

Decision 09-07-053 July 30, 2009

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

Application of Pacific Gas and Electric Company  
for Authorization to Enter into Long-Term  
Natural Gas Transportation Arrangements with  
Ruby Pipeline, for Cost Recovery in PG&E's Gas  
and Electric Rates and Nonbypassable  
Surcharges, and for Approval of Affiliate  
Transaction. (U39G and U39E)

Application 07-12-021  
(Filed December 21, 2007)

**ORDER DENYING REHEARING  
OF DECISION (D.) 09-05-012**

**I. INTRODUCTION**

In Decision (D.) 09-05-012 (or "Decision"), we awarded \$8,116.00 to Californians for Renewable Energy ("CARE") for its substantial contributions to D.08-11-032,<sup>1</sup> in which we approved long-term natural gas transportation arrangements between Pacific Gas and Electric Company ("PG&E") and Ruby Pipeline. We disallowed compensation on the issue of whether there was evidence regarding improper influence.

CARE filed a timely application for rehearing of D.09-05-012. In its rehearing application, CARE claims that the Commission committed legal error in D.09-05-012 because: (1) the disallowance was based on an incorrect factual statement, and (2) the determinations, including those that involve the CARE attorney's hourly rate, are the result of racial discrimination against a party that represents people of color. CARE in its application for rehearing also asks for oral argument under Rule 16.3 of Commission Rules of Practice and Procedure.

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<sup>1</sup> *Application of Pacific Gas and Electric Company for Authorization to Enter into Long-Term Natural Gas Transportation Arrangements with Ruby Pipeline, Etc. ("PG&E & Ruby Pipeline Gas Transportation Agreements")* [D.08-11-032] (2008) \_\_\_ Cal.P.U.C.3d \_\_\_.

We have reviewed each and every allegation raised in CARE's application for rehearing of D.09-05-012. We are of the opinion that good cause does not exist for the granting a rehearing. Accordingly, CARE's application for rehearing is hereby denied. Further, CARE's request for oral argument is denied for the reason discussed below.

## II. DISCUSSION

### A. **The Commission did not base its disallowance on an incorrect factual statement.**

In D.09-05-012, we rejected CARE's claim that it had made a substantial contribution to our determination in D.08-11-032 that there was no evidence that PG&E's parent company, PG&E Corporation, had an improper influence on the utility's negotiations with Ruby LLC.<sup>2</sup> (D.09-05-012, pp. 10-12.) CARE had asserted that it had made its substantial contribution on the issue of improper influence through its written testimony and in its written and oral responses to a motion filed by Gas Transmission Northwest Corporation ("GTN"). We reviewed the relevant record, and concluded that nothing in CARE's testimony or responses to GTN's motion demonstrates that CARE made any substantial contribution. (D.09-05-012, p. 10.) In fact, we noted that CARE's assertion that it had addressed the issue of improper influence in its written testimony and written and oral responses to GTN's motion were false. (D.09-05-012, p. 12.)

Also, we noted that D.08-11-032 relies on testimony and/or arguments from Division of Ratepayer Advocates ("DRA"), PG&E and The Utility Reform Network ("TURN") in resolving the improper influence issue. (D.09-05-012, p. 10, citing *PG&E & Ruby Pipeline Gas Transportation Agreements* [D.08-11-032], *supra*, at pp. 81-84 (slip op.)) D.08-11-032 makes no mention of any testimony or argument from CARE on this issue, since apparently there was none. (See D.09-05-012, p. 12.)

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<sup>2</sup> That determination was Finding of Fact No. 19 in D.08-11-032, which states: "There is no evidence that PG&E Corporation had any influence on PG&E's negotiations with Ruby LLC." (*PG&E & Ruby Pipeline Gas Transportation Agreements* [D.08-11-032], *supra*, at p. 114 (slip op.))

In its rehearing application, CARE argues as erroneous the following the statement: “[D.08-11-032’s] conclusion that there was no evidence of improper influence appears to rely entirely on testimony and/ or arguments provided by DRA, PG&E, and TURN.” Specifically, CARE argues that we were factually wrong because DRA and TURN did not present testimony and DRA also did not provide arguments, while CARE did present a written statement addressing the improper influence issue in response to a motion to dismiss. (Rehrg. App., pp. 1-2.)

