

Decision PROPOSED DECISION OF ALJ BEMESDERFER  
(Mailed 4/12/2007)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Chevron Products Company,

Complainant,

vs.

Equilon Enterprises LLC, dba Shell Oil Products  
US, and Shell Trading (US) Company,

Defendants.

Case 05-12-004  
(Filed December 5, 2005)

**OPINION DENYING DEFENDANTS' MOTION TO DISMISS AND  
COMPLAINANT'S MOTION FOR SUMMARY ADJUDICATION AND  
GRANTING DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION**

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**OPINION DENYING DEFENDANTS' MOTION TO DISMISS AND  
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**1. Summary**

Complainant alleges that an oil pipeline operated by one of the defendants and running from the San Joaquin Valley production fields to Bay Area refineries is a public utility subject to regulation by this Commission. Defendants move to dismiss the complaint, arguing that the moving parties are entitled to judgment as a matter of law based on the doctrines of *res judicata* and judicial estoppel as well as a long-standing practice of this Commission with respect to proprietary oil pipelines. Complainant and defendants also move separately for summary adjudication. For the reasons set forth below, we deny defendants' motion to dismiss the complaint by reason of estoppel and complainant's motion for summary adjudication but grant defendants' motion for summary adjudication.

This case is closed.

**2. Procedural Background**

This proceeding concerns the 265-mile-long, 20-inch heated oil pipeline running from the San Joaquin Valley to the Bay Area (the 20" Pipeline). On December 5, 2005, Chevron Products Company (Chevron) filed this complaint against Shell Trading (US) Company (Shell Trading) and Equilon Enterprises LLC, doing business as Shell Oil Products US (Equilon), which is the owner of the 20" Pipeline. Shell Trading and Equilon are both subsidiaries of Shell Oil Company (Shell Oil), an oil and gas production company, which is not a party to this case. The complaint accuses Equilon and Shell Trading of operating the 20" Pipeline as a public utility and argues that the pipeline should be subject to Commission rate regulation. Tesoro Refining and Marketing Company (Tesoro) intervened seeking the same relief and raising the same allegations.

A prehearing conference was conducted on March 21, 2006, at which time Administrative Law Judge (ALJ) Glen Walker proposed bifurcating the proceeding into two parts: first, determining whether the 20" Pipeline is or is not a public utility; second, if the pipeline is deemed a public utility, conducting an appropriate ratesetting proceeding. A Scoping Memo memorializing this procedure was issued by the assigned Commissioner on March 28, 2006.

On March 30, 2006, Equilon and Shell Trading filed a Motion to Temporarily Stay Discovery Pending Dispositive Motion and Request for Expedited Treatment. The motion was granted by ALJ Walker based on defendants' representation that a motion to dismiss, to be filed no later than April 6, 2006, could resolve the complaint. The motion to dismiss was filed on April 5, 2006, and responses to the motion were filed on April 25, 2006. Chevron on April 20, 2006, filed a motion for summary adjudication on its behalf. Defendants filed an opposition to that motion on May 5, 2006 including as a part thereof a motion for summary adjudication on their behalf. ALJ Walker granted requests by the moving parties to file replies to the motion to dismiss.

On June 13, 2006, the draft decision of ALJ Walker was mailed to the parties. ALJ Walker's draft decision dismissed the complaint. He found that Chevron was estopped from asserting the invalidity of the buy/sell agreements by an unpublished 1994 Court of Appeals opinion holding that the 20" Pipeline was not dedicated to public use. In 1994, Chevron was a part-owner of the 20" Pipeline. In the litigation that preceded the 1994 decision, Chevron took the position that the pipeline was not dedicated to public use.

Shortly after issuing the draft opinion and before considering comments from the parties, ALJ Walker retired. The case was then re-assigned to ALJ Bemederfer and ALJ Walker's draft opinion was withdrawn. Although

Judge Walker had denied an earlier request by Chevron for oral argument, on December 19, 2006 Chevron renewed that request, asserting that its due process rights would be jeopardized by a ruling on the cross-motions for summary adjudication without an oral argument. On January 10, 2007, assigned Commissioner Michael Peevey granted Chevron's renewed request. Thereafter, a prehearing conference was held on March 12, 2007 and oral argument was held before the assigned Commissioner and the assigned ALJ on March 13, 2007.

### **3. Factual Background**

Shell Oil ships the heavy crude it produces in the San Joaquin Valley to the Bay Area via the 20" Pipeline. Shell Oil's monthly shipments are always arranged before any remaining capacity is made available to other San Joaquin Valley producers. In order to ship their crude, the other producers, including Chevron, enter into so-called "buy/sell agreements" with Shell Trading. A buy/sell agreement is a contract in which a pipeline owner or crude oil trader buys crude oil from a supplier at one end of the pipeline and sells an equivalent amount of oil to the supplier at the other end of the pipeline.

