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Decision 12-02-038 February 16, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline.	Application 08-09-024 (Filed September 30, 2008)
And Related Matters.	Case 08-03-021 Case 09-02-007 Case 09-03-027

ORDER GRANTING LIMITED REHEARING OF DECISION (D.) 11-05-026 ON THE ISSUE OF THE CALCULATION OF THE REFUND, MODIFYING THE DECISION, AND DENYING REHEARING OF DECISION, AS MODIFIED, IN ALL OTHER RESPECTS

I. INTRODUCTION

Decision (D.)11-05-026 (or "Decision") involved Application (A.) 08-09-024, filed by San Pablo Bay Pipeline Company LLC ("SPBPC") for approval of tariffs for the San Joaquin Valley Crude Oil Pipeline ("Pipeline"). The proceeding also involved several complaint cases. In this decision, we (1) denied SPBPC's request to charge market-based rates for the transportation of heavy crude oil from the Pipeline; (2) set rates for the transportation of crude oil between the San Joaquin Valley and the San Francisco Bay Area at $1.34 per barrel; (3) resolved complaints filed by Independent Shippers[1] against SPBPC and Shell Trading US Company ("STUSCO")[2] and ordered

[1] "Independent Shippers" is the collective designation of Chevron Products Company ("Chevron"), Tesoro Refining and Marketing Company ("Tesoro") and Valero Marketing and Supply Company ("Valero") all of whom ship undiluted heavy crude oil on the Pipeline to their respective Bay Area

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refunds for past overcharges from April 1, 2005 to the effective date of D.11-05-026; (4) approved the transfer of physical assets from the Pipeline's former owner to SPBPC; (5) denied SPBPC's request to exclude certain tanks and truck racks from the assets transferred to it; and (6) adopted a tariff to govern the provision of heated oil transportation service by SPBPC.

San Pablo Bay Pipeline Company ("SPBPC") and Shell Trading Company ("STUSCO") timely filed an application for rehearing of the Decision. Each of the Independent Shippers (Chevron, Tesoro and Valero) filed timely responses that opposed the applications for rehearing.

In its rehearing application, SPBPC alleges the following errors: (1) The determination that refunds are due from April 2005 is not supported by the record, exceeds the Commission's authority, and constitutes an abuse of discretion; (2) the refund calculation and the forward-going rate are unlawful; (3) the Commission adopted unlawful tariff terms and conditions; and (4) the determination of public utility status involving the private storage tanks and truck racks is unlawful.

In its rehearing application, Shell Trading argues that (1) the determination to include private storage tanks and truck racks in SPBPC's jurisdictional property constitutes an unlawful taking under federal and state constitutions; (2) the Decision adopted unduly discriminatory tariff terms and conditions without providing necessary analysis or findings of fact to support the tariff; and (3) the Commission exceeded its legal authority by ordering refunds, and by imposing refund liability on STUSCO. SPBPC also requests oral argument.

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refineries. (D.11-05-026, p. 3, fn. 1.)

[2] STUSCO is an affiliate of SPBPC, and both entities make up the "Shell Parties" that also include Shell Oil Products US ("SOPUS") and their parent corporation, Royal Dutch Shell ("Shell"). SPBPC was created to serve as the public utility; it is the successor of Equilon Enterprises LLC dba Shell Oil Products U.S. ("Equilon"), and Shell Trading (US) Company. (See Application, p. 1.)

We have reviewed each and every issue raised in the applications for rehearing of D.11-05-026. For the reasons discussed below, we are of the opinion that good cause does exist for the granting of a limited rehearing solely on one issue: the correct methodology for determining the refund amount. We also modify D.11-05-026 to add some findings of fact and conclusions of law, correct one factual error, and clarify our decision to adopt April 1, 2005 as the start date for refunds for all three Independent Shippers. As to all other issues raised in the applications for rehearing, we are of the opinion that good cause does not exist to grant rehearing and we deny them.

II. DISCUSSION

A. SPBPC is a public utility subject to the Commission's jurisdiction.

SPBPC's public utility status affects two issues: when the 20" Pipeline acquired its public utility status; and whether the storage tanks and truck racks were dedicated to public use. (See SPBPC Rehrg. App., pp. 8-16; STUSCO Rehrg. App., pp. 10-12.) .