**1. The Commission is factually correct when we stated that D.08-11-032 relied on the testimony and/or argument from DRA, PG&E and TURN.**

The challenged statement indicates that a combination of testimony and arguments were collectively provided by DRA, PG&E, and TURN. While it is correct to say that DRA and TURN did not present testimony, this fact does not make the statement inaccurate because we use the words “and/ or,” and PG&E provided ample testimony.<sup>3</sup> However, CARE’s claim that DRA did not provide argument is incorrect. Further, CARE’s inference that TURN did not provide argument is also wrong.

In D.08-11-032, we describe DRA’s assertions of ratepayer benefits to demonstrate that the negotiations did not “lin[e] the pockets” of PG&E or its parent corporation.<sup>4</sup> DRA’s Opening Brief explicitly discusses how the negotiations have resulted in “a very good deal for ratepayers”<sup>5</sup> and in subsequent ex parte communications with the Commission on this subject, DRA repeatedly identifies the issue of improper influence and states that there is “[n]o evidence on record that a conflict of interest occurred”<sup>6</sup> and that DRA “supported PG&E’s discussion and stressed the importance of

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<sup>3</sup> See e.g., PG&E Testimony from Ex. PG&E-6, p. 1-3 [Roy Kuga Rebuttal Testimony], Ex. PG&E-6, pp. 2-1 to 2-5 [Fong Wan Rebuttal Testimony], R.T. Vol. 1, pp. 3-132 [Cross Examination of PG&E’s Witness Roy Kuga], R.T. Vol. 2, pp. 135-136 [Cross Examination of PG&E Witness Fong Wan].

<sup>4</sup> *PG&E & Ruby Pipeline Gas Transportation Agreements* [D.08-11-032], *supra*, at p. 82 (slip op.).

<sup>5</sup> DRA Opening Brief, pp. 3, 5, 10-12.

<sup>6</sup> Notice of Ex Parte Communication of November 4, 2008, attached handout (available at <http://docs.cpuc.ca.gov/efile/EXP/93506.pdf>). See also Notice of Ex Parte Communication of September

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this agreement for PG&E's ratepayers as the contract terms are very favorable." DRA noted that "Mr. Hawiger [of TURN] stated that PG&E's negotiations complied with the Commission's affiliate rules."<sup>7</sup>

Further, TURN did substantially contribute to the issue by providing argument. In its Opening Brief, TURN described how the negotiations obtained low rates for customers, and the economic benefits to be reaped as a result.<sup>8</sup> The brief also addresses at length the potential affiliate issues raised by the negotiations, highlighting the conflict of interest between PG&E's obligation to negotiate the best possible deal for its ratepayers and the temptation to promote PG&E Corporation by making higher payments to Ruby.<sup>9</sup> TURN concludes that, despite Mr. Wan and Mr. Kuga's knowledge of this conflict, they "wisely . . . insulated those individuals [working on the project] from any knowledge of the potential conflict" and "handled the situation with integrity and sound judgment."<sup>10</sup>

Based on the above, the challenged statement is factually correct. Accordingly, CARE's argument that this statement is based on an erroneous factual statement lacks merit.

**2. CARE's written statement addressing the improper influence issue in response to GTN's motion did not establish any substantial contribution.**

CARE claims that it made its substantial contribution on the issue of improper influence in its response to the motion to dismiss. (Rehrg. App., p. 2.) There was no such motion. CARE appears to be referring to CARE's Opposition to June 29,

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22, 2008, attached handout at slide 9 (available at <http://docs.cpuc.ca.gov/efile/EXP/91578.pdf>).

<sup>7</sup> Notice of Ex Parte Communication of September 22, 2008, p. 2.

<sup>8</sup> TURN Opening Brief, pp. 1-2, 6.

<sup>9</sup> TURN Opening Brief, pp. 7-8.

<sup>10</sup> TURN Opening Brief, p. 8.

2008, Motion of Gas Transmission Northwest Corporation to Suspend Proceedings (“CARE Response to GTN Motion”).

In its rehearing application, CARE highlights statements in its response to the GTN Motion to demonstrate that it had made a substantial contribution to the issue of improper influence. (See Rehrgr. App., p. 2, fn. 3.) However, these statements are not about this particular issue; rather, the statements involve CARE’s argument that the GTN suspension motion constituted a bad faith attempt to delay proceedings. (See CARE’s Response to GTN Motion, pp. 2-3.) Therefore, CARE’s assertion that its response to the GTN Motion evidences its substantial contribution on the issue of improper influence is inaccurate.

