rules, as they apply to independent storage companies, in Rulemaking (R.) 01-01-001. Lastly, the Decision certified the Environmental Impact Report (“EIR”) for the Wild Goose Expansion Project (“Project”) and further conditioned the CPCN on mitigation set forth in the EIR.

In *Re Natural Gas Procurement and System Reliability Issues* (“Gas Storage Decision”) [D.93-02-013] (1993) 48 Cal. P.U.C.2d 107, the Commission adopted policies and rules for natural gas utility storage programs, authorized unbundling of noncore storage service and allowed independent storage providers to enter the storage market and compete with existing local distribution companies under a “let the market decide” policy for construction of new storage facilities or expansion of existing facilities. In *Re Wild Goose Storage, Inc.* [D.97-06-091] (1997) 73 Cal. P.U.C.2d 90,¹ the Commission granted Wild Goose a CPCN authorizing it to develop, construct and operate an underground gas storage facility and to provide firm and interruptible storage service at market-based rates. Roseville filed an application for rehearing of D.97-06-091. The Commission denied that application for rehearing because Roseville lacked standing in D.97-10-070. Roseville filed a Petition for Writ of Review and Mandate (“Writ of Review”) of D.07-06-091, which the California Supreme Court denied.

In the present proceeding, Application (A.) 01-06-029, Wild Goose sought an amendment of its CPCN for additional storage capacity and related services at market-based rates. In the Decision, the Commission granted the amendment in the manner discussed above. Roseville Land Development Association (“Roseville”) timely filed an application for rehearing challenging the legality of the decision. In its application for rehearing, Roseville makes the following arguments: (1) the Commission violated Public Utilities Code Sections 1701.3(a) and 1701.3(c); (2) a need for the proposed expansion has not been established by evidence as required by Public Utilities Code Section 1001; (3)

¹ Rehearing of D.97-10-091 was denied in *Re Wild Goose Storage, Inc.* [D.97-10-070] (1997) 76 Cal. P.U.C.2d 246.

market-based rates for service from the Project should not be authorized; (4) the Project cannot be defined as a gas plant pursuant to Public Utilities Code and settled California Supreme Court precedent; (5) the Commission's waiver of various statutes, e.g., the statutory cost cap, warrants rehearing; (6) the Commission may not issue Wild Goose a CPCN because Wild Goose is a foreign corporation; (7) the Commission should reconsider its conclusion regarding eminent domain; and (8) Roseville's Petition to Set Aside Submission should be reconsidered. Roseville also requests an oral argument on this application for rehearing. Wild Goose filed a Response to Roseville's application for rehearing. That response has been considered.

III. DISCUSSION

A. Authority of a Non-Assigned Commissioner to Draft an Alternate Decision.

Roseville claims that pursuant to Public Utilities Code Section 1701.3(a) ("Section 1701.3(a)"), Commissioner Peevey did not have the authority to author the Alternate Decision, which was adopted at the Commission meeting. Section 1701.3(a) states:

If the commission pursuant to Section 1701.1 has determine that a ratesetting case requires a hearing, the procedures prescribed by this section shall be applicable . . . An alternate decision may be issued by the assigned commissioner or the assigned administrative law judge who is not the principal hearing officer . . .

(Pub. Util. Code § 1701.3(a).) We made a preliminary finding in Resolution ALJ 176-3066, issued on June 28, 2001, that the category for this proceeding is ratesetting and that hearings are necessary pursuant to Section 1701.1. The Scoping Memo of the assigned Administrative Law Judge ("ALJ") dated August 29, 2001, confirmed this finding. Commissioner Bilas was the original assigned Commissioner at the time of this Scoping Memo. However, after Commissioner

Bilas' departure from the Commissioner, President Lynch became the new assigned Commissioner to this proceeding.

Roseville's argument fails because Section 1701.3(a) does not limit the authorship of alternate decisions to the assigned Commissioner. Rather, Section 1701.3(a) merely defines when "[a]n alternate decision **may** be issued by the assigned commissioner or the assigned administrative law judge" (Pub. Util. Code § 1701.3(a), emphasis added.) Thus, there is nothing in this code section that limits or prevents another Commissioner from issuing an alternate decision.