1. The pipeline's public utility status predates April 1, 2005.

SPBPC contends that the Commission did not make SPBPC a public utility until D.07-07-040 became effective on July 26, 2007;[3] thus, SPBPC claims that the Commission cannot order refunds for the period prior to this date. Further, SPBPC argues that a 1994 Appellate Court decision holding that the Pipeline was not providing public utility services rendered it a private carrier not subject to Commission jurisdiction

[3] *Chevron Products Company v. Equilon Enterprises, dba Shell Oil Products US, and Shell Tradition (US) Company* ("*Chevron v. Equilon*") [D.07-07-040] (2007) ___ Cal.P.U.C.3d ___, as modified and affirmed in *Order Modifying Decision (D.) 07-07-040 and Denying Rehearing, As Modified* ("*Rehearing Order*") [D.07-12-021] (2007) ___ Cal.P.U.C. ___, petition for writ of review summarily denied in *Equilon Enterprises LLC v. Public Utilities Commission of the State of California* (Cal. Court of Appeal, 2nd Appellate District, Division 5), Case No. B203949, filed June 26, 2008. The California Supreme Court denied the petition for review on August 20, 2008. (See *Equilon Enterprises LLC v. Public Utilities Commission of the State of California* (California Supreme Court), Case No. S164909).)

under Public Utilities Code section 451.[4] (SPBPC Rehrg. App., pp. 8-16.) These arguments should be rejected for the reasons discussed below.

D.07-07-040 involved a 265-mile-long 20-inch oil pipeline ("20" Pipeline") running from the San Joaquin Valley to the Bay Area, owned by Equilon (SPBPC's predecessor) and STUSCO. In this decision, we determined that we had jurisdiction over the oil pipeline companies that transported oil through buy/sell agreements in which they acquired title to all oil products passing through the line. (*Chevron v. Equilon* [D.07-07-040], *supra*, at p. 14 (slip op.).) Thus, we asserted jurisdiction over them as public utilities. (See *id.* at pp. 23-26 (slip op.).)

The findings of fact in D.07-07-040 establish that SPBPC was a public utility as of 2005, if not earlier. In D.07-07-040, we found that the dispute over the prices of certain buy/sell agreements between Chevron and Equilon (SPBPC's predecessor) and STUSCO under the Proprietary Pipeline Contract commenced in 2005. (*Id.* at p. 24 [Facting of Fact No. 9] (slip op.).) In addition, Finding of Fact No. 12 states that: "In December 2005, Chevron filed its complaint alleging the 20" Pipeline was a public utility that the Commission [had] exclusive jurisdiction to determine pricing for the pipelines." (*Id.* at p. 24 (slip op.).) Further, we found that Chevron had access to the 20" Pipeline for the last five years through buy/sell agreements with STUSCO pursuant to a Proprietary Pipeline Contract. (*Id.* at p. 24 [Finding of Fact No. 8] (slip op.). This would mean the contract would have commenced in 2002. Based on the above findings of fact, it is obvious that SPBPC was a public utility before 2005. (See also generally, *id.* at pp. 4-5 & 13-20 (slip op.), for a discussion of the factual dispute and the determination of public utility status.)[5]

[4] All subsequent section references are to the Public Utilities Code, unless otherwise specified.
[5] In D.07-07-040, the Commission discussed the necessary inquiry to determine the Pipeline's public utility status as follows: (1) find proof that the buy/sell agreements are a subterfuge used merely to avoid Commission regulation; (2) that Equilon and Shell Trading have, through the use of these agreements, either expressly or impliedly dedicated the 20" Pipeline to public use; and (3) whether the Pipeline has impliedly been dedicated to public use turns on the issue of whether buy/sell agreements are a subterfuge to mask the transportation of oil products for compensation. The Commission found evidence to support

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Further, in D.07-12-021, we examined the evidence in Case (C.)05-12-004, and found the Pipeline had been dedicated to public use. In D.07-12-021, we stated:

> 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 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.

(*Rehearing Order* [D.07-12-021], *supra*, at pp. 18-19 (slip op.), citing in fn. 26 to Exhibits Supplied Pursuant to ALJ Request and Request for Clarification, dated April 11, 2007, Exh. B, 2005 Reporter's Transcript (Martinez).)[6] Thus, SPBPC, as Equilon's successor, has been a public utility since 1996.

In D.11-05-026, we explained why we found that the past period for the refund to be from April 1, 2005 to the effective date of a commission-approved tariff. (D.11-05-026, pp. 13-14.) April 1, 2005 seems reasonable in light of our findings in D.07-07-040, and the evidence set forth in D.07-12-021. Accordingly, we did not err in considering the refund period as commencing on April 1, 2005.

The argument that SPBPC did not become a public utility until July 26, 2007 (the date of issuance of D.07-07-040) has no merit. This runs contrary to the determinations in D.07-07-040, as affirmed by D.07-12-021, as discussed above.

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a positive answer to all three questions. (*Id.* at pp. 15-16 (slip op.).)