Further, upon review of the record leading to D.08-11-032, it is clear that CARE’s participation in the proceeding was limited to issues regarding pipeline-on-pipeline competition and greenhouse gas emissions, for which CARE has been compensated. (D.09-05-012, pp. 5 & 9-10.) CARE did not address the issue of improper influence through the testimony of its expert witness, or through its cross-examination of witnesses. (See generally, CARE Opening Brief, pp. 2 & 5; RT Vol. 8, pp. 823-825 [Final Oral Argument/Homec]; R.T. Vol. 4, pp. 445-449 [Testimony of Martin Homec]; R.T. Vol. 4, pp. 425 [Cross Examination of Thomas Michael Surak]; R.T. Vol. 6, p. 671 [Cross Examination of L. Jan Reid]; R.T. Vol. 7, p. 741 [Cross Examination of Leslie Ferron-Jones].)<sup>11</sup>

Moreover, CARE had previously disavowed any contribution to the issue on improper influence in written testimony. In Exhibit CARE-1, this rehearing applicant claimed an inability to contribute on the issue of undue influence, by stating the following:

Issue: Was the Ruby Precedent Agreement negotiated entirely at arms-length, without any undue favoritism, given that

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<sup>11</sup>Thus, CARE did not take the opportunity during the proceedings to participate on this issue. It did not cross-examine witnesses testifying as to the issue of improper influence.

PG&E Corporation has indicated intent to acquire an ownership interest in the Ruby Pipeline project?

Recommendation: There does not appear to be any way for CARE to know how the Agreement was negotiated. *Therefore, CARE does not have an answer for this question.*<sup>12</sup>

Subsequent documents filed by CARE fail to overcome this denial of its ability to contribute, as stated in Exhibit CARE-1. In its opening brief, CARE states that “the cross examination of PG&E’s witnesses did not demonstrate any wrong-doing by PG&E’s, El Paso Corporation’s or Ruby’s employees,”<sup>13</sup> but CARE did not conduct this cross-examination, nor does the brief significantly address how the cross-examination lead to this conclusion. CARE’s statement in its opening brief constitutes no more than an unsubstantiated assertion that does not support a determination of substantial contribution. This is because a mere mention in an opening briefing does not demonstrate substantial contribution.

For CARE to demonstrate substantial contribution its presentation must have “substantially assisted the commission in the making of its order or decision because the order or decision has adopted in whole or in part one or more factual contentions, legal contentions, or specific policy or procedural recommendations presented by the customer. . . .” (Pub. Util. Code, §1802, subd. (i).) In this proceeding it has failed to demonstrate substantial contribution on the issue of improper influence. Accordingly, we correctly disallowed intervenor compensation on this particular issue.

**B. CARE’s claims of discrimination are without merit.**

In its application for rehearing, CARE claims that our decision on gas transportation agreements and subsequent award of intervenor compensation fees reflect pervasive discrimination against parties representing people of color.<sup>14</sup> (See Rehrgr. App.,

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<sup>12</sup> D.09-05-012, p. 11 (quoting Exhibit CARE-1, p. 14), emphasis added.

<sup>13</sup> CARE Opening Brief, p. 2.

<sup>14</sup> CARE also makes a single vague assertion that the Commission may have discriminated against

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pp. 2-5.) These claims have no merit, as the award was demonstrably based upon Commission billing rates, Mr. Homec's legal experience and CARE's actual contribution to the hearings. (D.09-05-012, pp.15-21.) CARE claims that its participation in hearings before the Commission has been wrongfully precluded, in violation of Title 42 of the United States Code, section 1981, enforceable under Title 18 of the United States Code, section 242. (Rehrg. App., pp. 2-3.)

CARE's claims of discrimination by the Commission are without merit. In its rehearing application, CARE fails to set forth a cause of action under 42 U.S.C. §1981.<sup>15</sup> Furthermore, CARE lacks standing to assert a claim pursuant to 18 U.S.C. §242, since they are a private party.