In addition, Section 311(e) of the Public Utilities Code and Rule 77.6 of the Commission's Rules of Practice and Procedure do not limit the drafting of alternate decisions by Commissioners other than the assigned Commissioner. For example, Rule 77.6(a) states:

For purposes of this rule, "alternate" means a substantive revision by **a** Commissioner to a proposed decision not prepared by that Commissioner, which revision either: (1) materially changes the resolution of a contested issue, or (2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.

(Code of Regs., tit. 20, § 77.6(a), emphasis added.)

Moreover, we have never limited the writing of alternates to the assigned Commissioner. For the aforementioned reasons, Roseville's argument lacks merit.

B. Wild Goose's Compliance With Ex Parte Rules.

In its Application for Rehearing, Roseville contends that we violated the ex parte rules set forth in the Public Utilities Code Section 1701.3(c) (Section 1701.3(c)'), which states, in relevant part:

Ex parte communications are prohibited in ratesetting cases . . . Written ex parte communications may be permitted by any party provided that copies of the

communication are transmitted to all parties on the same day.

(Pub. Util. Code § 1701.3(c).) As previously discussed, we made a preliminary finding in Resolution ALJ 176-3066, issued on June 28, 2001, that the category for this proceeding is ratesetting. Therefore, Section 1701.3(c) applies to this proceeding.

The Public Utilities Code defines an *ex parte* communication as:

. . . any oral or written communication between a decisionmaker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter.

(Cal. Pub. Util. Code § 1701.1(c)(4).) Rule 7(c) of the Commission Rules of Practice and Procedures (“Rule 7(c)”) reiterates the California Public Utilities Code statutes.² The assigned ALJ’s Scoping Memo noted that “[t]he *ex parte* rules set forth in Rule 7 apply to this proceeding.” (Scoping Memo at 3.)

Roseville contends that “Wild Goose initiated several contacts with the commission that were not properly reported or should not have been initiated at all.” (App. for Rehearing at 2.) Specifically, Roseville is concerned about a written *ex parte* communication from Wild Goose to Advisors to Commissioners Peevey and Duque, and an Advisor to President Lynch on June 27, 2002, that was not noticed and filed with the Commission’s docket office until July 2, 2002 and that was not transmitted to the parties on the same day it was sent to the decisionmaker. This *ex parte* communication is of particular concern to Roseville because Roseville asserts that Wild Goose provided “essentially a map for what became the Alternate Decision” (App. for Rehearing at 3.)

² Rule 7(c) states: “[w]ritten *ex parte* communications are permitted at any time provided that the party making the communication serves copies of the communication on all other parties on the same day the communication is sent to a decisionmaker.”

Roseville’s claim that Wild Goose filed the communication at issue with the docket office five days late is without merit because, according to Rule 7.1(a) of the Commission’s Rules of Practice and Procedure,³ Wild Goose was required to file a “Notice of Ex Parte Communication” with the Commission’s Docket Office within three working days of the communication. Wild Goose filed Notice within three business days of the communication. However, Wild Goose did transmit the communication to the parties late, even though both Section 1701.3(c) and Rule 7(c) require that written ex parte communications be sent to all parties on the same day it is sent to the decisionmaker. Roseville asserts that because of this act, “the parties and the public have been denied a fair hearing and due process.” (App. for Rehearing at 3.)

While there is little doubt that Wild Goose technically erred in failing to notify parties in a timely fashion of its ex parte communication, this is harmless error. Although the Alternate Decision did adopt, in part, the position advocated in the written ex parte communication, the parties had an opportunity to file comments to the Alternate Decision. Thus, the parties had notice and opportunity to be heard.⁴

C. Sufficiency of the Evidence to Comply with Section 1001.

Roseville contends that Findings of Fact 4 through 7 of the Decision lack substantial evidence to support that there is need for this Project pursuant to Public Utilities Code Section 1001 (“Section 1001”). In particular, Roseville analyzes Wild Goose Exhibits No. 13 and 15, the direct testimony and rebuttal

³ Rule 7.1(a) of the Commission’s Rules of Practice and Procedure states: “Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. An original and seven copies of a “Notice of Ex Parte Communication (Notice) shall be filed with the Commission’s San Francisco Docket Office within three working days of the communication.” Rule 7.1(b) notes that “[t]hese reporting requirements apply to ex parte communications in ratesetting proceedings”

⁴ The Commission takes the opportunity to state that it does take the ex parte rules seriously. Parties who egregiously violate these rules could find themselves subject to Rule 1 sanctions.

testimony of R. Thomas Beach, and argues that Mr. Beach’s testimony “assumed, without evidence, that the expansion facility would make available gas storage to stabilize the larger gas storage and supply market for the benefit of ratepayers.”⁵ (App. for Rehearing at 5.) Roseville claims that because the record evidence does not support Findings of Fact 4 through 7, rehearing is required.