[6] SPBPC argues that the language in D.07-12-021 is dicta and should not be followed. (SPBPC's Rehrg. App., p. 14.) Specifically, it argues the Commission did not make a specific finding of fact. (SPBPC Rehrg. App., pp. 9-10.) This argument is flawed because the Commission did make a determination of dedication to public use in D.07-07-040 (see Conclusion of Law No. 9), and D.07-12-021 was discussing the record supporting this determination. (See discussion, *supra*.) Further, this discussion consisted of statements that were more than general observations and unnecessary to the decision, and thus, was not dicta. (See *People v. Ranscht* (2009) 173 Cal.App.4th 1369, 1374, quoting *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal.App.4th 1279, 1301, for a discussion as to what constitutes dicta.)

These determinations are final and cannot be collaterally attacked through an application for rehearing of D.11-05-026. Section 1709 provides: "In all collateral actions or proceedings, the orders and decisions of the [C]omission which have become final shall be conclusive." (Pub. Util. Code, §1709.)

Further, SPBPC contends that the "prior determination of public utility status has only become fully ripe with the Decision's establishment of rates." (SPBPC's Rehrg. App., p. 10.) This contention has no merit, and also constitutes an impermissible collateral attack of our final and unappealable determinations in D.07-07-040 and D.07-12-021 that SPBPC, as Equilon's successor, is a public utility, and has been operating as a public utility with respect to Chevron as of 2005, or even earlier.

There is no authority to support SPBPC's proposition that a pipeline is a public utility only as of the date of a Commission decision. (SPBPC Rehrg. App., p. 9.) SPBPC cites to none. Moreover, SPBPC's claim that the July 26, 2007 date controls is not supported by law because the definition of "public utility" depends on the actions of an entity. (See Pub. Util. Code, §§ 216, 218.) In particular, section 216(b) provides that a pipeline corporation is a public utility service subject to the jurisdiction of the Commission whenever it "performs a service for, or delivers a commodity to, the public or any portion thereof." (Pub. Util. Code, §216, subd. (b).) Also, "the test of [public utility] status is to be found in "acts and performance" of an entity. (See *Public Utilities California Corp* [D.37389] (1944) 45 C.R.C. 462, 465-466.)

SPBPC also asserts there has been no dedication. (SPBPC Rehrg. Application at p. 9.) In support of its argument, it cites two cases: *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419 and *Associated Pipe Line Co. v. Railroad Commission of Cal.* (1917) 176 Cal. 518. These cases have no relevance because dedication to public use was found in D.07-07-040 and D.07-12-021, and because they do not support SPBPC's contention that the Commission must first make a "requisite finding" before an entity is considered a public utility. Thus, SPBPC's assertion lacks merit and we reject it.

2. The Decision will be modified to add a finding of fact and two conclusions of law.

SPBPC further alleges that the Decision is devoid of findings of fact or conclusions of law on the material issue of when the Pipeline became subject to the reparations jurisdiction of the Commission. (SPBPC Rehrg. App., p. 9.) We agree that the Decision may require additional findings of fact and conclusions of law on this issue.

In D.11-05-026, we relied on D.07-07-040 to determine that SPBPC was a public utility subject to our jurisdiction even as early as 2002. (D.11-05-026, pp. 13-14.) We chose April 1, 2005 because all parties including SPBPC treated that date as the earliest date for which refunds could be sought. (D.11-05-026, p. 14.) Thus, we measured all refund claims from that date forward. (D.11-05-026, p. 14.)

However, the Decision lacks sufficient findings of fact and conclusions of law on this matter. Thus, we will modify D.11-05-026 to add a finding of fact and two conclusions of law, as set forth in the Ordering Paragraphs below.

3. The 1994 Court of Appeal Decision did not preclude the Commission from finding public utility status as of 1996 in D.11-05-026.

SPBPC contends that an appellate court's decision in the *People v. Chevron Corporation, et al* ("*1994 Decision*") precludes the Commission from finding that the Pipeline has been providing public utility service since 1996.[7] Specifically, it argues that this appellate decision is binding, and thus, claims that the Pipeline's status as a private carrier ended on July 26, 2007, and not any sooner, when D.07-07-040 became effective. (SPBPC Rehrg. App., pp. 12-16.) This contention lacks merit.

The 1994 Decision is not relevant to our determination of our jurisdiction over the Pipeline as a public utility in D.07-07-040, as affirmed by

[7] *People v. Chevron Corporation, et al* ("*1994 Decision*"), California Court of Appeal, Second Appellate District, Division One, Case No.B078250, filed August 3, 1994 [not certified for publication], review denied *People v. Chevron Corporation, et al.*, California Supreme Court, Case No. S042133¸ filed October 27, 1994.