**C. Care's request for oral argument under Rule 16.3 of the Commission Rules of Practice and Procedure should be denied.**

CARE asserts that Rule 16.3 of the Commission's Rules of Practice and Procedure provides authority to request oral argument on the issue of racial discrimination. However, CARE fails to enumerate a claim for oral argument with sufficient specificity for its request to be granted. We require a greater level of detail than provided by CARE in order to evaluate requests for oral arguments on their merits.

Rule 16.3 provides in relevant part:

- (a) If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises

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CARE attorneys based on age, but fails to explain or substantiate this allegation. Thus, this assertion has no merit.

<sup>15</sup> In failing to specify the facts or the record underlying its discrimination allegation, CARE's rehearing application does not comport with the requirements of Public Utilities Code section 1732, which requires such specificity. (Pub. Util. Code, §1732; see also, Rule 16.1(c) of the Commission Rules of Practice & Procedure, Cal. Code of Regs., tit. 20, §16.1, subd. (c).)

issues of major significance for the Commission because the challenged order or decision:

- (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation;
- (2) changes or refines existing Commission precedent;
- (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or
- (4) raises questions of first impression that are likely to have significant precedential impact.

These criteria are not exclusive. The Commission has complete discretion to determine the appropriateness of oral argument in any particular matter. Arguments must be based only on the evidence in the record. Oral argument is not part of the evidentiary record.<sup>16</sup>

CARE's request identifies Rule 16.3 and states that D.09-05-012 "raises [an] issue of major significance." (Rehrg. App., p. 4.) CARE does not specify which subsection of Rule 16.3 applies to its claim, nor does it identify how oral arguments on the issue of alleged racial discrimination will aid in the resolution of its application for intervenor compensation. CARE merely requests oral arguments for the reason that it "needs the opportunity of oral argument to address this issue to explain its position." (Rehrg. App., p. 5.)

CARE cannot make oral arguments to supplement an otherwise insufficient rehearing application.<sup>17</sup> Parties are required to make specific contentions in the application for rehearing under Rule 16.3(a), and to grant an unsupported request for oral arguments on the grounds that arguments will "explain its position" improperly asks us to grant oral arguments in place of a thorough pleading.

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<sup>16</sup> Cal. Code of Regs., tit. 20, §16.3, subd. (a).

<sup>17</sup> This includes CARE's unsubstantiated discrimination argument.

We have repeatedly exercised our Rule 16.3 discretion to deny oral arguments where parties fail to make in-depth pleadings for oral arguments. For example, in D.08-06-023,<sup>18</sup> we refused to grant oral arguments where the defendant utilities did no more than sweepingly assert that Rule 16.3 provided authority. (*UCAN Order Modifying Decision*, [D.08-06-023], *supra*, at pp. 26-28 (slip op.)). In denying the oral argument request, we stated: “The Utilities broadly contend that each of the above criteria [is] triggered in this case. However, they do not establish how that is so, or explain how oral argument will assist us in resolving the application.” (*Id.* at p. 26 (slip op.)); see also, *Order Granting Rehrq. of Res. E-4101* [D.07-09-048] (2009) \_\_\_ Cal.P.U.C.3d \_\_\_, at p. 5 (slip op.) [request for oral argument denied since the party did not present any arguments in support of its request.]

Because CARE has failed to identify the specific grounds upon which it requests oral arguments, and because our criteria require that the requesting party identify arguments in favor of granting oral arguments *before* we grant them, CARE’s request must be denied.

### III. CONCLUSION

We find that CARE did not make a sufficient contribution to merit compensation on the finding that PG&E was not improperly influenced in its negotiations. In addition, CARE’s allegations of racial discrimination and lack of opportunity for people of color are not legally or factually substantiated by CARE’s pleading, our actions, or the record at hand. Therefore, CARE’s application for rehearing is denied. Furthermore, we deny CARE’s request for oral arguments for failure to plead with sufficient specificity.

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<sup>18</sup> *Utility Consumers’ Action Network vs. SBC Communications, et al., Order Modifying Decision (D.)07-07-020, Denying Rehearing of Decision, as Modified (“UCAN Order Modifying Decision”)* [D.08-06-023] (2008) \_\_\_ Cal.P.U.C.3d. \_\_\_

**THEREFORE, IT IS ORDERED** that:

1. Rehearing of D.09-5-012 is denied.
2. The request for oral argument is hereby denied.
3. This proceeding, Application 07-12-021, is closed.

This order is effective today.

Dated July 30, 2009, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners