

Decision 07-12-021

December 6, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

<p>Chevron Products Company,</p> <p style="text-align: center;">Complainant,</p> <p style="text-align: center;">vs.</p> <p>Equilon Enterprises LLC, dba Shell Oil Products US, and Shell Trading (US) Company,</p> <p style="text-align: center;">Defendants.</p>
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Case 05-12-004  
(Filed December 5, 2005)

**ORDER MODIFYING DECISION (D.) 07-07-040 AND DENYING REHEARING, AS MODIFIED**

**I. INTRODUCTION**

In this Order we dispose of the application for rehearing of Decision (D.) 07-07-004 (“Decision”) filed by Equilon Enterprises LLC, dba Shell Oil Products US (“Equilon”), and Shell Trading (US) Company (“Shell”). In D.07-07-040, we resolved a complaint filed by Chevron Products Company (“Chevron”) against Equilon and Shell. Equilon owns and operates a 265 mile-long crude oil pipeline which runs from the San Joaquin Valley to the Bay Area (“the Pipeline”). Shell is engaged in the business of buying and selling crude oil. A portion of the crude oil Shell purchases is for use by Equilon in the Shell Martinez refinery. In addition, non-affiliate third party producers enter contracts with Shell known as buy/sell agreements (also known as exchange agreements) for the use of capacity in the Pipeline. Under those agreements, Shell purchases crude oil from producers in the San Joaquin Valley and takes title to that oil while it is in the Pipeline. Shell then resells an equivalent amount of crude oil to the third party in the Bay Area for use at various refineries.

Chevron's complaint alleged that Equilon and Shell (collectively "Shell") operate the Pipeline as a public utility which should be subject to Commission regulation. In D.07-07-040, we agreed, and granted Chevron's motion for summary adjudication.

Shell filed a timely application for rehearing challenging the Decision on the grounds that the Commission: (1) improperly granted summary judgment where there were disputed facts; (2) failed to apply res judicata as a bar to Chevron's complaint; (3) ignored the doctrine of judicial estoppel; (4) issued a decision that conflicts with California Supreme Court precedent; (5) disregarded the law regarding dedication to public use; (6) improperly changed policy in an adjudicatory proceeding; (7) failed to provide the required findings of fact and conclusions of law; (8) did not make findings supported by the record; (9) did not have authority to regulate the purchase and sale of crude oil; (10) violated Shell's due process rights; (11) made a determination that resulted in an improper taking of property; and (12) abused its discretion. In addition, Shell requests oral argument in accordance with Rule 16.3 of the Commission's Rules of Practice and Procedure.

A timely response to the application was filed by Tesoro Refining and Marketing Company ("Tesoro").<sup>1</sup> Two weeks after the date for filing a timely response, we received Chevron's response and associated motion to file certain confidential information under seal.<sup>2</sup> Although the documents reflect the correct date for filing, it is unclear why the Commission did not actually receive these documents until two weeks later. However, even if the documents were late-filed, we believe there is no harm or prejudice in accepting Chevron's response in this instance. Accordingly, we accept and

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<sup>1</sup> Tesoro filed a petition to intervene and join Chevron's complaint. (Petition of Tesoro Refining and Marketing Company to Intervene and Become a Party In the Complaint Proceeding Brought By Chevron Products Company Against Equilon Enterprises LLC, Doing Business as Shell Oil Products U.S. and Shell Trading (U.S.) Company, dated December 12, 2005.)

<sup>2</sup> See Rule 16.1(d) of the Commission's Rules of Practice and Procedure, Cal Code of Regs., tit. 20, § 16.1, subd. (d) providing that responses to an application for rehearing should be filed and served no later than 15 days after the date the application for rehearing was filed. Pursuant to Rule 16.1 the deadline for filing a response was September 14, 2007. Chevron's response was received October 2, 2007.

have considered Chevron's filing. Consistent with the treatment afforded certain other documents in this proceeding, we also grant Chevron's motion to file certain confidential information under seal.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that modifications, as described herein, are warranted to: (1) clarify our basis for not applying the doctrines of res judicata and judicial estoppel; (2) eliminate language that suggests the Decision asserts jurisdiction over crude oil companies who are not parties to this proceeding; (3) clarify the basis for finding that *Associated Pipe Line v. Railroad Commission* ("Assoc. Pipe Line") (1917) 176 Cal. 518 is not controlling; (4) clarify certain findings of fact; and (5) add an ordering paragraph directing Shell to file tariffs for its third party contracts. Rehearing of D.07-07-040, as modified, is denied. In addition, we deny the request for oral argument.

## II. DISCUSSION

### A. Summary Judgment

Shell contends that there are triable issues of fact, thus the Decision improperly granted summary judgment. (Shell Rhg. App., at pp. 9-11.)

Summary judgment is permissible only when the pleadings demonstrate that there is "no triable issue regarding any material fact, and the moving party is entitled to judgment as a matter of law."<sup>3</sup> The distinction between questions of fact and questions of law is as follows:

Questions of fact concern the establishment of historical or physical facts....Questions of law relate to the selection of a rule....Mixed questions of law and fact concern the application of the rule to the facts and the consequent

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<sup>3</sup> The Commission does not have a rule governing summary judgment, but generally looks to the same standard and requirements followed by the courts. (See e.g., *County Sanitation District No. 2 of Los Angeles County v. Southern California Edison Company* [D.01-02-071] (2001) \_\_ Cal.P.U.C. 3d \_\_, 2001 Cal. PUC LEXIS 146, \*7, \*8, citing to *Westcom Long Distance, Inc. v. Pacific Bell et al.* [D.94-04-082] (1994) 54 Cal.P.U.C.2d 244, 249.)

determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual....If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal....”<sup>4</sup>

Shell claims there are triable issues of fact because it disputes two facts which must be established to assert jurisdiction: (1) whether it transports oil for others for compensation; and (2) whether it has dedicated property to public use. (Shell Rhg. App., at p. 10, also see D.07-07-040, at pp. 14-15.)

We are aware that the issue of whether an entity’s property and operations should be subject to regulation is sometimes viewed as a question of fact. However, where the record is undisputed, summary judgment is permissible because jurisdiction is a mixed question of law and fact.<sup>5</sup>

Here, the record and the material facts of this proceeding are undisputed. This is confirmed by Shell’s own application for rehearing (Shell Rhg. App., at pp. 11, 31-33.), as well as pleadings submitted by both Shell and Chevron advocating summary judgment on that basis.<sup>6</sup> In addition, our Decision explains that statutory requirements are applied to determine whether Shell transports oil for others for compensation (D.07-07-040, at pp. 14-15.), and relevant case law is applied to determine whether Shell has dedicated its property to public use. (D.07-07-040, at p. 15). Accordingly, our determination required applying the legal principles to the facts and record.

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<sup>4</sup> See *Crocker National Bank v. City and County of San Francisco* (“*Crocker Nat’l. Bank*”) (1989) 49 Cal. 3d 881, 889, 1989 Cal. LEXIS 2089, \*8.

<sup>5</sup> See *Allen v. Railroad Commission* (“*Allen*”) (1918) 179 Cal. 68, 74-75.

<sup>6</sup> See Chevron Motion for Summary Adjudication, dated April 20, 2006; and Opposition to Chevron’s Motion for Summary Adjudication and Request for Summary Adjudication in Favor of Equilon and Shell, dated May 5, 2006. Chevron and Shell also submitted affidavits in support of their motions, consistent with the legal requirements for summary judgment. (See *Jack v. Wood* (1968) 258 Cal.App.2d 639, 645-646.)

Shell also disputes Finding of Fact (“FOF”) Numbers 5 and 7. (Shell Rhg. App., at p. 10.) FOF 5 states:

Defendants aggressively market the excess capacity of the 20” Pipeline to other oil producers in the San Joaquin Valley. (D.07-07-040, at p. 23.)

FOF 7 states:

The buy/sell differential represents a fee for transporting the oil from the San Joaquin Valley to the Bay Area. (D.07-07-040, at p. 24.)

We agree that FOFs 5 and 7 should more closely reflect the material facts in this proceeding. Accordingly, as set forth below in the ordering paragraphs of this Order, we will modify the Decision to restate these findings as follows:

5. Defendants market excess capacity of the 20” Pipeline to other oil producers in the San Joaquin Valley and to Bay Area refineries.

7. Shell moves crude oil from the San Joaquin Valley to the Bay Area refineries, and receives compensation under the buy/sell agreements for the transportation service it provides.

Shell argues that *Jack v. Wood* (1968) 258 Cal.App.2d 639, and *People ex rel. Mosk v. Santa Barbara* (1960) 192 Cal.App.2d 342, establish that improper summary judgment is reversible error. (Shell Rhg. App., at p. 9, and fn. 34.) We disagree that these cases demonstrate error here.

Specifically, in *Jack v. Wood*, a summary judgment was remanded for further proceedings because supporting affidavits were considered too indefinite and unspecific to permit summary judgment.<sup>7</sup> Here, Chevron and Shell submitted the requisite affidavits, and there is no allegation that they are too indefinite or unspecific to support a determination. In *People ex rel. Mosk v. Santa Barbara*, the Court affirmed a summary judgment where the matter required interpretation and application of relevant law. As we

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<sup>7</sup> See *Jack v. Wood*, *supra* 258 Cal.App.2d at p. 646.

explained above, this proceeding involved a similar exercise thus, summary judgment was appropriate.

Finally, we note that the Decision finds that the Pipeline is subject to regulation as a public utility, but inadvertently fails to include a requirement that Shell file tariffs for its third party contracts. Accordingly, as set forth in the ordering paragraphs below, we will modify the Decision to direct Shell to file tariffs for its third party contracts.

### **B. The Doctrine of Res Judicata**

Shell contends the Decision errs because it failed to properly apply the test for res judicata to bar Chevron's complaint. In addition, Shell contends the Decision erroneously created a new element of the test by finding that res judicata only applies to "losing parties." (Shell Rhg. App., at pp. 11-18.)

Res judicata prevents parties, or those in privity with them, from re-litigating the same matter that was already litigated in a court of competent jurisdiction.<sup>8</sup> The doctrine generally applies where: (i) the issues decided in the prior adjudication are identical with those presented in the later action; (ii) there was a final judgment on the merits in the prior action; and (iii) the party against whom the plea is raised was a party or was in privity with a party to the prior adjudication.<sup>9</sup>

Nothing in our Decision contradicts a finding that these elements of res judicata could be satisfied in this proceeding. Thus, we view the issue before us here as whether we correctly found that res judicata only applies against a party who lost in an earlier action.

We find some merit to Shell's argument that application of the doctrine may not be strictly determined by whether a party won or lost the prior action. Therefore, as

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<sup>8</sup> *Citizens for Open Access to Sand and Tide v. Seadrift Association* ("Sand & Tide") (1998) 60 Cal.App.4<sup>th</sup> 1053, 1065-1066.

<sup>9</sup> See *Sand & Tide, supra*, 60 Cal.App.4<sup>th</sup> at 1066; *Lyons v. Security Pacific National Bank* ("Lyons v. Security Pacific") (1995) 40 Cal.App.4<sup>th</sup> 1001, 1016.

set forth below in the ordering paragraphs of this Order, we will modify our Decision to eliminate reliance on that factor. Nonetheless, Shell is wrong that we were bound to apply res judicata to bar Chevron's complaint. It is within the discretion of any decisionmaker to take into account public policy or other considerations to preclude application of the doctrines of estoppel.<sup>10</sup> In this instance we believe circumstances warrant our exercise of discretion to not apply res judicata. In particular, it is relevant that this Commission was not a party to the prior action where the court considered whether the Pipeline was subject to Commission regulation.<sup>11</sup> Yet, this Commission is the California agency vested with exclusive jurisdiction over public utilities, and is uniquely suited to determine whether the Pipeline should be subject to Commission jurisdiction.<sup>12</sup> To the extent we were precluded from considering that matter previously, we should consider it now. As set forth below in the ordering paragraphs, we will clarify our basis to not apply res judicata.<sup>13</sup>

### C. The Doctrine of Judicial Estoppel

Shell contends the Decision errs because it failed to apply judicial estoppel to bar the complaint. (Shell Rhg. App., at pp. 18-23.)

Judicial estoppel prevents a party from asserting a position in one legal proceeding that is contrary to a position previously taken in the same or some other

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<sup>10</sup> *Zapata v. Department of Motor Vehicles* (1991) 2 Cal.App.4<sup>th</sup> 108, 115-116; and *California Amplifier, Inc. v. RLI Insurance Company* (2001) 94 Cal.App.4<sup>th</sup> 102, 118-119.

<sup>11</sup> *The 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, vs. Chevron Corporation, et al., Los Angeles Superior Court Case No. C587912, Consolidated with Case No. C661310* filed in the Superior Court of the State of California, County of Los Angeles, on February 19, 1986.

<sup>12</sup> Also see *Northern California Power Agency v. Public Utilities Commission* (1971) 5 Cal.3d 370, 377-379 [Demonstrating that the Commission has an obligation to consider issues brought before it even where other entities may have exclusive jurisdiction over those issues].

<sup>13</sup> The doctrine of collateral estoppel is a secondary aspect of res judicata, and the same elements are applied to determine its applicability. Thus for purposes of this Order, both doctrines are addressed by virtue of the res judicata analysis. (See *People v. Sims* (1982) 32 Cal.3d. 468, 478; *Clark v. Leshner* (1956) 46 Cal.2d 874, 880; and *First N.B.S. Corp. v. Gabrielsen* (1986)179 Cal.App.3d 1189, 1195.)

proceeding. The test to apply judicial estoppel is: (i) the same party has taken two positions; (ii) the positions were taken in judicial or quasi-judicial administrative proceedings; (iii) the party was successful in asserting the first position; (iv) the two positions are totally inconsistent; and (v) the first position was not taken as a result of ignorance, fraud, or mistake.<sup>14</sup>

There is merit to Shell's argument that the elements of the test can be satisfied. Thus, again the issue is whether there is a legitimate basis not to apply the doctrine. Shell argues the Decision errs because the reason for not applying the doctrine makes no sense, and is inapposite of relevant case law. (Shell Rhg. App., at pp. 18- 19 citing to *Schmier v. Supreme Court of California* (2002) 96 Cal.App.4<sup>th</sup> 873.) Shell also asserts that the Decision wrongly concludes "...there is no public policy that bars a litigant from changing its legal theory when its factual situation has changed...." (Shell Rhg. App., at p. 19, referring to D.07-07-040, p. 17, fn. 23.) Shell argues this rationale is contrary to the public policy which prevents parties from playing fast and loose with the court by taking contradictory positions. (Shell Rhg. App., at p. 19, citing to *Schulze v. Schulze* (1953) 121 Cal.App.2d 75; *In re Marriage of Toth* (1974) 38 Cal.App.3d 205.)