D.07-12-021. Also, what SPBPC omits to mention is that the allegations in the complaint and in the stipulation of the parties establishes that the 1986 lawsuit involved in the appellate court's decision was limited to "events or conditions existing no later than December 31, 1985."[8] In the 1994 Decision," the Court of Appeal concluded that, during the 1980-1985 period litigated in the 1986 lawsuit, "the percentage of piped oil acquired from other producers was very low." (*1994 Decision*, *supra*, at p. 11 (unpublished slip op.), which is found as Attachment 13 to Complaint in C.05-12-004.) While the record in C.05-12-004 does not show precisely when after 1985 this key fact changed, the evidence was undisputed that it had substantially changed by 1996, as shown by the following table summarizing the information provided by Shell:

Percentage of Crude Transported on the Pipeline for Third Parties[9]

1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	1996-2005
60.6%	52.2%	52.2%	42.0%	51.9%	46.0%	39.6%	41.6%	38.0%	40.6%	46.4%

Therefore, contrary to SPBPC's argument, the *1994 Decision* did not prevent us from finding public utility status as of 1996 in D.11-05-026, or the earlier decisions: D.07-07-040 and D.07-12-0021. Again, we reiterate that the determinations of public utility status made in D.07-07-040 and D.07-12-021 are final and unappealable, and are not subject to an impermissible collateral attack. (See Pub.Util. Code, §1709.)

B. The storage tanks and truck racks were dedicated to public use, as they were found to be utility property.

D.11-05-026 requires SPBPC to treat certain storage tanks and truck racks as assets subject to Commission jurisdiction. (D.11-05-026, p. 8.) To the extent that SPBPC sought to exclude these assets from its rate base, the Decision treats that as an

[8] C.05-12-004, Long Beach Complaint, ¶ 27 (Attachment 1 at 13) (emphasis added); Stipulation Re: Issues of Fact, filed March 22, 1993, ¶¶ 1-2 (Exhibit 4 to Chevron's Request for Official Notice in Support of Opposition to Motion to Dismiss ("Chevron's Request for Official Notice") at 2).
[9] C.05-12-004, Shell's Supplemental Response to First DRs (Appendix, Tab 3, Attachment 2).

unsuccessful de facto application for section 851approval for the transfer of property that is not necessary or useful in the performance of its duties to the public. (D.11-05-026, p. 8.)

SPBPC and STUSCO challenge the determinations that the storage tanks and truck racks were dedicated to public use. Specifically, they argue that the decision lacks specific findings that the storage tanks or truck racks were now or ever dedicated to public use, and if there was such a finding, it would not be supported by record evidence. They further argue that there is no evidence that SPBPC unequivocally and intentionally dedicated these assets to public use. Moreover, they argue that we failed to properly weigh the evidence, and employed an incorrect legal standard for determining whether there was "dedication" of the property. (See SPBPC Rehrg. App., pp. 46-61; STUSCO Rehrg. App., p. 10-12.)

1. There were legally sufficient findings of fact and conclusions of law on the Commission's determination that the storage tanks and truck racks were public utility assets.

Section 1705 provides that Commission decisions shall "contain separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision." (Pub. Util. Code, §1705.)

In the Decision, there is a lengthy discussion about these assets – as to whether they were or were not public utility assets. (D.11-05-026, pp. 4-9.) This is a material issue to D.11-05-026. The issue of dedication to public use was presumed, since that issue had been decided in D.07-07-040. (See discussion in fn. 5, *supra*.)

Based on the record evidence, we concluded that they were public utility assets, and thus denied SPBPC's request to exclude these storage tanks and truck racks from the assets transferred from the Pipeline's former owner to SPBPC. (See D.11-06-026, pp. 4-9.)

The Decision contains the following findings of fact that show that the storage tanks and truck racks were public utility property:

1. The Shell Parties propose excluding truck racks and 2 proprietary tanks at Coalinga; truck racks and 5 proprietary tanks at Bakersfield; and 1 proprietary tank at Rio Bravo from the Pipeline assets being sold to Applicant.
2. The assets identified in FOF 1 are useful or necessary in the conduct of Applicant's business.

(D.11-05-026, p. 33.) Further, the Decision contains the following conclusions of law regarding the storage tanks and truck racks:

2. Sale or other disposition of public utility property useful or necessary in the conduct of a public utility's business requires the prior approval of this commission pursuant to Pub. Util. Code § 851.

3. The Application is also a de facto application for § 851 approval of the transfer out of public utility service of the assets identified in FOF 1.

5. The de facto application of San Pablo Bay Pipeline Corporation for authorization to transfer out of public utility service the assets identified in FOF 1 should be denied.

(D.11-05-026, pp. 34-35.)

Therefore, these findings of fact and conclusions of law were sufficient to comply with section 1705 requirements as to the determination of whether the storage tanks and truck racks were public utility assets. Thus, dedication to public use was presumed with the finding that these assets were utility property, and there was no need to make separate findings of fact and conclusions of law on this issue.