Chevron has had access to the 20" Pipeline for the last five years through buy/sell agreements with Shell Trading pursuant to a California Proprietary Pipeline Transportation Commitment Agreement (the Proprietary Pipeline Contract). In 2005, prior to filing its complaint with this Commission, Chevron disputed the prices of certain buy/sell agreements with Shell Trading. In accordance with the terms and conditions of the Proprietary Pipeline Contract, the dispute was submitted to arbitration. An arbitration decision was issued on June 20, 2005, establishing the price per barrel under the buy/sell agreements through December 31, 2005.

According to defendants, Chevron for a time refused to honor the arbitration award and refused to arbitrate pricing after calendar year 2005. Nevertheless, in December 2005, Chevron and Shell Trading entered into a new buy/sell agreement establishing pricing for transactions between January 1, 2006 and June 30, 2007. Chevron at that time also filed this complaint with the Commission. Chevron contends that if the Commission determines that the 20" Pipeline is operated as a public utility, then the Commission will assume exclusive jurisdiction to regulate rates and charges, and both the arbitrator's award and the new buy/sell agreement for 2006 and 2007 presumably would be moot.<sup>1</sup>

Equilon and Shell Trading on February 16, 2006, asked ALJ Walker to issue a declaration confirming the 2005 arbitration award and requiring Chevron to arbitrate the pricing issues raised in its complaint. By ruling dated April 3, 2006, ALJ Walker denied the motion, observing that an order to compel arbitration among parties that are not public utilities is a matter for the civil courts rather than this Commission.

#### **4. Motion to Dismiss**

Equilon and Shell Trading move to dismiss on three grounds. First, they maintain that the doctrines of *res judicata* and collateral estoppel bar Chevron from maintaining the complaint because it was a party to an earlier adjudication before the California Court of Appeal in which the same 20" Pipeline was deemed not to be a public utility. Second, defendants argue that the complaint is

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<sup>1</sup> *Miller v. Railroad Commission* (1937) 9 Cal.2d 190 (once Commission assumes jurisdiction over a public utility, Commission may set aside any prior order or determination of courts in matters coming under the exclusive jurisdiction of the Commission).

also barred by the doctrine of judicial estoppel, which under certain narrow circumstances prevents a party (in this case Chevron) from taking a position in one case and then taking a contrary position on the same issue in a later case. Finally, Equilon and Shell Trading argue that this Commission since 1917 has declined to exercise jurisdiction over oil pipelines operating through buy/sell agreements and that a Commission investigation of pipelines between 1975 and 1979 was concluded without a change in the Commission's practice.

### **5. Prior Court of Appeal Decision**

In 1986, the California Attorney General, the City of Long Beach, and the State of California (collectively, the State) filed suit against various oil companies, including Chevron (the State Action).<sup>2</sup> In the State Action, the State asserted that Texaco Inc. (later acquired by Chevron) – then the owner of the 20" Pipeline – was operating the pipeline as a common carrier based on the same allegations now being made by Chevron in its complaint before this Commission.<sup>3</sup> The gravamen of the complaint was that buy/sell agreements were "sham" transactions used for the sole purpose of evading Commission regulation. The complaint further alleged that, by providing transportation services through the use of buy/sell agreements, Texaco had dedicated the 20" Pipeline to public use.

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<sup>2</sup> *People of the State of California, the City of Long Beach, as Trustee for the State of California, and the State of California, as Beneficiary v. Chevron Corporation, et al.*, Los Angeles Superior Court Case No. C587912, Consolidated with Case No. C661310.

<sup>3</sup> In October 2001, Chevron Corp. acquired Texaco Inc. as a wholly owned subsidiary and changed its name to ChevronTexaco Corporation. In February 2002, ChevronTexaco Corporation sold its interest in Equilon to Shell Oil Company. In May 2005, ChevronTexaco Corporation changed its name to Chevron Corporation. Complainant Chevron Products Company is a division of Chevron U.S.A. Inc. Chevron U.S.A. Inc. is a major subsidiary of Chevron Corporation.

In 1991, most of the parties to the State Action settled, with five defendant oil companies agreeing to dedicate their crude oil pipelines in California as common carriers subject to Commission regulation. However, the settlement did not include the 20" Pipeline or two other heated crude oil pipelines. The parties disputed whether the three pipelines were private property exempt from Commission regulation or public utilities subject to such regulation. The parties agreed to litigate the status of the three pipelines in Superior Court.