Even if Shell is correct, we need not reach the merits of these arguments. As we have stated, it is within the discretion of the decision-maker not to apply judicial estoppel and we believe such circumstances exist here.<sup>15</sup> In addition, we note that application of judicial estoppel is usually limited to instances where a party misrepresents or conceals material facts. There is no evidence in this proceeding to suggest that Chevron misrepresented or concealed the material facts. For these reasons, we find it was reasonable and lawful not to bar Chevron's complaint. In the ordering paragraphs below, we will clarify the Decision accordingly.

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<sup>14</sup> *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4<sup>th</sup> 171, 184; *Drain v. Betz Laboratories, Inc.* (1999) 69 Cal.App.4<sup>th</sup> 950, 958.

<sup>15</sup> *California Amplifer, Inc. v. RLI Insurance Company* (2001) 94 Cal.App.4<sup>th</sup> 102, 118-119.

**D. Relevant California Supreme Court Precedent**

Shell contends the Decision errs because it disregarded California Supreme Court precedent established in *Assoc. Pipe Line, supra*. (Shell Rhg. App., at pp. 23-25.)

As discussed below, Shell is wrong that *Assoc. Pipe Line* is controlling in this instance. However, as discussed below, our Decision somewhat overstates the holding in *Assoc. Pipe Line*. Thus, we will modify our Decision accordingly.

In *Assoc. Pipe Line*, the California Supreme Court annulled a Commission decision which asserted jurisdiction over certain crude oil pipelines owned by Associated Pipe Line Company and its parent Associated Oil Company. The Commission found that the companies had monopoly control over pipelines from the San Joaquin Valley, putting them in an advantageous economic position over other independent producers in the area.<sup>16</sup>

The Supreme Court rejected that conclusion, and found that Associated Pipe Line produced, purchased, and transported crude oil for use only by itself or its affiliates. The Court also disagreed there was any evidence of a monopoly since various other companies operated similar pipelines transporting crude oil from the San Joaquin Valley. The Court distinguished the case from *U.S. v. Ohio Oil* (1914) 234 U.S. 548, in which Standard Oil Company had acquired control of all pipelines fed by oil fields in the particular geographic area, such that it not only transported its own oil but that of any other producers needing to transport oil out of those fields.

Shell argues that *Assoc. Pipe Line* applies here because all crude oil is either used for its own refining purposes or is used by its customers (suggesting its buy/sell agreements are with affiliates). Shell also claims it does not have monopoly control over crude oil transportation from the San Joaquin Valley to the Bay Area. (Shell Rhg.App, at pp. 25, 46-47.)

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<sup>16</sup> *Assoc. Pipe Line, supra*, 176 Cal. at p. 528-529.

We continue to find that *Assoc. Pipe Line* is not controlling. As previously discussed, the material facts of this case are undisputed. Shell's dispute goes to our conclusions, and the weight which should be given to any particular fact. However, there is no evidence to support Shell's claim that it provides service to only itself or affiliate entities. As we noted in the Decision, typically about 50% of total Pipeline capacity is dedicated to non-affiliate third party use. (D.07-07-040, at p. 19.) Further, Shell's claim that it does not have monopoly control is not persuasive.

Shell argues that Chevron and other producers have other options for transporting crude oil from the San Joaquin Valley to the Bay Area. Even if that is true, the circumstances are not analogous to *Assoc. Pipe Line*. There, the company transported only a fraction of the total pipeline capacity. By contrast, Shell transports the majority of total crude oil moved between the San Joaquin Valley and the Bay Area, it transports all of the heated crude oil, and it controls what is arguably the most efficient and desirable mode of transportation.

That said, our statement of the holding in *Assoc. Pipe Line* is somewhat inaccurate.<sup>17</sup> *Assoc. Pipe Line* found that the company was not subject to Commission jurisdiction because it transported crude oil only to itself and/or its affiliates. *Assoc. Pipe Line* does not apply here because nothing in that case mentions issues that are considered here regarding third party transactions, buy/sell agreements, or the relevance of holding title to the crude oil in the pipeline. The facts here are more analogous to *U.S. v. Ohio Oil*, because Shell controls the only heated crude oil pipeline from the San Joaquin Valley to the Bay Area and it not only carries its own crude oil, but that of any other producer wanting to move its crude oil by that means. As set forth below in the ordering paragraphs of this Order, we will modify our Decision to provide this clarification.

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<sup>17</sup> See D.07-07-040, at pp. 11, 25 [Finding of Fact Number 19] stating: "The California Supreme Court in 1917 ruled that a pipeline owner that transports only that oil to which the pipeline owner had acquired title does not thereby transport crude oil for others."

## E. Dedication to Public Use

Shell contends the Decision errs because: (1) it failed to properly apply the law regarding dedication; (2) it erroneously relied on *Pacific Gas and Electric Company v. Dow Chemical Company* (“*PG&E v. Dow*”) [D.94-07-063] (1994) 55 Cal.P.U.C.2d 430; and (3) proper application of the law and facts support Shell’s motion for summary judgment. (Shell Rhg. App., at p. 25-33.)

### 1. The Law Regarding Dedication

The legal test for dedication has undergone some change since its inception,<sup>18</sup> however, it is generally stated as:

...whether or not [a person has] held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as [an] accommodation or for other reasons peculiar and particular to them.<sup>19</sup>

Shell contends there is no dedication because only surplus capacity is offered to the public. To support this assertion, Shell relies on *Richfield Oil Corporation v. Public Utilities Commission* (“*Richfield Oil*”) 1960) 54 Cal.2d 419; *Klatt v. Railroad Commission* (“*Klatt*”) (1923) 192 Cal. 689; *Richardson v. Railroad Commission* (“*Richardson*”) (1923) 191 Cal. 716; and *Thayer v. California Development Company* (“*Thayer*”) (1912) 164 Cal. 117. (Shell Rhg. App., at pp. 27-28.)

We disagree that any of the cited cases contradict our findings. In *Richfield Oil*, the Court annulled a Commission decision which found that the company had

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<sup>18</sup> See e.g., *Greyhound Lines v. Public Utilities Commission* (“*Greyhound Lines*”) (1968) 68 Cal.2d 406, 413 [Indicating that while still serving an important function, the doctrine of dedication is founded upon constitutional principles no longer in existence.].

<sup>19</sup> *Independent Energy Producers Association, Inc. v. State Board of Equalization* (“*Independent Energy Producers*”) (2005) 125 Cal.App.4<sup>th</sup> 425, 442-443, citing *Van Hoosear v. Railroad Commission* (1920)  
(continued on next page)

dedicated its gas operations to public use. The Court compared the company's provision of gas to Edison against the company's provision of gas to several other entities for their peaking service. The Court simply found the Commission had gone too far in its assertion of jurisdiction for purposes of Richfield Oil's contract with Edison. *Richfield Oil* is not analogous to the facts here because Shell is not offering third party service to just one entity, under a single contract. Shell admits that it or its predecessors have entered numerous buy/sell agreements with all refineries connected to the Pipeline, and with every major producer in the San Joaquin Valley.

*Klatt, Richardson and Thayer* are also not analogous. In *Klatt* and *Richardson*, individual homeowners allowed neighbors to use their water, only when there was excess, and only as an accommodation. There was no intent to provide water as a business venture, or to make a profit. By contrast, Shell is in business to, among other things, transport crude oil. As we indicated in the Decision, Shell markets that service, and it does so to make a profit. Finally, we find no relevance to *Thayer* because it does not address the issue of surplus capacity at all.

Next, Shell cites to *Richfield Oil* to argue the Decision is overly broad because it failed to "carve out from regulation the capacity used for Equilon's own refining purposes." (Shell Rhg. App., at pp. 26-27.)

Shell's argument wrongly suggests that in *Richfield Oil*, the same pipeline was used to provide service to Edison and the other entities receiving gas for their peaking purposes. Nothing in *Richfield Oil* supports that conclusion. *Richfield Oil* merely found that the pipeline used to provide service to Edison had not been dedicated to public use.

Shell also argues the Decision failed to consider that it was obligated by the Proprietary Pipeline Contract to enter the buy/sell agreements with Chevron. Shell claims the contract was negotiated when Chevron was as an affiliate and thus, the

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184 Cal. 553, 554.

Decision should only evaluate whether portions of the Pipeline used to serve parties other than Chevron have been dedicated to public use. (Shell Rhg. App., at pp. 27, 39.)

We find no basis to conclude that Shell provides service to Chevron as an affiliate. Even if Shell and Chevron were affiliates at the time the contract was negotiated, the relationship was clearly being severed. The fact is that Chevron is not an affiliate, and has not been receiving service as an affiliate, for 6 years. Shell has been providing capacity service to Chevron as an unaffiliated third party.

Finally, Shell argues the Decision overstates the percent of total Pipeline capacity allocated to third party use. Shell refers to evidence it submitted in this proceeding,<sup>20</sup> but now claims there is a distinction between the amount reported as “oil not used for refining purposes,” and the amount of capacity which is in fact subject to buy/sell agreements with non-affiliated third parties. (Shell Rhg. App., at pp. 27-28.)

We recognize that the amount of capacity offered to third parties may not, by itself, be indicative of dedication. However, we did not rely solely on that fact to reach a determination. Our Decision merely notes, as one factor, that Shell has consistently made significant amounts of capacity available to third parties. We are also troubled that Shell now suggests its statements or exhibits do not really mean what they say. To accept Shell’s argument would put us in an untenable position of revisiting the credibility of all information submitted in this proceeding and potentially the weight accorded to every statement or exhibit in the record.<sup>21</sup> The evidence Shell submitted distinguishes between

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<sup>20</sup> Exhibits Supplied Pursuant to ALJ Request and Request for Clarification (“April Exhibits”), dated April 11, 2007, Exh. A; Chevron Motion for Summary Adjudication, dated April 20, 2006, Appendix of Exhibits, Tab 3 Shell Supplemental Response to Chevron Data Request.

<sup>21</sup> Summary judgment may be granted where inferences are reasonably deducible from the evidence. (See *Solis v. Kirkwood Resort Company* (2001) 94 Cal.App.4<sup>th</sup> 354, 361.) In addition, the courts may not substitute their own judgment regarding the weight to be accorded evidence or factual findings of the Commission where there is evidence to support the Commission’s findings, and its findings and conclusions are arrived at from the consideration of conflicting evidence or undisputed evidence from which conflicting inferences may reasonably be drawn. (See *Camp Meeker Water System v. Public Utilities Commission* (1990) 51 Cal.3d 845, 864-865.)

capacity for its own or affiliate use, and capacity for unaffiliated third parties. We find no acceptable reason to accept Shell's disavowal of that data now.

## 2. Reliance on *PG&E v. Dow*

Shell contends the Decision errs because we improperly relied on *PG&E v. Dow* to find that the Pipeline has been dedicated to public use. (Shell Rhg. App., at pp. 29-31.) We disagree.

*PG&E v. Dow* involved a complaint against Dow Chemical Company ("Dow") and its subsidiary Great Western Pipeline Company, Inc. ("Great Western") regarding their operation of certain natural gas pipelines. Based in part on buy/sell agreements similar to those at issue here, the Commission found the pipelines had been dedicated to public use.<sup>22</sup>

Shell argues *PG&E v. Dow* is not controlling because different standards for dedication apply to different industries. Shell claims a different standard should apply to crude oil companies because unlike natural gas companies, they do not have franchise areas and an assurance of rate of return and freedom from competition. To support its position, Shell relies on *Application of Western Gas Resources-California, Inc.* ("*Western Gas Resources*") [D.99-11-023] (1999) 3 Cal.P.U.C.3d 297, 1999 Cal. PUC LEXIS 856, and *Greyhound Lines, Inc. v. Public Utilities Commission* ("*Greyhound Lines*") (1968) 68 Cal.2d 406. (Shell Rhg. App., at p. 29.)

*Western Gas Resources* does not support Shell's argument because the Commission merely denied *Western Gas Resources*' application for a certificate of public convenience and necessity ("CPCN"). The Commission did note different physical characteristics between industries, but only in the context of policies related to gas and electric industry restructuring and deregulation. It is not relevant for purposes of dedication.

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<sup>22</sup> *PG&E v. Dow* [D.94-07-063], *supra*, 55 Cal.P.U.C.2d at pp. 449-450 [Conclusion of Law Numbers 1 and 2], 1994 Cal. PUC LEXIS 974 at \*60.

*Greyhound Lines* appears to contradict Shell's argument, because the Court focused on the actual characteristics of dedication, rather than strict or varied standards attached to territoriality, formulas, and industries. It is similar to *PG&E v. Dow* which also looked to the underlying characteristics of the company's actions, rather than particular industry differences.

Nevertheless, Shell argues we cannot rely on *PG&E v. Dow* because we have already accepted the use of buy/sell agreements in the crude oil business, and have even relied on them in granting pipeline corporations market-based rate authority. Shell relies on seven Commission decisions as alleged evidence of such acceptance.<sup>23</sup> (Shell Rhg. App., at p. 30.)

We see nothing in the cited Decisions to support Shell's assertions. Only three of the cited decisions make any mention of the existence of buy/sell agreements or other contracts. In each case, it was neither appropriate nor necessary to act regarding their use in the particular circumstances involved. For example, in *Unocal I* [D.94-05-022], *supra*, and *Unocal II* [D.96-04-061], *supra*, we approved a settlement to assume jurisdiction over various oil pipelines. Similarly, in *In re Edison* [D.94-10-044], *supra*, we assumed jurisdiction over certain fuel oil pipelines where Edison had contracted to

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<sup>23</sup> *Investigation on the Commission's own motion into the rates, rules, charges, operations, business practices, contracts, services, property and facilities of every person, 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 ("Atlantic Richfield")* [D.88640] (1978) 83 Cal.P.U.C. 582, 1978 Cal. PUC LEXIS 837; *Investigation on the Commission's own motion into the rates, rules, charges, operations, business practices, contracts, services, property and facilities of every person, 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 ("1979 Oil OIF")* [D.91074] (1979) 2 Cal.P.U.C.2d 565, 1979 Cal. PUC LEXIS 1254; *In re Investigation Into Possible Over-Assessment by the State Board of Equalization ("State Bd. of Equalization")* [D.93-07-047] (1993) 50 Cal.P.U.C.2d 386, 1993 Cal. PUC LEXIS 567; *City of Long Beach v. Unocal California Pipeline Company ("Unocal I")* [D.94-05-022] (1994) 54 Cal.P.U.C.2d 422, 1994 Cal. PUC LEXIS 380; *City of Long Beach v. Unocal California Pipeline Company ("Unocal II")* [D.96-04-061] (1996) 66 Cal.P.U.C.2d 28, 1996 Cal. PUC LEXIS 280; *In re Southern California Edison Company ("In re Edison")* [D.94-10-044] (1994) 56 Cal.P.U.C.2d 642, 1994 Cal. PUC LEXIS 683; and *Application of San Pablo Bay Pipeline Company ("San Pablo Bay Pipeline Co.")* [D.05-07-016] (2005) \_\_\_ Cal. P.U.C.3d \_\_\_, 2005 Cal. PUC LEXIS 292.

provide service with members of the public. In view of the settlement agreements presented in each case, and the utilities' voluntary submission to jurisdiction, it was not necessary to particularly analyze operations, practices, or issues which might otherwise have been in dispute.

The other cited Commission decisions are not at all relevant to support Shell's argument. In *Atlantic Richfield* [D.88640], *supra*, a settlement agreement was adopted under which the Commission took jurisdiction over some of the company's pipelines. However, the matter offers no guidance because there is no mention of the existence of buy/sell agreements.

In the *1979 Oil OII* [D.91074], *supra*, an investigation regarding crude oil pipelines was closed. It does not support Shell's argument because that decision is also silent regarding the existence of buy/sell agreements.

*State Bd. Of Equalization* [D.93-07-047], *supra*, was wholly unrelated to issues of dedication and/or buy/sell agreements. The investigation involved the assessment of utility property taxes. Pipeline and certain other utilities were dismissed only because they were not subject to a settlement in that proceeding which was limited to entities subject to cost-of-service, or rate base rate-of-return ratemaking.<sup>24</sup>

*San Pablo Bay Pipeline Co.* [D.05-07-016], *supra*, approved a CPCN to operate certain crude oil, black oil, and refined petroleum product pipelines and facilities. It has no bearing here because it did not involve issues of dedication or the use of buy/sell agreements.

Finally, Shell argues that *PG&E v. Dow* does not apply because the remedy sought in that case differs from the remedy Chevron seeks here. (Shell Rhg. App., at p. 30.)

Shell offers no legal authority to establish any linkage between remedies sought and the standard for determining dedication. In addition, we see no evidence that

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<sup>24</sup> *State Bd. Of Equalization* [D.93-07-047], *supra*, 1993 Cal. PUC LEXIS 567 at \*6, \*7.

Chevron seeks condemnation of the Pipeline as Shell claims, which could result in an unlawful taking of the Pipeline. Chevron simply seeks Commission rate regulation of the Pipeline. As discussed in Section K of this Order, while condemnation may result in a compensable taking, the right to regulate as we exercised in this case, is distinguishable. It is lawful and it is not a taking.

### **3. Arguments Allegedly Supporting Shell's Motion for Summary Adjudication**

Shell contends the Decision errs because proper application of the facts and law support a finding of no dedication to public use. Accordingly, Shell argues its motion for summary adjudication should be granted. (Shell Rhg. App., at pp. 31-33.)

Shell claims the following facts are undisputed, and act to weigh against a finding dedication: (1) Shell has denied access to certain customers; (2) Shell only provides access based on mutually agreed upon terms; and (3) Shell only provides access when there is excess capacity; (4) there has been a reduction in the overall volume of crude oil subject to buy/sell agreements; and (5) Shell does not "aggressively" solicit third party business.

Our Decision considered these facts and nevertheless found that the Pipeline has been dedicated to public use. Further, Shell offers no legal authority to show that this particular set of facts is determinative regarding dedication.

Our Decision accepted Shell's assertion that it has denied service to some producers. (D.07-07-040, at pp. 17-18.) We recognize this factor is generally relevant to an evaluation of dedication. However, closer scrutiny of the record appears to show only that Shell refused to provide service to Tesoro after Tesoro intervened in this proceeding. It also shows that Shell has declined to offer Chevron more capacity than it already has under its existing buy/sell agreements. We are doubtful this is what the courts have contemplated as constituting a denial of like service to potential customers. Thus, we do not find Shell's argument on this point to be particularly compelling.

Similarly, we do not view the fact that Shell enters into agreements only when there are mutually agreed upon terms as a compelling factor. That has not necessarily precluded jurisdiction where the facts otherwise evidence dedication.

The fact that overall crude oil volumes in the Pipeline have reduced does not appear to be relevant. Shell offers no authority to suggest that changing, even lessening, volumes of product allocated to third party use is particularly meaningful for purposes of a dedication analysis. Further, as we noted in our decision, even if the volume in question has reduced from its overall high of approximately 80%, it remains, on average, at about 50%. Shell's ongoing practice is to market a significant amount of capacity to third parties, and Shell offers no evidence that it intends to meaningfully reduce or eliminate this availability in the future.

Whether or not Shell "aggressively" solicits third party transactions is not the point. Even if the term "aggressively" is an overstatement, dedication is not based on the degree of voracity involved. The fact remains that Shell markets third party transactions.

Finally, Shell argues that the relevant and determinative factors in *PG&E v. Dow* cannot be established here.<sup>25</sup> These factors are: (1) articles of incorporation which reflect that the company will transport gas under contract for others; (2) continuous supply of excess capacity to third parties with no expectation that it would ever be used by the company; and (3) solicitation of business evidenced by a letter to a third party. (Shell Rhg. App., p. 32.)

As previously discussed, each of these factors is present in this case. Corporate documents clearly state Shell is in the business of transporting crude oil. Shell has substantially more capacity on the Pipeline than it needs, and has continually provided this capacity to third parties since 1996. Shell offers no evidence to suggest it

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<sup>25</sup> Shell refers to factors reiterated in *PG&E v. Dow* from its predecessor proceeding *PG&E v. Dow* [D.93-06-043] 49 Cal.P.U.C.2d 614, 624, 1993 Cal. PUC LEXIS 483, \*29, \*30, \*31; and *PG&E v. Dow* [D.94-07-063], *supra*, 55 Cal.P.U.C.2d. at pp. 444-445, 1994 Cal. PUC LEXIS 974 at \*42, \*43, \*44.

intends to ever use this capacity for itself or that it will cease engaging in business transactions with third parties. And even if the record does not include letters of solicitation, Shell admits to marketing its services.<sup>26</sup>

#### **4. Alleged Change of Policy in an Adjudicatory Proceeding**

Shell contends the Decision violates section 1701.1 by changing Commission policy in an adjudicatory proceeding. Shell argues that policy can only be changed in quasi-legislative, or rulemaking proceedings. (Shell Rhg. App., at pp. 33-36.) We find no merit in Shell's argument.

Section 1701.1. pertains to the categorization of Commission proceedings and specifically defines quasi-legislative and adjudicatory proceeding.<sup>27</sup> Consistent with section 1701.1, quasi-legislative proceedings involve the formulation of rules or policy applicable to an entire industry and all future cases.<sup>28</sup> Adjudicatory proceedings involve the application of rules to specific facts – in order to affect the rights or duties of the specific parties.

In Shell's view, the proposed decisions issued in this proceeding were consistent with section 1701.1, however, Shell claims the Decision improperly makes policy affecting all crude oil companies. (Shell Rhg. App., at p. 36.) This is not correct.

The Decision follows the same legal and factual approach as the proposed decisions, it simply reaches a different conclusion. Further, even if the Decision could

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<sup>26</sup> Exhibits Supplied Pursuant to ALJ Request and Request for Clarification, dated April 11, 2007, Exh. B, 2005 Reporter's Transcript (Martinez).

<sup>27</sup> Section 1701.1(c)(1) provides in pertinent part:

(c)(1) Quasi-legislative cases...are cases that establish policy, including, but not limited to, rulemakings and investigations which may establish rules affecting an entire industry.

(2) Adjudication cases...are enforcements cases and complaints....

(Pub. Util. Code, § 1701.1, subs. (c)(1) and (c)(2).)

<sup>28</sup> Shell cites to *Strumsky v. San Diego Employees Retirement Association* (1974) 11 Cal.3d 28, 34, fn. 2.

have implications for other companies, it is limited to the facts of this case and only directly affects Equilon and Shell.<sup>29</sup> The Decision is consistent with our long-standing approach of addressing oil pipeline issues on a case-by-case basis.<sup>30</sup> That said, we agree that certain language in the Decision could be misinterpreted to suggest an immediate industry-wide affect. Accordingly, as set forth in the ordering paragraphs below, we will modify our Decision to clarify our intent.

Shell is wrong that Commission “actions and inactions over the last 90 years” have established a policy to not regulate crude oil pipelines. (Shell Rhg. App., at p. 34) Arguably, the Commission has not actively sought to assert jurisdiction in many instances. However, as stated, the Commission addresses regulation of crude oil companies on a case-by-case basis. The fact remains that this Commission does regulate crude oil pipelines. It is irrelevant that regulation has thus far been limited to pipelines that voluntarily submit to Commission jurisdiction or expressly hold themselves out as being willing to serve any customer requesting service.

We also reject the notion that the cases Shell cites establish a policy not to regulate crude oil companies.<sup>31</sup> *Atlantic Richfield* [D.88640], *supra*, approved a settlement whereby the company agreed to operate some of its pipelines as a public utility. If anything, it evidences our assumption of jurisdiction.

The *1979 Oil OII* [D.91074], *supra*, is a cursory decision closing an investigation regarding crude oil pipelines. As previously mentioned, it contains no meaningful discussion. Such silence can not reasonably be construed to establish Commission policy.

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<sup>29</sup> D.07-07-040, at p. 26 [Conclusion of Law Numbers 8, 9, and 10].

<sup>30</sup> *Unocal II* [D.96-04-061], *supra*, 66 Cal.P.U.C.2d at p. 33, 1996 Cal. PUC LEXIS 280 at \*15, \*16.

<sup>31</sup> Shell cites to *Atlantic Richfield* [D.88640], *supra*; the *1979 OII* [D.91074], *supra*; *State Bd. of Equalization* [D.93-07-047], *supra*; *Unocal I* [D.94-05-022], *supra*; and *Unocal II* [D.96-04-061], *supra*.

As previously mentioned, in *State Bd. Of Equalization* [D.93-07-047], *supra*, we dismissed pipeline and certain other utilities from an investigation concerning the utility property taxes. Shell suggests that the dismissal, and the form of rate regulation involved, equates to a policy not to regulate. That is incorrect. The investigation had nothing to do with the regulation of crude oil companies, and the utilities were released only from that proceeding, not from Commission regulation.

*Unocal I* [D.94-05-022], *supra*, approved a settlement resulting in Commission jurisdiction over a number of California crude oil pipelines. Again, Shell disregards the simple fact that the case actually demonstrates regulation of a pipeline, not a policy not to do so. *Unocal II* [D.96-04-061], *supra*, denied rehearing of *Unocal I*, and explicitly confirmed our authority to regulate the rates, terms and conditions, and financial transactions of oil pipelines operating as public utilities.

#### **F. Findings of Fact**

Shell contends the Decision violates section 1705 because it fails to include findings of fact (“FOF”) and conclusions of law (“COL”) which support a conclusion that the Pipeline is dedicated to public use. In particular, Shell points to findings and conclusions which it claims are contradictory, incorrect, or disputed. (Shell Rhg. App., at pp. 37-38.) While Shell does not establish error, as discussed below, we will modify the Decision to clarify certain findings.

Section 1705 provides in pertinent part that a Commission order or decision “...shall contain, separately stated, findings of fact and conclusions of law...on all issues material to the order or decision.” (Pub. Util. Code, § 1705.)

Shell argues that when read together, FOF 3 and FOF 19 refute a determination that Shell transports oil for others for compensation or that it has dedicated the Pipeline to public use. FOF 3 states:

Defendants use the Pipeline to transport oil they produce themselves, and when capacity permits, oil purchased from other producers through buy/sell agreements. (D.07-07-040, at p. 23.)

FOF 19 states:

The California Supreme Court in 1917 ruled that a pipeline owner that transports only that oil to which the pipeline owner had acquired title does not thereby transport crude oil for others. (D.07-07-040, at p. 25.)

As discussed in Section D, above, the Decision should be modified to correctly state the holding in *Assoc. Pipe Line*. Accordingly, as set forth in the ordering paragraphs below, D.07-07-040, p. 25, FOF 19 is modified to read:

In *Assoc. Pipe Line*, the California Supreme Court found that the company was not subject to Commission jurisdiction because it transported crude oil only to itself and/or its affiliates.

Shell argues FOF 5 is a disputed fact and thus, cannot be used to support the Decision. FOF 5 states:

Defendants aggressively market the excess capacity of the 20” Pipeline to other oil producers in the San Joaquin Valley. (D.07-07-040, at p. 23.)

As previously discussed, Shell’s own statements reflect that it markets Pipeline capacity to third parties.<sup>32</sup> Whether it markets such capacity “aggressively” is a subjective judgment and is unnecessary to support the Commission’s determination. Therefore, as set forth below in the ordering paragraphs, D.07-07-040, p. 23, FOF 5 is modified to state:

Defendants market the excess capacity of the 20” Pipeline to other oil producers in the San Joaquin Valley and to Bay Area refineries.

Shell argues COL 9 contradicts FOF 20 because Shell in no way voluntarily submits to Commission jurisdiction or holds itself out as willing to serve any customer. COL 9 states:

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<sup>32</sup> See *ante*, fn 26.

Equilon and Shell have manifested an unequivocal intention to dedicate the 20" Pipeline to public use by engaging in the business of transporting oil for a fee. (D.07-07-040, at p. 26.)

FOF 20 states:

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. (D.07-07-040, at p. 25.)

Shell wrongly suggests COL 9 and FOF 20 are interdependent. FOF 20 is merely a factual statement regarding the existing regulatory conditions. COL 9 is an otherwise reasonable conclusion based on the evidence.

Finally, Shell argues that COL 8 circumvents the proper test for dedication because dedication cannot be found based on contracts or because of a large number of contracts. (Shell Rhg. App., at p. 38 citing to *Allen*, *Richfield Oil*, and *Thayer*.) COL 8 states:

Equilon and Shell Trading are in the business of transporting oil for a fee through the use of buy/sell agreements. (D.07-07-040, at p. 26.)

Contrary to Shell's suggestion, COL 8 does not find that Shell dedicated the Pipeline to public use solely because it had entered into numerous buy/sell agreements. The evidence supports COL 8. Shell merely ignores that we considered several factors to reach a determination. Moreover, nothing in *Allen*, *Richfield Oil*, or *Thayer* suggests that it is improper to take into account contracts. Those cases only suggest that it is the nature and substance of the contracts that is important, not the sheer number of contracts.