A request for an amendment of an existing CPCN triggers the same type of review as a request for the original CPCN. Section 1001 states:

[n]o . . . gas corporation . . . shall begin the construction of . . . a line, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity required or will require such construction.

(Pub. Util. Code § 1001.) In the Decision, we established that Project need under Section 1001 should be interpreted in light of our Gas Storage Decision⁶ and subsequent decisions. We further observed in the Decision that:

In the original Wild Goose and Lodi CPCN decisions the Commission determined that its “let the market decide” policy should apply to competitive gas storage providers and therefore, that it would not test the need for a new gas storage project on a resource planning basis, but instead would rely on a presumptive showing of need, established by the builders and users of the new project accepting all of the risk of the unused, new capacity.

⁵ Roseville’s reference to this testimony constitutes no more than a request for the Commission to reweigh the evidence, and reconsider its policy determinations. Thus, reference to this testimony does not support Roseville’s claim of insufficiency of evidence to support the determination.

⁶ The Gas Storage Decision provides that: “The Commission should entrust noncore storage expansion decision to market participants. The Commission should not review the need for new storage projects intended to serve noncore customers, as long as all the risk of unused capacity resides with the builders and users of the new facilities.” (*Gas Storage Decision* (1993) Cal. PUC LEXIS 66 at 87, Finding of Fact No. 37.)

(D.02-07-036 at 8.) Thus, in this Decision, there was a presumptive showing of need.⁷

In addition, record evidence supports our determination of need for the Project pursuant to Section 1001. We commented in the Decision that, with the exception of particular localized constraints, “. . . the record does not controvert Wild Goose’s testimony that gas storage can exert downward pressure on border price increases attributable to upstream interstate and intrastate transmission constraints . . . and likewise, can serve as a substitute for interstate gas during times of high demand.” (D.02-07-036 at 9.) We also noted that the record shows customer interest in Wild Goose’s storage services (*Id.* at 10.)

Moreover, the Testimony of Paul Amirault supports the determination that there is a need for the Project under Section 1001. Specifically, Mr. Amirault states in his testimony that:

There is a clear market demand for storage services. This was demonstrated first through the open season that Wild Goose held last December for its existing storage capacity and again through the open season for expansion capacity that Wild Goose conducted prior to its submission of its expansion application . . .

(Exhibit No. 10 at 2.) In addition, the Office of Ratepayers Advocates (“ORA”) submitted prepared testimony in support of Wild Goose’s Application to amend its CPCN. (Exhibit 300 at 1.) ORA stated in its testimony that it “supports Wild Goose’s request to expand its facilities with the understanding that it will bear the entire financial risk of the project, in accordance with the ‘let the market decide’ policy adopted in the Storage Decision.” (Exhibit 300 at 10.)

⁷ In its rehearing application, Roseville appears to be attacking the policy adopted in the 1993 Gas Storage Decision by challenging the need for the Project. (See *Gas Storage Decision* (1993) Cal. PUC LEXIS 66 at 87, Finding of Fact No. 37.) Such an argument would essentially be a collateral attack on a Commission decision, which violates Public Utilities Code Section 1709.

Based on the above, record evidence supports our determination of need. Therefore, we did not commit legal error.

D. Authorization of Market-Based Rates for Service for Wild Goose Expansion.

Roseville argues that Wild Goose's market power exhibits should not have been admitted into evidence because the parties involved in the Wild Goose market study were not qualified. (App. for Rehearing at 6.) Roseville contends that with the new evidence in its Petition to Set Aside Submission, "it is incumbent on the commission to reopen the case." In the Decision, we denied Roseville's Petition to Set Aside Submission and declined to take official notice of the attached documents.⁸ (D.02-07-036 at Ordering Paragraph 24.)