In the State Action, plaintiffs sought a judicial declaration finding that the 20" Pipeline was operated as a public utility. That relief rested primarily on the following allegation:

Each defendant has continued regularly during the period after 1980 to transport crude oil through its pipelines for others for compensation. In these pipeline operations defendants have each entered into sham crude oil purchase and sale or exchange agreements designed to disguise the fact that the pipelines are actually transporting oil for others. Pursuant to these sham transactions, defendant pipeline owners purport to purchase and take title to the crude oil offered for shipment at the pipeline entry point, with an agreement that similar quantities of crude oil will be resold to the original seller at the desired point of delivery.<sup>4</sup>

Similarly here, Chevron alleges in its complaint:

By purporting to provide transportation services on the Shell Pipeline pursuant to the Shell Trading Contracts, Defendants are attempting to create the impression that they are merely buying and selling crude oil rather than providing public utility pipeline transportation service on the Shell Pipeline. The buy-sell arrangement on the Shell Pipeline is a subterfuge, lacking economic

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<sup>4</sup> Long Beach Complaint at 34.

substance, devised for the sole purpose of evading Commission jurisdiction.<sup>5</sup>

In Superior Court, the defendants (including Chevron) asserted that the buy/sell agreements were legitimate, arm's-length transactions that resulted in the oil company being the true owner of the crude oil in its pipelines. They stated that the transfer of title under the buy/sell agreements had genuine legal and economic consequences, including the transfer of risk of loss, risk of property damage, and the risk that the purchaser of the crude oil might be unwilling to accept oil when it was tendered for delivery.<sup>6</sup> Moreover, the defendants (including Chevron) maintained that the fact that these transactions were intended to avoid regulation was irrelevant as under California law any entity is permitted to structure its business activities so as to avoid falling within the purview of a particular regulatory scheme.<sup>7</sup>

The California Court of Appeal decided in favor of Chevron, Mobil, and Texaco. In its August 3, 1994 decision<sup>8</sup> (the Court of Appeal Decision), the Court held that "the oil companies' conduct here establishes these pipelines [including the 20" Pipeline] were private, not common carriers subject to PUC regulation."<sup>9</sup> The Court's conclusion was based on findings that (1) the pipeline companies always owned the crude oil in the pipelines and suffered any risk of loss,

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<sup>5</sup> Chevron Complaint at 10.

<sup>6</sup> Submission of Chevron, Mobil and Texaco Pursuant to Court Order of May 28, 1992, filed July 30, 1992, at 20-22) (Joint Submission).

<sup>7</sup> Joint Submission at 18, citing *Thayer v. California Development Co.* (1912) 164 Cal. 117 and *People v. Duntly* (1932) 217 Cal. 150.

<sup>8</sup> Attachment 13 to the defendants' Request for Official Notice.

<sup>9</sup> Court of Appeal Decision at 11.

(2) crude oil purchases from other producers were made through legitimate arm's-length transactions, (3) the companies never offered to transport oil, but rather bought and sold based on their own needs and available pipeline capacity, and (4) the percentage of crude oil bought from other producers was very low.

The Court analogized the transactions to that of a supermarket company:

[I]f a large supermarket company produced some agricultural products on its own farms, and shipped them to market in its private trucks, but occasionally bought other produce from independent producers to fill its trucks when its own harvest could not, whether bought with cash or a promise to give produce to the other company at a later time, the supermarket's trucks would not thereby become common carriers, whether the trucks delivered the produce only to the supermarket's stores or delivered it to others for resale.<sup>10</sup>

Citing *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419 and *Associated etc. Co. v. Railroad Commission* (1917) 176 Cal. 518, the Court noted that the California Supreme Court held that similar transactions did not render the pipelines common carriers.<sup>11</sup>

The Court of Appeal Decision is not certified for publication, and under Rule 977 of the California Rules of Court, “[e]xcept as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.” However, under Rule 977(b), “[a]n unpublished opinion may be cited or relied on...when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel...” The

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<sup>10</sup> *Id.* at 12.

<sup>11</sup> *Id.* at 13.

Commission thus may rely on the decision if defendants' motion to dismiss implicates one or more of these three doctrines.

## **6. *Res Judicata*, Collateral Estoppel and Judicial Estoppel**

Equilon and Shell Trading argue that Chevron should not be permitted to successfully take one position regarding buy/sell agreements in the State Action and then, seeking lower prices than those available through the buy/sell agreements, take an opposite position in this case. Defendants cite the doctrines of *res judicata*, or claim preclusion;<sup>12</sup> collateral estoppel or issue preclusion; and judicial estoppel, or preclusion of inconsistent positions. As more fully discussed below, *res judicata* bars a losing party in one case from re-asserting the same claim in a subsequent action between the same parties; collateral estoppel bars a party who lost an issue in one case from re-litigating that issue in a subsequent action between the same parties; and judicial estoppel prevents a party from "asserting a position in a legal proceeding that is contrary to a position previously taken in the same or earlier proceeding."<sup>13</sup> According to defendants, California public policy does not permit litigants "to play fast and loose with the court" by taking self-contradictory positions.<sup>14</sup>

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<sup>12</sup> The doctrine of *res judicata*, or "a matter adjudged," holds that a final judgment on the merits by a court of competent jurisdiction is conclusive of rights of parties or their privies in all later suits on points and matters determined in the former suit. (Black's Law Dictionary, Rev. 4<sup>th</sup> ed., at 1470.)