Also, SPBPC's request to exclude the assets was based on an argument that these assets were "unnecessary to the common carrier operation of the Pipeline," and not an issue of dedication to public use. As we noted: "The burden of proof is on Applicant to demonstrate that property excluded from the transfer of the Pipeline to SPBPC is unnecessary to operation of the Pipeline as a public utility." (D.11-05-026, p. 5 [Footnote

omitted].) In weighing the evidence presented by SPBPC and the Independent Shippers, we were not convinced by SPBPC's argument.

2. Record evidence supports the Decision's findings.

The evidence shows that the Pipeline has historically been operated as an integrated system. (Ex. Chevron-47 at p. 55 (Lee).) In D.07-07-040, we found the entire Pipeline to be a public utility, on the basis that it had continually provided this capacity to third parties since 1996. (*Rehearing Order* [D.07-12-021], *supra*, at pp. 18 -19 (slip op.).) Since the entire Pipeline system, including the disputed assets under discussion, has been operating as a public utility prior to its transfer to SPBPC, the Decision was correct in treating SPBPC's and STUSCO's attempt to remove these public utility assets from its rate base as an §851 application. Under that statutory section, the applicant's burden of proof is to demonstrate that property excluded from the transfer of the Pipeline to SPBPC is unnecessary to operation of the Pipeline as a public utility. (D.11-05-026, p. 5; citing *Re Pacific Gas and Electric Co.* [D.00-02-046] (2000) 4 Cal.P.U.C.3d 315.) The evidentiary record shows, however, that the Pipeline has indeed dedicated the disputed assets to public use and that they are necessary to the regulated business of transporting crude oil.

The Decision recognizes that many of the tanks marked private by the Pipeline, such as crude oil truck unloading facilities and tankage for storage, were necessary to keeping the pipeline system operating in the past, are used and useful in utility service, and are necessary under readily anticipated circumstances to maintain heated service, which the Independent Shippers need for transportation of SJVH. (Independent Shippers ("IS") Exh. 1, pp. 12-13; see Tesoro Exh. 17, Response No. 27 of San Pablo Bay to Chevron's Third Set of Data Requests and Attachment F ("Fixed Asset' Database"), dated April 21, 2009; Tesoro Exh. 31 (Georgen), pp. 13-14; Chevron Exh. 47C (Lee), pp. 7-10; Chevron Exh. 47 (Lee), p. 55; RT. Vol. 8, p. 1433 (Miller/Tesoro).) The Pipeline's own witnesses effectively support the need for all tankage to be included in utility assets. (RT Vol. 5, pp. 435-436, 438, 440, 477, 463-470 (Dompke/SPBPC); and (RT Vol. 3, pp. 851, & 863-864 (LaBorne/SPBPC).) Mr. Dompke's testimony

demonstrates that utility service subsidizes Shell's private activities, including the "regrading" of inferior quality Outer Continental Shelf crude ("OCS") supplies into SJVH. This is counter to the principles of regulation, which rest on the equal access of all shippers to facilities used to provide a utility service, and can only be corrected by including these assets in SPBPC's rate base.

In addition, the evidence demonstrates that the truck unloading facilities that are marked "private" on Exhibit Tesoro 6 (diagram of the pipeline's facilities) are operational and have been used by the Pipeline for STUSCO's proprietary trading activities and service to third parties. (Tesoro Exh. 31 (Georgen), pp. 5-6 and 10-11.)

In their argument that we failed to weigh the evidence by relying on the testimony of Tesoro's witness, Mark Georgen, (SPBPC Rehrg. App., pp. 55-56 and 58-59; STUSCO Rehrg. App., pp. 10-12), the rehearing applicants fail to mention that his testimony was confirmed by all other witnesses: Mr. Miller for Tesoro, Mr. Lee for Chevron, and Shell's Messrs. Dompke and LaBorne, or the detailed multi-day shipper tour of all system assets in 2008 in which Mr. Georgen participated. His testimony was undisputed, as The Shell Parties waived cross-examination of Mr. Georgen. There was no mention in the record of any "confusion" over "storage tanks" and "break-out tanks" as STUSCO indicates. (STUSCO Rehrg. App., p. 11.) If that was indeed the case, STUSCO failed to persuade us of that argument. It is not error for the Commission to weigh the evidence differently.

In support of their claim that the assets are not used and useful, the rehearing applicants rely on the testimony of Pipeline witness Paul Smith to the effect that they were identified as not required for public utility service. (SPBPC Rehrg. App., pp. 52-53; Smith, Ex. SP-17, pp. 5-10 & Smith, Ex. SP-18, pp. 3-4.) However, Mr. Smith's testimony provided no explanation as to why the tanks and truck racks were not needed, how the Pipeline determined they were not needed, how they have been historically used or how they are expected to be used if held for STUSCO's private use. When responding to Tesoro data requests asking for an explanation for Mr. Smith's additional review of Pipeline assets at each location, SPBPC responded that there were no

such documents. (Tesoro Exh. 9, Response of San Pablo Bay to Tesoro's Seventh Set of Data Requests, dated April 1, 2010 (Data Response No. 260.) Simply claiming, with no support or explanation, that assets are not necessary or useful to utility service does not provide an evidentiary foundation to support giving STUSCO preferential access to these assets to the exclusion of the Independent Shippers.

In light of the above, and contrary to the rehearing applicants' arguments, we did weigh the evidence, and found Mr. Georgen's testimony, and that of the other witnesses supporting his position whether the storage tanks or truck racks were public utility assets (including presumptively dedication to public use) more persuasive than Mr. Smith's.

Also, we denied the transfer of these assets based on a concern of possible discrimination. (D.11-05-026, p. 8.)[10] This was based on evidence that demonstrated that the operation of the storage tanks and truck racks outside of the regulated utility could mean discriminatory and preferential treatment to the Pipeline's affiliated shipper. We believed that the retention of all pipeline assets in the regulated pipeline was a way to ensure adequate, reliable and non-discriminatory service to all shippers. The Decision correctly determined that the Pipeline has not met its burden of proving the assets are not used and useful, and thus, should, if it wishes to divest assets or withdraw them from utility service, file a Section 851 application that complies with established Commission procedure and meets the required burden of proof. (D.11-05-026, pp. 4-9.)

3. The Commission correctly weighed the evidence and concluded that the rehearing applicants had not met their burden of proof.

The rehearing applicants also argue that the Decision erroneously applied the assignment of the burden of proof in an unlawful manner. (SPBPC's Rehrg. App., pp. 61-64; STUSCO's Rehrg. App., pp. 8-9.) We reject this argument.

[10] The Public Utilities Code prohibits public utilities from providing discriminatory service to their affiliates. (See Pub. Util. Code §§ 453 & 461.5.)

The rehearing applicants repeat arguments made to the Commission in past cases (see D.07-07-040) as to Commission jurisdiction, and now argue that the burden of proof lies with the Independent Shippers as to what actually constitutes the jurisdictional property making up the Pipeline system.[11] The record shows that Shell's witness merely stated that the assets at issue are proprietary without more detail. Under section 851, SPBPC must present proof that such assets are not used and useful—which it clearly did not. The Decision recognizes this in our analysis of this issue, and thus, its findings are supported by record evidence.

SPBPC incorrectly argues that the Public Utilities Code "does not assign a burden of proof to a particular party to a Commission proceeding." (SPBPC Rehrg. App., p. 61.) However, relevant statutes in the Public Utilities Code place the burden of proof on the public utility asking for Commission authorization or approval. For example, section 454(a) requires a public utility to provide a "showing before the commission" that a rate change is justified. (Pub. Util. Code, §454, subd. (a).) Another example, and of import in the instance case, is section 851 that mandates a public utility to "secure an order" from the Commission to transfer, sell, lease, assign, mortgage, dispose of, or encumber its jurisdictional property. (Pub. Util. Code, §851.) Even STUSCO admits that the applicant bears the burden to remove utility property from service. (STUSCO Rehrg. App., p. 8.) STUSCO also asserts that the burden of proving that private assets are necessary to the operation of the pipeline is on its competitors. (STUSCO Rehrg. App., p. 9.) However, none of the cases that STUSCO relies upon state that this burden of proof applies if the applicant, as it did here, initially included the facilities as part of its public utility service and conceded that the system has operated as a single entity. (*Ibid.*)

[11] Opening Comments of Shell Trading (US) Company on the Presiding Judge's Proposed Decision, filed April 8, 2011 ("STUSCO Comments"), pp. 4-8; Comments of San Pablo Bay Pipeline Company on Proposed Decision of ALJ Bemesderfer, filed April 8, 2011 ("SPBPC Comments"), pp. 16-20; SPBPC Rehrg. App., pp. 61-64; STUSCO Rehrg. App., pp. 8-9.

If SPBPC wished to withdraw assets from public utility service, SPBPC was required to prove that these assets were not used and useful; the Independent Shippers have no burden of proof in this regard. (See Pub. Util. Code §851; see also, *Application of Pacific Gas and Electric Co*. [D.04-03-036] (2004) __ Cal. P.U.C.3d __, p. 28 (slip op.).) Accordingly, the Decision appropriately finds that SPBPC failed to carry that burden, since the evidence shows that the tanks and truck racks have been and are necessary or useful to the Pipeline's public utility service.[12]

4. The determination to not exclude the storage tanks and truck racks does not constitute an unconstitutional taking.

STUSCO claims that our determination to include the storage tanks and truck racks is an unlawful taking of property without just compensation. (STUSCO Rehrg. App., pp. 13-14.) This claim has no merit.

The takings argument starts from the premise that there was an involuntary conversion of the storage tanks and truck racks to public utility service. (SPBPC's Rehrg. App., p. 36.) This premise is false. The Pipeline was converted to public utility status by the voluntary actions of SPBPC's predecessors, Equilon and STUSCO. (See D.07-07-040, *supra*, at p. 26 [COL 8 and 9] (slip op.).) With the Pipeline becoming a public utility, its assets that were used and useful became public utility property. Thus, there was no taking.

[12] As stated above, the Decision leaves SPBPC free to file a section 851 application if it chooses to do so. (D.11-05-026, p. 9.) Since the rate base adopted by the Commission includes the value of the disputed assets (nearly $10 million) (D.11-05-026, p. 19), there is no prejudice to SPBPC or its affiliate, STUSCO. The Decision adopts the analysis of Chevron witness Matthew O'Loughlin that the proper rate base with the contested tanks and truck racks included is $110,447,187. (Chevron Exh. 49 (O'Loughlin), MPO_81, Schedule 3.) If the contested assets were excluded, the appropriate rate base would be $100,763,947. (Chevron Exh. 49 (O'Loughlin), MPO_63, Schedule 3.)

C. The Commission correctly found that the refund period commenced on April 1, 2005

1. The Decision correctly adopts a three year statute of limitations.

SPBPC argues that the refund period with respect to each complainant should be governed by the two year statute of limitations imposed under section 735, and measured from the date of the filing of each party's complaint. (SPBPC Rehrg. App., p. 19.) We reject this argument.

SPBPC's claim that section 735 is the controlling statute is incorrect. Since the Pipeline had no rates on file with the Commission, by definition it charged rates in violation of section 494.[13] Section 735 specifically excludes the application of the two year statute of limitations for complaints regarding violations of section 494 (see Pub. Util. Code, §735), and therefore does not apply. Section 493(b) allows the Commission to set just and reasonable rates if the public utility has provided transportation service. (Pub. Util. Code, §493, subd. (b).)

The Decision correctly adopted a three year statute of limitations to the complainants' refund claims on the basis that violations of section 494 are subject to a three year statute of limitations under Section 736. (D.11-05-026, p. 13; see Pub. Util. Code, §§ 494 & 736.)

[13] Section 494(a) provides in relevant part: "No common carrier shall charge, demand, collect, or receive a different compensation for the transportation of persons or property, or for any service in connection therewith, than the applicable rates, fares, and charges specified in its schedules filed and in effect at the time . . ." (See *e.g., Ortega v. AT&T Communications* [D.98-10-023] (1998) 82 Cal.P.U.C.2d 310, 313. ["Because the rate increase reflected in AL 254 was not approved by the Commission, and is therefore invalid, charging such a rate is unreasonable, thus enabling the Commission to order reparations. . . ."). A utility cannot escape its statutory obligation by the expedient of failing to file a tariff.

2. The Commission lawfully treated April 1, 2005 as the earliest date from which refunds could be sought by all independent shippers, including Chevron, Tesoro and Valero.

The Decision adopted April 1, 2005 as the start date for measuring refunds, on the ground that "when the assigned Administrative Law Judge (ALJ) consolidated the refund cases with the San Pablo Bay Pipeline Company rate case, all parties including the rehearing applicants, treated April 1, 2005 as the earliest date from which refunds could be sought. Accordingly, all refund claims will be measured from that date forward." (D.11-05-026, pp. 13-14.) All parties agreed to the April 1, 2005, including SPBPC. (See February 13, 2009 "Joint Motion to Consolidate Proceedings," p. 1, filed by SPBPC and Chevron.) Thus, without specifically stating the obvious, our Decision was based on SPBPC's implied waiver of its right to object to the start date for refunds on the basis of a violation of the three year statute of limitations.

3. The statute of limitations commencing on April 1, 2005 was equitably tolled.

The statute of limitations in section 736 was tolled by the filing and pendency of Chevron's C.05-12-004. That complaint, like all the others filed and consolidated into this docket, sought refunds from April 1, 2005, putting the Pipeline on notice of the claim. Chevron filed C.05-12-004 in December 2005, seven months into the limitations period. Tesoro intervened in that proceeding on December 12, 2005, and adopted Chevron's Complaint as its own.[14] The statute of limitations remained tolled until August 20, 2008, when the court challenges to D.07-07-040 and D.07-12-021 filed by SPBPC's predecessors, Equilon and STUSCO, in the California Court of Appeal and the California Supreme Court were finally denied. (*See Equilon Enterprises LLC Et al. v. Public Utilities Commission of the State of California*, California Court of Appeal,

[14] Petition of Tesoro Refining and Marketing Co. to Intervene and Become a Party in the Complaint. Brought by Chevron Products Co. Against Equilon Enterprises LLC, Doing Business as Shell Oil Products U.S. and Shell Trading Co., filed in C.05-12-004 on December 13, 2005.