Roseville appears to argue that record evidence does not support our finding that the Wild Goose should get market-based rates for its expansion Project. There is substantial evidence in the record to support our determination, and therefore, Roseville's argument fails.

E. Wild Goose's Public Utility Status.

Roseville claims that Wild Goose cannot be a public utility because it is not a gas corporation operating a gas plant to store gas "for light, heat, or power" as defined in Public Utilities Code Section 222 ("Section 222".) In order to make this argument, Roseville relies on Wild Goose's admission that it does not ask its customers for what purpose they use the gas. (App. for Rehearing at 8-9.)

By statutory definition, Wild Goose, as a provider of gas storage, is a "gas corporation" and thus, a "public utility." (See Pub. Util. Code §216(a), which defines a public utility to include a gas corporation.) A gas corporation "includes every corporation or person owning, controlling, operating, or managing any gas plant for compensation within this State, . . ." (Pub. Util. Code § 222.) Gas plant is described as "all real estate, fixtures, and personal property, owned, controlled,

⁸ See Section I of this Order for further discussion of this issue.

operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, underground storage, or furnish of gas, natural or manufactured, for light, heat, or power.” (Pub. Util. Code § 221.) Thus, Wild Goose is a “gas corporation” that possesses the statutory attributes of a “public utility.”

The statement by Wild Goose that Roseville cites in support of its claim is not dispositive. What determines Wild Goose’s public utility status is whether this entity is providing service for compensation and has dedicated its property for public use. (See *Richfield Oil Corp. v. P.U.C.* (1960) 54 Cal.2d 419.) In its original CPCN Application, Wild Goose stated that it would use its underground storage facility to provide firm and interruptible storage services at market-based rates (see A.96-08-058, filed August 26, 1996 at 5), and thus, Wild Goose will be owning and operating its gas plants for compensation. Likewise, in its request to amend its CPCN, Wild Goose states that it will use the underground storage facility in order to provide firm and interruptible service at market-based rates.⁹ (See A.01-06-029, filed June 18, 2001 at 1.) Therefore, Roseville’s argument lacks merit.

In addition, Roseville has challenged Wild Goose’s public utility status in the past. In issuing Wild Goose its initial CPCN as a storage provider, the Commission made a determination about Wild Goose’s public utility status. Accordingly, Roseville is arguably barred from bringing this claim by the doctrine of res judicata. Res judicata precludes the relitigation of a final judgment on the merits between the same parties or parties in privity with them. (See *Mycogen Corp v. Monsanto Co.* (2002) 28 Cal. 4th 888, 896.) It is applied to promote judicial and administrative economy, bring finality to adjudicated issues, and prevent wasteful multiple litigation. (*Kopp v. Fair Political Practices Comm.* (1995) 11 Cal. 4th 607, 679; 7 Witkin Cal. Procedure (4th ed. 1997) § 280, p. 820.)

⁹ In fact, the Commission stated in Ordering Paragraph 2 of the Decision that “Wild Goose is granted a . . . [CPCN] . . . to provide firm and interruptible storage service at market based rates . . .”

The doctrine of res judicata gives certain "conclusive effect" to a former court judgment in subsequent litigation on the same controversy. (7 Witkin Cal. Procedure (4th ed. 1997) § 280, p. 820.) In order to preclude a new case from going forward, there must be an identity of parties and an identical cause of action. (See *Citizens for Open Access to Sand and Tide, Inc. v. Seadrift Assoc.* (1998) 60 Cal. App. 4th 1053, 1065-1067; see also *Matthews v. Meadows Management Co.*, D.99-09-072; 1999 Cal. PUC LEXIS 639.)

Roseville has previously challenged Wild Goose's public utility status in court. In its Petition for Writ of Review of the original Wild Goose CPCN decision, Roseville contended that Wild Goose was not a public utility. In addressing this argument in its Answer to Roseville's Petition for Writ of Review, the Commission argued that Wild Goose is a gas corporation pursuant to Public Utility Code Sections 216, 221 and 216. The California Supreme Court summarily denied Roseville's Petition for Writ of Review. (See the Court's denial, filed March 11, 1998, in *Roseville Land Development Assoc. v. Public Utilities Comm.*, Case No. S066162.) This denial is a final and conclusive decision on the merits.