<sup>13</sup> *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4<sup>th</sup> 171, 181 (citations omitted).

<sup>14</sup> *Schulze v. Schulze* (1953) 121 Cal.App.2d 75, 83; *In re Marriage of Toth* (1974) 38 Cal.App.3d 205, 212 (litigant may not "blow hot and cold" by taking the benefits of a doctrine "when it suits his purpose" and then repudiating the same facts "when it is no longer profitable or to his advantage to do so").

Defendants argue that between 1985 and 1994, Chevron in the State Action contended that transporting crude oil acquired using buy/sell agreements does not qualify as providing transportation services for others and that Texaco's use of such agreements could not have resulted in the 20" Pipeline being dedicated to the public use. Later, Chevron acquired an interest in the 20" Pipeline, sold it to Equilon and ultimately sold its interest in Equilon to Shell Oil Company. According to defendants, Chevron now "seeks to obtain an unfair economic advantage by reversing the positions from which it benefited in the State Action."<sup>15</sup>

## **7. Commission Practice**

*Associated Pipe Line Co. v. Railroad Commission* (1917) 176 Cal. 518 represented the Commission's first and last attempt to require all crude oil pipeline owners in the state to operate their pipelines as public utilities. Acting pursuant to state statute, the Railroad Commission ordered pipeline owners to file for Commission review of their schedules of rates for the transportation of oil products. The pipeline owners appealed. The California Supreme Court ruled that pipeline owners that transport their own crude oil or purchase crude oil from third parties and transport only that oil to which the pipeline owner had acquired title do not thereby transport crude oil for others. The Court went on to state that neither the Legislature nor the Commission could, by fiat, require that private crude oil pipelines be made public utilities available for public use without condemning the property and providing just compensation to the owners. It held that any such action would constitute a violation of state and

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<sup>15</sup> Motion to Dismiss at 22.

federal constitutional prohibitions on the taking of private property without compensation.<sup>16</sup> The United States Supreme Court affirmed the state court decision on June 5, 1920.<sup>17</sup>

Since *Associated Pipeline*, the Commission has never required public utility status for a crude oil pipeline that was used by its owner to transport crude oil purchased from third parties. The only crude oil pipelines that the Commission currently regulates are those that either voluntarily submitted to Commission regulation or expressly held themselves out as being willing to serve any customer requesting service.<sup>18</sup>

In *City of Long Beach v. Unocal California Pipeline Company*, D.96-04-061, the Commission commented:

Actually, this Commission has had little to do in the past with crude oil pipelines, both because FERC [the Federal Energy Regulatory Commission] regulation controls where interstate operation is involved and because state pipelines were operated privately by major oil companies. In the Four Corners cases cited by Long Beach, it can be seen that intrastate rates essentially have followed FERC rates, which in turn are calculated on a form of cost-of-service ratemaking. (1994 Cal. PUC LEXIS 380, at 21-22; footnotes omitted.)

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<sup>16</sup> *Associated Pipeline*, 176 Cal. at 529.

<sup>17</sup> 251 U.S. 228.

<sup>18</sup> See, e.g., *In re Southern California Edison Company*, Decision (D.) 94-10-044 (utility proposal contemplated entering into contracts with all customers that could potentially use its pipeline system and did not seek to deny service to others); *City of Long Beach v. Unocal California Pipeline Company*, D.94-05-022 (referencing settlement agreement in which Union Oil, Shell Oil, Chevron, Texaco, and Mobil agreed to dedicate proprietary pipelines to public utility service); *Application of San Pablo Bay Pipeline Company*, D.05-07-016 (approving voluntary request of pipeline owner to be regulated as a common carrier).

Indeed, in *Re Investigation Into Possible Over-Assessment by State Board of Equalization*, D.93-07-047, the Commission dismissed oil pipelines and other utilities (cellular, non-dominant interexchange carriers, radiotelephone utilities) from the proceeding on the basis that they “are not subject to cost-of-service [or] rate base rate-of-return regulation.” (D.93-07-047 at 6.)

Finally, the Commission after a lengthy investigation declined to take action with respect to oil pipelines like the 20” Pipeline at issue here. Between 1975 and 1979, the Commission investigated the business practices of crude oil pipeline companies to determine the extent to which they should be regulated.<sup>19</sup> The investigation resulted in the production by pipeline owners of thousands of documents and the execution of a settlement agreement regarding Atlantic Richfield Company, one of the pipeline owners. After four years, the investigation was concluded without a finding that the public interest requires the Commission to regulate pipeline owners as a result of their use of buy/sell agreements. (D.91074 (1979) Order Discontinuing Proceedings.)

## **8. Discussion**

The parties have submitted voluminous pleadings in support of their positions, providing for official notice dozens of decisions, rulings, transcripts and briefs from their earlier participation in arbitration and the State Action. ALJ Walker ruled that official notice would be accorded these documents. In addition, the parties have presented oral arguments to the ALJ and the assigned Commissioner. In essence, however, we are dealing with a dispute in which

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<sup>19</sup> See D.88640 (1978) *Investigation on the Commission’s Own Motion into the rates, rules, charges, operations, business practices, corporation, individual, partnership, joint venture or other entity which operates any pipeline for the transportation of crude or refined petroleum products within the State of California*, Case No. 9893.

defendants have set buy/sell prices pursuant to contract higher than what complainant believes it should pay. This Commission rarely addresses contract disputes between parties, even when the parties are utilities, deferring instead to the civil courts on such matters.<sup>20</sup>

Nevertheless, while economics may drive this case, the complaint alleges a legitimate jurisdictional question, and we are obligated to consider whether we should assert jurisdiction over oil pipeline companies that transport oil through buy/sell agreements in which they acquire title to all of the oil products passing through the line.

Under the Public Utilities Code, a “pipeline corporation” includes every corporation “owning, controlling, operating, or managing any pipeline for compensation within this state.” (Pub. Util. Code § 228.) “Common carrier” includes “every person and corporation providing transportation for compensation to or for the public or any portion thereof, except as otherwise provided in this part.” (§ 211.) “Public utility” includes every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.” (§ 216.)

Section 216(b) of the Public Utilities Code provides:

Whenever any common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone

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<sup>20</sup> The Commission has stated, “Since the Commission has no jurisdiction to award damages, complaints alleging breach of contract are better served through the civil courts.” *Crystal River Oil and Gas v. Pacific Gas and Electric Co.*, D.00-10-005, citing *Penalosa v. P.T. & T.*, 64 CPUC 496, 497.

corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, or heat corporation, is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.

For an oil company to be a public utility and common carrier subject to Commission regulation, in addition to the statutory requirements that it transport oil for others for compensation, the company must have dedicated its property to public use. Dedication requires that the pipeline owner, either expressly or impliedly, unequivocally offer transportation service on equal terms to all members of the public who might be able to use it.<sup>21</sup>

The fundamental claim raised in the complaint and during oral argument is that the 20" Pipeline is being operated as a public utility. In order to prove this claim, the complainant must demonstrate (1) that the buy/sell agreements are a subterfuge used merely to avoid Commission regulation, and (2) that Equilon and Shell Trading have, through the use of these agreements, either expressly or impliedly dedicated the 20" Pipeline to public use. Equilon and Shell Trading have not expressly dedicated the pipeline to public use. Whether the pipeline has impliedly been dedicated to public use thus turns on the issue of whether buy/sell agreements are a subterfuge to mask the transportation of oil products for compensation.

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<sup>21</sup> *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419, 426-433; *Associated etc. Co. v. Railroad Commission* (1917) 176 Cal. 518, 520-530.

California Rule of Court 977 limits the use of unpublished opinions to instances where the unpublished opinion is relevant to subsequent litigation under the doctrines of law of the case, *res judicata* or collateral estoppel. Law of the case is inapplicable because the current litigation is a different case from the State Action. The question is whether either *res judicata* or collateral estoppel arises on these facts. If not, the Rule clearly bars any use of the Court of Appeal Decision in this decision.

In its narrowest aspect, *res judicata* precludes parties or their privies from relitigating a cause of action finally resolved in a prior proceeding. Collateral estoppel, which is sometimes referred to as a broader form of *res judicata*, “may preclude a party to prior litigation from redisputing issues therein decided against him or her, even when those issues bear on different claims raised in a later case.”<sup>22</sup> Both *res judicata* and collateral estoppel, whether considered as separate doctrines or two aspects of the same doctrine, require that the party seeking to relitigate a claim or an issue in a subsequent proceeding must have had the claim or issue decided against it or its privies in the earlier litigation. The public policy behind these doctrines is to encourage judicial efficiency by prohibiting a losing litigant from rearguing its case in another forum. That is not the situation here. The Court of Appeal Decision found *in favor* of Chevron on the issue of the validity of the buy/sell agreements between the pipeline operator and the oil seller/buyer. Because the essential requirement of an earlier loss is lacking, neither *res judicata* nor collateral estoppel bars Chevron from asserting the invalidity of the buy/sell agreements in this proceeding. None of

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<sup>22</sup> *Vandenberg v. Superior Court* (1999) 21 Cal. 4<sup>th</sup> 815.

the three exceptions to the Rule being available, the Rule prohibits us from relying on the Court of Appeal Decision as a basis for denying relief to Chevron.<sup>23</sup> Accordingly, the motion to dismiss this action on the basis that Chevron is estopped from asserting the invalidity of the buy/sell agreements is denied.

Having determined that the motion to dismiss must be denied, we now consider Equilon and Shell Trading's motion for summary adjudication. As the moving parties, they have the burden of establishing that there are no triable issues of material fact.<sup>24</sup> It appears from the record they have met that burden. The parties agree that there has been no express dedication. They agree that the buy/sell agreements, on their face, transfer title to oil obtained from third parties to Equilon and Shell Trading before the oil enters the pipeline and impose on Equilon and Shell Trading the risk of loss for the oil in the pipeline at any time. They agree that the buy/sell agreements transfer title and risk of loss to a third-party purchaser of oil only after oil leaves the pipeline. Chevron acknowledges the pipeline is used to transport only the pipeline owners' own oil products and oil products that the pipeline owners have purchased from third parties through buy/sell agreements. Chevron also acknowledges that Equilon and Shell Trading have refused to enter into buy/sell agreements with some

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<sup>23</sup> Because the Rule does not carve out an exception for judicial estoppel, we need not consider whether it applies to these facts or, more precisely, whether it would apply if the 1994 decision had been certified for publication. However, we note that there is no public policy that bars a litigant from changing its legal theory when its factual situation has changed, as the factual situation of Chevron has changed in this case.

<sup>24</sup> See Code of Civil Procedure § 437(c), sub-section c; *Williams v. California Physicians' Service* (1999, 3d Dist) 72 Cal. App. 4<sup>th</sup> 722.

producers,<sup>25</sup> and that they do not make service available to all potential customers on equal terms.<sup>26</sup>

Given these undisputed facts, the remaining question is whether Equilon and Shell Trading are entitled to judgment as a matter of law. We conclude that they are. Neither the buy/sell agreements nor the manner in which Equilon and Shell Trading operate the 20" Pipeline constitutes implied dedication of the pipeline to public use. On the contrary, the pipeline owners have been scrupulous to create documentation that clearly establishes transfer of title and risk of loss before any third-party oil enters the pipeline. They have also been careful to avoid offering service to all potential customers on equal terms or otherwise.

Chevron concedes that public utility dedication of a pipeline cannot be presumed without evidence of unequivocal intention. That intention is absent (1) when the pipeline owner has denied access to certain customers; (2) when the pipeline owner has only provided access to customers where the parties were able to agree on terms and conditions of service, including price; or (3) where the public is on notice that access is only available to the extent capacity is not required by the pipeline owner. In this case, Chevron admits that Equilon and Shell Trading have declined to enter into buy/sell agreements; Chevron acknowledges that Equilon and Shell Trading do not provide buy/sell arrangements absent mutual agreement on terms and conditions; and Chevron agrees that only surplus capacity is available for use in buy/sell arrangements.

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<sup>25</sup> Chevron's Response to First Data Request at 9, Request for Admission No. 18; Tesoro Response at 5.

<sup>26</sup> Chevron Complaint at 12; Tesoro Response at 6.

At the oral argument, Chevron attempted to demonstrate that the pipeline has in fact been dedicated to public use by introducing statements made by Shell Trading executives during a failed 2005 arbitration between the parties before an arbitrator from the Judicial Arbitration and Mediation Service (JAMS). Shell Trading executives testifying at the JAMS arbitration repeatedly referred to Equilon as being in the business of transporting crude oil for third parties. But a close examination of the statements made by the Shell Trading executives reveals that they saw their job as selling the *excess capacity* of the pipeline after first serving Shell Oil's need for crude oil transportation. For example, Dan Martinez of Shell Trading described his organization as charged with "trying to enhance the utilization of all the assets; otherwise keeping it as full as possible."<sup>27</sup> To achieve this goal, Shell Trading and Equilon typically make about 50% of the pipeline's capacity available to third parties.<sup>28</sup> The amount of pipeline capacity made available to third parties is the amount left after Equilon has transported oil produced by Shell Oil.

It may be objected that if a pipeline regularly carries more than a *de minimis* amount of oil purchased from others, the pipeline is being operated as a public pipeline even if the owners limit access and take other, similar steps manifesting an intention to operate the pipeline as a private entity. But the absolute proportion of oil purchased from others is less important, in our view, than the fact that the owners are making available to third parties only their excess pipeline capacity. As was the case in *Associated Pipeline*, these owners are

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<sup>27</sup> Chevron-Equilon oral argument March 13, 2007, Transcript p. 7.

<sup>28</sup> *Id.*, pp. 7-8.

trying to generate incremental revenue from an asset operated in the first instance strictly for their own benefit. Transportation of purchased oil is an incidental feature of the pipeline's operation and does not change a private pipeline into a public pipeline.<sup>29</sup>

In summary, a pipeline that carries only oil owned by the pipeline operator or its parent and that does not offer transportation to all potential customers and that does business with different customers on different terms is a private pipeline. The fact that the owners *could operate* the pipeline as a public utility does not imply that they *intend to operate* the pipeline as a public utility. Equilon and Shell Trading deliberately operate the pipeline as a private pipeline and an allegation that they do so only to avoid public regulation is not sufficient to transform the pipeline into a public utility.

In its moving papers and in the oral argument, Chevron claimed that the outcome of this case should be controlled by the Commission's decision in *PG&E v. Dow Chemical Corp.* (1994) 55 CPUC 2d 430. In that case, Dow Chemical and a subsidiary used a gas pipeline to deliver gas to industrial customers through a combination of leases and exchange agreements. Under the leases, the "lessees" purportedly took a possessory interest in a portion of the pipeline, purportedly transporting their own natural gas for themselves. Under the "exchange"

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<sup>29</sup> We recognize that under a different set of facts we might reach a different conclusion. If, for example, Equilon and Shell Trading transported only a minimal amount of oil produced by Shell Oil and regularly held back Shell Oil's production to make all of the pipeline capacity available to third parties, we might conclude that such conduct constituted implied dedication. But that case is not before us. Instead, we are dealing with a situation in which more than half of the pipeline's capacity is used to transport oil produced by the parent of the pipeline owners, which oil is always given first access to the pipeline leaving only excess capacity available for potential use by others.

agreements, customers delivered gas to the gas field end of the pipeline and in exchange received gas delivered at the other end of the pipeline adjacent to their own facilities. The agreements specifically disclaimed dedication of the pipeline. Based on these facts, the Commission found irrelevant Dow Chemical's contractual provision disclaiming dedication, instead looking to Dow's conduct as determinative. The Commission concluded that Dow Chemical's conduct "unequivocally shows a dedication of excess capacity for the life of the pipeline."<sup>30</sup>

However, *PG&E v. Dow Chemical* is distinguishable from the complaint case before us. In the natural gas industry, gas corporations, such as Pacific Gas and Electric Company (PG&E), are given a franchise area, an obligation to serve that franchise area, and the right to earn a reasonable rate of return based on serving customers in that area. Because of this, PG&E sought, and the Commission granted, a cease and desist order to stop Dow Chemical from competing with PG&E in its franchise territory and placed a restriction on Dow Chemical's use of its pipeline for that purpose. No such franchise area is at issue in the case before us, nor was a remedy sought by which Dow Chemical would be required to make its natural gas pipeline available to others. The Commission read Dow Chemical's conduct as manifesting an intention to compete with PG&E for gas transmission services. In this case, Shell Trading and Equilon are not competing with a public pipeline. Instead, they operate the only heated pipeline between the San Joaquin Valley and the Bay Area. Indeed, a case might be made that as monopoly operators their operation of the pipeline should be

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<sup>30</sup> *Dow Chemical*, 55 CPUC 2d at 444.

impressed with a public purpose. In his oral argument, counsel for Tesoro Refining, the intervenor in this case, went some way in that direction, pointing out that because Shell Oil is both a provider of services to other Bay Area refiners and a competitor, it derives valuable competitive information when it makes its excess pipeline capacity available to others.<sup>31</sup>

But there is a compelling reason that *PG&E v. Dow Chemical* does not control this case. In its *Associated Pipeline* decision, the California Supreme Court held that transfer of title and risk of loss was dispositive of the question of whether the oil being transported belonged to the pipeline owner. In refusing to look beyond the terms of the sale documents, the Court enshrined a distinction that has controlled jurisprudence in the oil pipeline industry ever since. If the initial sale of oil from a producer to a third party, in this case Shell Trading, is a genuine transfer of title and risk of loss, *Associated Pipeline* teaches us that our inquiry need go no further. Chevron does not contest that title and risk of loss are transferred to Shell Trading at the San Joaquin end of the pipeline. Since all the oil in the pipeline belongs to either Equilon or its parent, under the doctrine of *Associated Pipeline*, Equilon is operating a private pipeline. In short, contrary to the approach we adopted in *PG&E v. Dow Chemical*, in an oil pipeline case transfer of title *is* dispositive. While a contemporary court looking at these facts in the light of current theories of jurisprudence might overrule *Associated Pipeline*, to date no court has done so.

Moreover, in *PG&E v. Dow Chemical*, there was no indication that the Commission had previously permitted the use of exchange agreements in the

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<sup>31</sup> *Transcript*, pp. 22-24.

natural gas industry. Dow Chemical had attempted to employ such agreements for what appeared to be the first time, and the Commission found that in the natural gas industry, such contracts are not appropriate. By contrast, the Commission has long recognized the use of buy/sell agreements in the crude oil industry. The restriction imposed in a gas pipeline case is not applicable in a case involving a crude oil pipeline.<sup>32</sup>

Accordingly, we find that Equilon and Shell Trading's motion for summary adjudication should be granted.

### **9. Chevron's Motion for Summary Adjudication**

In view of our decision to grant defendants' motion for summary adjudication, Chevron's motion for summary adjudication is denied.

### **10. Category and Need for Hearing**

On December 15, 2005, in the Instructions to Answer notice in this case, this proceeding was deemed adjudicatory, and a hearing was deemed necessary. As explained above, a hearing became unnecessary based upon our decision to grant defendants' motion for summary adjudication.

### **11. Comments on Proposed Decision**

The proposed decision of ALJ Bemederfer in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Comments were filed on May 2, 2007, and reply comments were filed on May 7, 2007. All comments

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<sup>32</sup> See *Application of Western Gas Resources-California, Inc.*, D.99-11-023, 1999 Cal. PUC LEXIS 856 at 24. ("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.")

merely reargue positions previously taken in briefs and have been accorded no additional weight.

## **12. Assignment of Proceeding**

Michael R. Peevey is the assigned Commissioner and Karl Bemederfer is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. The 20" Pipeline that is the subject of this complaint is owned by Equilon and Shell Trading.

2. The 20" Pipeline is a 265-mile-long heated oil pipeline running from the San Joaquin Valley to the Bay Area.

3. Defendants are sister companies who use the pipeline to transport oil produced by their parent and, when capacity permits, oil purchased from other producers through buy/sell agreements.

4. A buy/sell agreement is a contract in which a pipeline owner or crude oil trader buys crude oil from a supplier at one end of the pipeline and sells an equivalent amount of oil to the supplier at the other end of the pipeline.

5. Chevron has had access to the 20" Pipeline for the last five years through buy/sell agreements with Shell Trading pursuant to a Proprietary Pipeline Contract.

6. Chevron in 2005 disputed the prices of certain buy/sell agreements with defendants and, pursuant to the Proprietary Pipeline Contract, submitted the dispute to arbitration.

7. An arbitration decision that issued on June 20, 2005, established the price per barrel under the buy/sell agreements through December 31, 2005.

8. In December 2005, Chevron and Shell Trading entered into a new buy/sell agreement establishing pricing for transactions between January 1, 2006 and June 30, 2007.

9. In December 2005, Chevron filed this complaint, alleging that the 20" Pipeline is a public utility and that the Commission has exclusive jurisdiction to determine pricing for the pipeline.

10. Equilon and Shell Trading have moved to dismiss the complaint based on the doctrines of *res judicata* and judicial estoppel, as well as what they contend is the Commission's policy on buy/sell agreements at oil pipelines.

11. Both complainant Chevron and defendants Equilon and Shell Trading have moved for summary adjudication.

12. The California Court of Appeal in 1994 held that buy/sell agreements involving the 20" Pipeline are valid contractual agreements and that, therefore, the 20" Pipeline is not a public utility subject to Commission regulation.

13. Chevron was the prevailing party in the 1994 litigation.

14. The 1994 Court of Appeal opinion was not certified for publication.

15. California Rule of Court 977 prohibits citation of or reliance on unpublished opinions except that unpublished opinions may be used to bar re-litigation of claims or issues in subsequent proceedings under the doctrines of *res judicata* and collateral estoppel.

16. The California Supreme Court in 1917 ruled that a pipeline owner that transports only that oil to which the pipeline owner has legal title does not thereby transport crude oil for others.

17. The only crude oil pipelines that the Commission currently regulates are those that either voluntarily submitted to Commission regulation or expressly held themselves out as being willing to serve any customer requesting service.

18. There are no material issues of disputed fact.

### **Conclusions of Law**

1. An oil pipeline corporation that transports oil for others for compensation is a public utility subject to the jurisdiction of the Commission.

2. For an oil company to be a public utility and common carrier subject to Commission regulation, in addition to the statutory requirement that it transport oil for others for compensation, the company must have dedicated its property to public use.

3. The uncertified Court of Appeal Decision in 1994 held that the use of buy/sell agreements on the oil pipeline at issue in this case did not constitute transportation of oil for others.

4. *Res judicata* and collateral estoppel may only be invoked to prevent the losing party in prior litigation from re-litigating lost claims or issues in subsequent proceedings between the same parties.

5. Chevron's complaint is not barred by *res judicata* or collateral estoppel because Chevron was the prevailing party in 1994.

6. Chevron's complaint is not barred by judicial estoppel because unreported cases may not be used to establish judicial estoppel.

7. A pipeline owner may be deemed to have dedicated the pipeline to public use only if it has manifested an unequivocal intention to do so.

8. Equilon and Shell Trading have not manifested an unequivocal intention to dedicate the 20" Pipeline to public use.

9. The motion of Equilon and Shell Trading for summary adjudication should be granted and this proceeding should be closed, effective immediately.

### **O R D E R**

**IT IS ORDERED** that:

1. The motion of Equilon Enterprises LLC, doing business as Shell Oil Products US, and Shell Trading (US) Company to dismiss this complaint is denied.

2. The motion of Equilon Enterprises LLC, doing business as Shell Oil Products US, and Shell Trading (US) Company for summary adjudication is granted.

3. The motion of Chevron Products Company for summary adjudication is denied.

4. No hearing is necessary in this proceeding.

5. Case 05-12-004 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.