### **G. Record Support**

Shell contends the record does not support a finding that the Pipeline has been dedicated to public use. In particular Shell asserts the circumstances here are analogous *Assoc. Pipe Line* because it provides service to only itself (60% of Pipeline capacity), its affiliate (25% capacity for Chevron). Further, Shell claims third party service is provided only as an accommodation. (Shell Rhg. App., at pp. 38-41.)

Shell's argument fails because as discussed in Section D above, the facts here are not analogous to *Assoc. Pipe Line*. As also discussed in Section E above, Shell's argument that its contract with Chevron is affiliate service is not persuasive. Finally, Shell offers no evidence to support a conclusion that the buy/sell agreements with other third parties are merely as accommodations.

Shell also reargues its position that it only provides surplus capacity and declines to enter buy/sell agreements with some potential customers. (Shell Rhg. App., at p. 40.) These arguments fail as previously discussed in Sections E.1 and E.3 above. Accordingly, we will not repeat those arguments here.

#### **H. Commission Jurisdiction**

Shell contends the Decision errs because we do not have authority to regulate the buying and selling of crude oil. Shell contends that while we have regulatory authority over the sale of electricity and gas pursuant to Public Utilities Code sections 217-218, and 221-222, we do not have similar authority over the crude oil industry. (Shell Rhg. App., at pp. 41-42.) Shell is wrong.

An agency exceeds its authority when it acts beyond the power conferred upon it by the constitution or statute. The courts have recognized that the Commission is vested with broad authority to regulate public utilities pursuant to the California Constitution.<sup>33</sup> In addition, the Public Utilities Code confers broad authority to the Commission,<sup>34</sup> and includes sections 216, 227, and 228 pertaining specifically to the regulation of pipeline corporations engaged in the transmission, storage, distribution, or

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<sup>33</sup> See *Southern California Edison v. Peevey* (2003) 31 Cal.4<sup>th</sup> 781, 792 stating: "PUC's authority derives not only from statute but from the California constitution, which creates the agency and expressly gives it the power to fix rates for public utilities. (Cal. Const., art. XII, §§ 1, 6.) ...[W]e have described PUC as 'a state agency of constitutional origin with far reaching duties, functions and powers' whose 'power to fix rates [and] establish rules' has been 'liberally construed.' (citations omitted.)"

<sup>34</sup> See Public Utilities Code section 701 stating: "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."

delivery of crude oil.<sup>35</sup> That the Commission has regulatory authority over crude oil companies and pipelines is further evidenced by the multiple decisions exercising that authority.<sup>36</sup>

Nevertheless, Shell claims that the Decision exceeds this authority because it somehow restricts who may purchase crude oil, such that Chevron will be precluded from purchasing crude oil from a party if it has also sold crude oil to that same party. (Shell Rhg. App., at p. 41.) Shell misinterprets the impact of our Decision.

Our Decision does not limit the ability of Chevron, or any other entity, to purchase crude oil. Nor does it restrict Shell's ability to sell crude oil. The Decision merely finds that because the Pipeline is operating as a public utility, it is subject to Commission regulation.

#### **I. Due Process**

Shell argues its due process rights were violated because the Decision adopts new policy without a hearing, depriving Shell of an opportunity to be heard.<sup>37</sup> (Shell Rhg. App., at pp. 42-44.)

As discussed in Section F, above, the Decision did not adopt new policy. Further, both Shell and Chevron advocated that the complaint be resolved by summary adjudication, without hearings. That Shell now disagrees with our Decision does not establish the need for evidentiary hearings, nor does it establish that Shell did not have an opportunity to be heard. Numerous pleadings submitted by Shell evidence that it had, and fully exercised, its right to be heard regarding each contested issue in this

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<sup>35</sup> See Public Utilities Code section 211 (defining common carrier), section 216 (defining public utility), section 227 (defining pipe line), and section 228 (defining pipeline corporation).

<sup>36</sup> See e.g., *Unocal I* [D.94-05-022], *supra*; *Unocal II* [D.96-04-061], *supra*; *In re Edison* [D.94-10-044], *supra*; and *Atlantic Richfield* [D.88640], *supra*.

<sup>37</sup> *People v. Western Airlines, Inc.* (1954) 42 Cal.2d 621, 632 ["Due process...is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made."].

proceeding.<sup>38</sup> Shell also had, and participated in, the opportunity to present oral arguments before the Commission on this matter.

Shell also argues that the Commission relied on evidence outside the record in reaching a determination. However, Shell does not point to any statement that is not supported by the record. Shell points to the comment of one Commissioner at the Commission's July 26, 2007 public meeting which mentions "compelling policy issues," and the fact that Shell has "monopoly control of the only heated pipeline between the San Joaquin and the Bay Area..." (Shell Rhg. App., at pp. 42-43.)

However, as previously discussed there is evidence to support the conclusion regarding monopoly control. In addition, Shell's assertion is contradicted by its own admission that the Decision does not rely on this information. (Shell Rhg. App., at p. 43.) The evidence and law upon which we rely in making an ultimate determination are contained in the proposed decision or proposed alternate decision on which we vote. Here, the Decision properly discusses the law and evidence which were the basis of our determination, and that determination is not based on the comments of any individual Commissioner.

#### **J. Alleged Taking of Property**

Shell contends that the Decision is an unlawful taking pursuant to the Fifth and Fourteenth Amendments of the United States Constitution because it deprives Shell of its right to use the Pipeline for its own purposes. (Shell Rhg. App., at pp. 44-45.) Shell's contention is without merit.

Citing to *Pacific Telephone and Telegraph Company v. Eshleman* ("*Eshleman*") (1913) 166 Cal. 640, 680, 689-690, Shell argues that an agency can not

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<sup>38</sup> See e.g., Equilon and Shell Answer to Chevron Complaint (dated February 16, 2006), Equilon and Shell Opposition to Chevron Motion for Summary Adjudication (dated May 5, 2006), Equilon and Shell Motion to Dismiss (dated April 5, 2006), Equilon and Shell Reply to Opposition to Motion to Dismiss (dated May 1, 2006), Motion for Authority to File and Maintain Confidential Information (dated May 5, 2006), April Exhibits, Comments on Draft Decision (dated July 5, 2006), Reply Comments on Draft Decision (dated July 10, 2006).

deprive an owner of its exclusive right to use personal property without due process and compensation. Shell also cites to *Associated Pipe line, supra*, 176 Cal. at p. 529 to argue the Commission can not declare, by mere fiat, that an entity's assets are available to the public, and to *Kaiser Aetna et al. v. United States* ("*Kaiser Aetna*") (1979) 44 U.S. 164, 179-180 to argue that the right to exclude is a fundamental property right that can not be taken without compensation.

*Eshleman* and *Kaiser Aetna* do establish the above stated principles.

However, Shell offers no explanation or analysis to demonstrate how the Decision violates those principles. In addition, Shell ignores that when entities have dedicated their property to public use, regulation by an agency is a valid exercise of police power and does not constitute a taking. In *Eshleman* the California Supreme Court found:

One conspicuous example of the legitimate exercise of police power is evidenced by the right of regulatory control exercised by courts, boards, and commissions over property held in private ownership, but devoted by the owners to a public use.<sup>39</sup>

...the vitally essential principle limiting the exercise of police power and distinguishing it from the exercise of the power of eminent domain, is that private rights in the former case must, for the benefit of society, yield to reasonable regulations controlling the use of property, in the case of public utilities, within the use to which the property has been dedicated. The law has the power to regulate the use to increase efficiency and prevent abuses, and such regulations, though they involve an expenditure of money or a modification of the use, are regulations which the law-making power may impose by virtue of the very fact that the property has been dedicated to public use....such a regulation is not a taking within the constitutional inhibition...<sup>40</sup>

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<sup>39</sup> See *Eshleman, supra*, 166 Cal. at p. 662-663.

<sup>40</sup> *Id.*, at pp. 677-678. Also see *U.S. v. Ohio Oil, supra*, 234 U.S. at pp. 561-562 [Finding that it is not a taking for the government to find an oil pipeline company is a common carrier where it transported oil for members of the public, even though it held title to that oil while in its pipeline.].

As discussed in Section E, above, it was reasonable to find that the Pipeline has been dedicated to public use. Consequently, our exercise of regulation does not violate the Fifth and Fourteenth Amendments and is not a compensable taking. The Decision does not deprive Shell of its right to use the Pipeline to serve its own refinery needs nor does it deprive Shell of its right to continue to own and operate the Pipeline.

### **K. Abuse of Discretion**

Shell contends the Decision errs because it constitutes an abuse of discretion. (Shell Rhg. App., at pp. 45-47.) We disagree.

An abuse of discretion is established if: (1) an agency does not proceed in a manner required by law; (2) an order or decision is not supported by findings; or (3) the findings are not supported by the record.<sup>41</sup> Shell's contentions are each based on arguments that were previously raised and rejected in Sections G, H, J, and K of this Order. Accordingly, we will not repeat them here.

### **L. Request for Oral Argument**

Shell requests oral argument on the application for rehearing pursuant to Rule 16.3 of the Commission's Rules of Practice and Procedure. (Shell Rhg. App., at p. 48.)

Rule 16.3 of the Commission's Rules of Practice and Procedure provides that the Commission has complete discretion to determine the appropriateness of oral argument in any particular matter.<sup>42</sup> The Rule provides the following criteria as guidance:

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<sup>41</sup> Code of Civ. Proc., § 1094.5. Also see *Davis v. Civil Service Commission* (1997) 55 Cal.App.4<sup>th</sup> 677, 686-687; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4<sup>th</sup> 1215, 1236-1237.

<sup>42</sup> See Rule 16.3(a) of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, § 16.3, subd. (a).

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

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

(Cal. Code of Regs. Tit. 20, § 16.3, subd. (a).)

Shell claims that oral argument is warranted based on the broad allegation that the Decision triggers each of the above criteria. However, Shell does not explain or support its claim. Because Shell fails to establish that any of the criteria which might merit oral argument were met here, we deny Shell's request.

### III. CONCLUSION

For the reasons stated above, D.07-07-040 is modified to: (1) clarify the basis for not applying the doctrines of res judicata and judicial estoppel; (2) eliminate language that suggests the Decision asserts jurisdiction over crude oil companies who are not parties to this proceeding; (3) clarify the basis for finding that *Assoc. Pipe Line* is not controlling; (4) clarify certain findings of fact; and (5) add an ordering paragraph directing Shell to file tariffs for its third party contracts. Rehearing of D.07-07-040, as modified, is denied. In addition, we deny the request for oral argument.

Therefore **IT IS ORDERED** that:

- 1.D.07-07-040 is modified as follows:
  - a. Page 23, FOF 5 is modified to state:

“Defendants market excess capacity of the 20” Pipeline to other oil producers in the San Joaquin Valley and to Bay Area refineries.”

b. Page 24, FOF 7 is modified to state:

“Shell moves crude oil from the San Joaquin Valley to the Bay Area refineries, and receives compensation under the buy/sell agreements for the transportation service it provides.”

c. Page 10, first full paragraph, third sentence is modified to read:

“As discussed more fully below, res judicata and collateral estoppel bar a party in one case from re-asserting the same claim 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.” (footnote included)

d. Page 16, is modified to delete the first full paragraph, and restate the second full paragraph continuing to p. 17 to state:

“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 a prior litigation from redisputing issues therein decided, even when those issues bear on different claims raised in a later case.” *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815. Judicial estoppel prevents a party from asserting contrary positions in different legal proceedings. The public policy behind these doctrines is to encourage judicial efficiency. However, even if the elements of these doctrines are satisfied in this proceeding, we believe circumstances warrant our exercise of discretion to not apply the doctrines. In particular, it is relevant that this Commission was not a party to the prior action where the court considered whether the Pipeline was subject to Commission regulation. Yet, this Commission is the California agency vested with exclusive jurisdiction over public utilities, and is uniquely suited to determine whether the Pipeline should be subject to Commission jurisdiction. To the extent we were precluded from considering that matter previously, we should consider it now. Further, we note that judicial estoppel is usually invoked only where a party has

misrepresented or concealed material facts. There is no evidence in this proceeding that Chevron has acted in that manner.”

e. Page 25, COL 4 is modified to state:

“Res judicata and collateral estoppel prevent a party in a prior litigation from re-litigating lost claims or issues in subsequent proceedings between the same parties.”

f. Page 25, COL 5 is modified to state:

“We exercise our discretion as a decisionmaker not to apply res judicata or collateral estoppel to bar Chevron’s complaint.”

g. Page 26, COL 6 is modified to state:

“Chevron’s complaint is not barred by judicial estoppel because there is no evidence that Chevron has misrepresented or concealed material facts.”

h. Page 11, Section 7, first full paragraph, forth sentence is modified to state:

“The California Supreme Court found that the company was not subject to Commission jurisdiction because it transported crude oil only to itself or its affiliates.”

i. Page 21, first full paragraph to state:

“In holding that PG&E v. Dow Chemical is more applicable here, we necessarily decline to rely on Assoc. Pipe Line. Assoc. Pipe Line found that the company was not subject to Commission jurisdiction because it transported crude oil only to itself and/or its affiliates. Assoc. Pipe Line does not apply here because nothing in that case mentions sales documents, third party transactions, buy/sell agreements, or the relevance of holding title to the crude oil in the pipeline. The facts here are more analogous to U.S. v. Ohio Oil because Shell controls the only heated crude oil pipeline from the San Joaquin Valley to the Bay Area and it not only carries its own crude oil, but that of any other producer wanting to move its crude oil by that means.”

j. Page 25, FOF 19 is modified to state:

“In *Assoc. Pipe Line*, the California Supreme Court found that the company was not subject to Commission jurisdiction

because it transported crude oil only to itself and/or its affiliates.”

k. Page 14, second paragraph is modified to state:

“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 Equilon and Shell with respect to the 20” Pipeline.”

l. Page 23, FOF 5 is modified to state:

“Defendants market the excess capacity of the 20” Pipeline to other oil producers in the San Joaquin Valley and to Bay Area refineries.”

m. Page 26 is modified to add an Ordering Paragraph to state:

“Shell is directed to file tariffs for its third party contracts.”

2. Rehearing of D.07-07-040, as modified, is denied.

3. This proceeding, Case (C.) 05-12-004, is closed.

This order is effective today.

Dated December 6, 2007, at San Francisco, California.

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

I reserve the right to file a dissent.

/s/ RACHELLE B. CHONG

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Rachelle B Chong  
Commissioner

C.05-12-004

D.07-12-021

Commissioner Rachelle B. Chong, dissenting:

For the reasons stated in my dissent from the underlying decision, I am dissenting from the Commission's decision denying rehearing of D.07-07-040.

/s/ RACHELLE B. CHONG

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Rachelle B. Chong  
Commissioner