In *People v. Western Airlines* (1954) 42 Cal. 2d 621, the California Supreme Court addressed a prior Commission decision which had asserted jurisdiction over the defendant, Western Airlines. The Court held that a denial of a petition for review by the Court is a decision on the merits as to both the law and the facts presented in the review proceedings. In reaching this conclusion, the Court also stated:

It seems clear that where [Commission] determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties.

(42 Cal. 2d at 630.) This position was reiterated in *Consumers Lobby Against Monopolies v. P.U.C.* (1979) 25 Cal. 3d 891, 900.¹⁰ (See also *In the Matter of UPS* [D. 97-04-049] (1997) 71 CPUC2d 714.)

Roseville now makes the same argument before the same parties. Therefore, based on the above discussion, Roseville is barred from attacking our determination that is now final and conclusive according to the doctrine of res judicata.

F. Roseville’s Claim that Various Statutes Were Waived.

Roseville argues that we waived various statutes in its Decision. In particular, Roseville claims that we have waived Sections 454, 489 and 1005.5 of the Public Utilities Code (“Section 454”, “Section 489” and “Section 1005.5”, respectively.) Roseville claims that we do not have the authority to grant such waivers. Roseville’s proposed solution to this problem is to give Wild Goose the status of an independent gas storage provider, thereby determining that it is not a public utility. Roseville’s logic is flawed.

Roseville refers to Section 454, noting that pursuant to this statute, “[a] real, juridical public utility is not permitted to change any rate or alter any contract so as to result in any new rate, except upon a *showing* before the commission *and* a finding by the commission that the new rate is justified” (emphasis in original.) (App. for Rehearing at 13.) Roseville also points out that under Section 489, “[e]very public utility must also file, print, and keep open schedules showing all rates and charges, together will [sic] all rules, contracts, privileges, rentals, or service” (*Id.*, emphasis in original.)

¹⁰ In *Consumers Lobby Against Monopolies v. P.U.C.* (1979) 25 Cal. 3d 891, 900, the California Supreme Court held that when determinations by the Commission “have been appropriately and unsuccessfully - challenged . . . by direct attack and have run the gamut of approval by the highest courts . . . they should have conclusive effect of res judicata as to the issue involved where they are brought again into question in subsequent proceedings between the same parties.”

We did not waive Sections 454 and 489. (See D.02-07-036 at 51, Finding of Fact 16.) As noted in the Decision, Roseville “misunderstands the application of these statutes to the noncore gas storage market.” (*Id.* at 22.) We held a hearing and made a finding that a utility may charge market-based rates because it cannot exercise market power in a certain specific market. Therefore, we have satisfied Section 454 by making the appropriate finding required by that section. In compliance with Section 489, Wild Goose files tariffs with us, which specify a range of rates to be charged in conformance with Wild Goose’s market-based authority.

We did waive Section 1005.5 in the Decision, in Conclusion of Law 9, which states: “Because Wild Goose does not have captive customers who are financing the expansion project, we should waive the cost cap requirement of Pub. Util. Code § 1005.5 for this application.” (D.02-07-036 at 55, Conclusion of Law 9.) Under Section 1005.5, we must set a cost cap when it authorizes construction of a utility facility over fifty million dollars. However, we have the authority to issue a waiver of Section 1005.5. Section 701 of the Public Utilities Code (“Section 701”) states:

The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

Thus, Section 701 confers upon us broad authority to regulate public utilities. Because we recognized that Wild Goose bears the entire financial risk of the Project and does not have captive customers who would be financing the Project, Section 1005.5 was not relevant to this proceeding. Therefore, we had the authority under Section 701 to waive the cost cap required by Section 1005.5.

G. Wild Goose’s Status as a Foreign Corporation.

Roseville argues, that according to Public Utilities Code Section 704 (“Section 704”), we may not grant Wild Goose a CPCN because it is a foreign corporation. Roseville asserts that Section 704 “. . . has been consistently construed to prohibit foreign corporations, not engaged in a public utility business before 1912, from transacting any public utility business in this state.” (App. for Rehearing at 14.)

Roseville is arguably barred from making this argument by the doctrine of res judicata. As discussed in Section E of this Order, res judicata prohibits the relitigation of a cause of action previously and finally decided. In Roseville’s Petition for Writ of Review of the original Wild Goose CPCN decision, Roseville made the identical argument that Section 704 prevents Wild Goose from being a public utility. We argued in our Answer to the Petition for Writ of Review that Roseville’s contention lacked merit for the reasons discussed below. The California Supreme Court denied Roseville’s Petition for Writ of Review. Consequently, Roseville is barred from relitigating this issue by res judicata.

Roseville’s argument also fails on the merits. The cases that Roseville cites in support of its position do not support its position that Section 704 prevents us from issuing Wild Goose a CPCN because Wild Goose is a foreign corporation. For example, in *Southern Sierras P. Co. v. Railroad Com.* (1928) 205 Cal. 479, 481, the Court stated that, “[a]lthough a foreign corporation, it is operating lawfully in this state, since it has been engaged in doing business therein prior to March 23, 1912, the date when the Public Utilities Act became effective.” Roseville interprets this language to mean that any public utility that was not in business in California before March 23, 1912 may not be granted a be granted a “license, permit, or franchise to own, control, operate, or manage any public utility business.” Roseville’s interpretation is unsupportable under rules of statutory construction.

Clearly, Section 704 does not prevent a foreign corporation from ever becoming a public utility. Rather, the statute was enacted to give us jurisdiction over a foreign corporation which lawfully transacts public utility business in the State, and thus, the right to grant or deny a foreign corporation a CPCN. The statute permits a foreign corporation to be a public utility so long as it complies with the laws of the State, including acquiring a certificate of qualification to transact intrastate business from the Secretary of State, and obtains permission from us, through the granting of a CPCN, to operate as a public utility. The point of including the April, 1912 date was to grandfather companies already doing business as of that date and thereby exempt them from the requirements above, not to exclude foreign corporations forever after this date from operating as a public utility within California, as Roseville argues.

To accept Roseville's claim that Public Utilities Code Section 704 bars all foreign corporations, including Wild Goose, from becoming public utilities would require us to ignore important language in the statute that addresses when a foreign corporation can qualify to transact public utility business. Such an interpretation would be contrary to the basic rules of statutory construction. The fundamental rule is that the plain words of a statute must not be ignored "unless it clearly appears that the language used is contrary to what, beyond question, was the intent of the Legislature." (*Breshears v. Indiana Lumbermen* (1967) 256 Cal.App.2d 245, 250; *People ex. Rel. Pub. Util. Com. v. City of Fresno* (1967) 254 Cal.App.2d 76, 82.) There is no justification in ignoring the language in Public Utilities Code Section 704 which addresses when a foreign corporation can be a public utility.

Our previous decisions do not support Roseville's interpretation of Section 704. For example, In D.94-04-051, the Commission stated that, "[u]nder Section 704 of the California Public Utilities Code, a foreign corporation may be authorized by this Commission to conduct a public utility business once it is qualified to do business in California." (*In the Matter of Intelcom Group, Inc.*

[D.94-04-051 at 3] (1994) 55 CPUC2d 504.) Therefore, it is clear that, according to our interpretation and application of Section 704, foreign corporations may become public utilities in this State.

Wild Goose, as a foreign corporation, has been authorized by the Secretary of State to transact intrastate business in the State of California. (See Certificate of Qualification, No. 1974223, dated July 17, 1996, in Application of Wild Goose, A.96-08-058, filed August 26, 1996.) Accordingly, pursuant to Rule 16(a) of the Commission's Rules of Practice and Procedures, Wild Goose met the requirement for a foreign corporation to be eligible for transacting public utility business in the State. Therefore, Public Utilities Code Section 704 did not preclude us from amending Wild Goose's CPCN.

H. The Commission's Authority over Eminent Domain.

Roseville argues that the power of eminent domain is beyond our authority in this case. However, Roseville's contention hinges on our acceptance of its claims that Wild Goose is not a gas corporation or that it is a foreign corporation that does not comply with Section 704. Since both of these allegations fail, Roseville's contention that the power of eminent domain is beyond our authority in this proceeding is without merit.

I. Request to Reconsider Petition to Set Aside Submission.

In the Decision, we declined to take official notice of a Wall Street Journal article ("Article") even though Wild Goose did not object to notice being taken. (App. for Rehearing at 17.) Roseville argues that "[b]ecause Wild Goose has admitted the truth of the facts reported in the Newspaper article, and not objected to notice being taken, the commission will abuse its discretion if it does not reverse this otherwise minor ruling." (*Id.*) The Commission did not abuse its discretion in declining to take official notice of the Article.

In its Petition to Set Aside Submission, Roseville argued that a merger between Wild Goose and Encana Corporation required the Commission to reexamine the market power evidence in the proceeding. As part of this petition, Roseville requested that we take official notice of certain exhibits that supported the relief it requested. We denied Roseville's Petition to Set Aside Submission in the Decision and declined to take official notice of the attached exhibits. (D.02-07-036 at Ordering Paragraph 24.)

Wild Goose filed an Opposition to the Petition to Set Aside Submission ("Opposition"). Although Roseville claims that Wild Goose did not object to us taking official notice of the Article, Wild Goose's Opposition indicates that the contrary was true. In its Opposition, Wild Goose stated that, "[i]n yet another attempt to discredit Wild Goose, the Roseville Petition cites a New York Times article¹¹ [sic] . . . such evidence is of no probative value in this proceeding, and offers no valid reason to reopen the record." (Opposition at 6-7.)

Rule 73 of the Commission's Rules of Practice and Procedure states: "Official notice may be taken of such matters as may be judicially noticed by the courts of the state of California." None of the attachments qualified for mandatory judicial notice under Evidence Code Section 451. Roseville contends that we must take official notice of the Article. It purportedly bases its authority on Section 451(f) of the Evidence Code which states that mandatory judicial notice shall be taken of "[f]acts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute." Roseville argues that because Wild Goose "provided its own counterpoint," the Encana First Quarter 2002 Financial Report,¹² Wild Goose has "admitted the truth of the facts reported in the newspaper article." (App. for Rehearing at 17.) We

¹¹ Wild Goose mistakenly refers to the article as being from New York Times article instead the Wall Street Journal.

¹² Attachment B to Wild Goose's Opposition to Petition to Set Aside Submission, Supporting Declaration and Request for Official Notice filed on July 11, 2002.

disagree with this conclusion. Wild Goose's response did not make the Article at issue a "fact[] or proposition[] of generalized knowledge that [is] so universally known that [it] cannot reasonably be the subject of dispute."

Because we are not required to take mandatory notice of the Article, we had the discretion whether to take official notice of the article or not. (See Evidence Code § 452.) We exercised that discretion in declining to take official notice of the Article, and therefore, we did not commit legal error.

Roseville also contends that we have "misperceived the facts underlying the other evidence of Wild Goose's unforthcoming conduct." (App. for Rehearing at 17-18.) This claim has no basis. We recognized the potential problems regarding the issues that Roseville raised in its Petition to Set Aside Submission in its Decision. We have not foreclosed on any future discussion of this issue, but rather have found that there is not sufficient evidence at this point to reopen the record on market power in this proceeding.¹³ (See D.02-07-036 at 48.)

J. Request for Oral Argument

Roseville request oral argument on its application for rehearing. Rule 86.3 of the Commission's Rules of Practice and Procedure state that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Cal. Code of Regs., tit. 20, § 86.3.) Roseville has not presented any evidence that the Decision departs from existing precedent or establishes new precedent, and therefore, it does not raise before us issues of major significance. Therefore, Roseville's request for oral argument should be denied.

¹³ The Commission determined that "Roseville Land has not raised facts sufficient for us to reopen the record in this proceeding." (D.02-07-036 at 48.) However, the Commission stated that "[s]hould we determine, in a future proceeding, that the EnCana merger requires other market power mitigations, we can require them at that time." (*Id.*)

IV. CONCLUSION

We have carefully considered all of the arguments presented by Roseville and are of the opinion that good cause for rehearing has not been shown. We conclude that no legal error has been demonstrated.

For the reasons stated above,

Therefore **IT IS ORDERED** that:

1. Rehearing of D.02-07-036 is hereby denied.
2. This proceeding is closed.

Dated April 3, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
SUSAN P. KENNEDY
Commissioners

Commissioner GEOFFREY F. BROWN
being necessarily absent, did not
participate