Second Appellate District, Division Five, Case No. B203949 – Order denying petition for writ of review (June 26, 2008); *Equilon Enterprises LLC Et al. v. Public Utilities Commission of the State of California*, California Supreme Court, Case No. S164909 – Order denying petition for review (August 20, 2008) [2008 Cal. Lexis 10214].) Because of the tolling of the statute of limitations mandated in section 736, Chevron and Tesoro had another two years and five months from August 20, 2008 to file their subsequent complaints based on the same facts and claims set forth in their 2005 complaints. Thus, C.08-03-021 by Chevron and C.09-02-007 by Tesoro were timely filed on March 27, 2008 and February 13, 2009, respectively.

Equitable tolling "is a judge-made doctrine which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370, quoting *Addison v. State of California* (1978) 21 Cal.3d 313, 318-319) [holding statute of limitations tolled where plaintiff first filed in federal court and, after federal case was dismissed and statute had run, filed state claim in state court]; *see also Bollinger v. National Fire Ins. Co.* (1944) 25 Cal. 2d 399, 405 & 411 ["When claims are honestly made, care should be taken to prevent technical forfeitures . . . ."].) The doctrine works "to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." (*Lantzy*, 31 Cal.4th at p. 370.)

Courts evaluate three factors to determine whether tolling is equitable: "(1) timely notice to defendants in filing the first claim; (2) lack of prejudice to defendants in gathering evidence to defend against the second claim; and (3) good faith and reasonable conduct by plaintiffs in filing the second claim." (*Downs v. Dep't of Water and Power of Los Angeles* (1997) 58 Cal.App.4th 1093, 1100 [holding the statute of limitations was equitably tolled where the second action "was based on the identical facts and charges" as the first action]; see also, *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 971, 924; *Addison*, 21 Cal.3d at p. 319.) The first factor requires that the plaintiff file the first claim within the statutory period and provide timely notice to the

defendant of the second claim. (See *Downs*, 58 Cal.App.4th at p.1100.) The second factor requires that " 'the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him or her in a position to fairly defend the second.' " (*Id*., quoting *Collier*, 142 Cal.App.3d at p. 925). The final factor requiring good faith and reasonable conduct by the plaintiff is "less clearly defined," but has been determined by courts based on the promptness of the plaintiff's second claim. (See *id*.)

Like the courts, we have applied equitable considerations to toll the statute of limitations in cases where declining to do so would result in unfairness to the claimant. (*See In Re MCI WORLDCOM, Inc. and Sprint Corp.* {D.02-07-030] (2002) __ Cal. P.U.C.3d __, p. 34 (slip op.) ["We feel justified in invoking the broad powers granted us in § 701, to do all things necessary and convenient in the exercise of our jurisdiction to supervise and regulate public utilities."].)

We believe that Chevron and Tesoro satisfy all three factors for equitable tolling. Chevron filed a timely complaint in December 2005, providing timely notice to Equilon and STUSCO. We bifurcated the original complaint into two parts, the first considering whether the Pipeline is a public utility and the second, "an appropriate ratesetting proceeding." (D.07-07-040, *supra*, at p. 3 (slip op.).) We did not conduct the ratesetting in that case, effectively deferring it to the present proceedings, and therefore the refund claims remained pending, as the claims relate back to 2005. Since the current complaints for refunds are largely based on identical facts and charges as Chevron's first complaint, Equilon and STUSCO cannot claim to have been prejudiced in their ability to gather evidence to defend against the current complaints, and they have proffered no arguments or evidence to that effect. Chevron and Tesoro acted in good faith and reasonably in filing their second action after awaiting the outcome of Equilon and STUSCO's court challenges, and then filing their current claims for refunds.

We believe that equitable tolling should also apply to Valero's complaint, C.09-03-027, which was filed March 23, 2009, as amended by Valero on June 16, 2009, asserting a claim under section 494. For the equitable reasons discussed below, we deny

the rehearing application on this issue as it pertains to Valero, so that it too should be entitled to refunds from April 1, 2005, rather than March, 2006, (if one applies a three year limitations period to its claim.)

As a matter of equity, tolling the statute for Valero's complaint would "prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." *(Lantzy*, *supra*.) We should keep in mind that the record shows that long before 2005, the Pipeline, while engaging in public utility activities, consistently violated the Public Utilities Code, thereby unlawfully profiteering to the detriment of all three complainants. To cut short Valero's right to legitimate refunds even further by not tolling the three year statute of limitations would be unjust, because under the circumstances of this case, the rationale and purpose of that statute would not be served.

The United States Supreme Court has held:

> "Statutes of limitations are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

(3 Witkin Cal. Proc. Actions, § 408 (4th ed. 2006), quoting *Order of Railroad Telegraphers v. Railway Express Agency* (1944) 321 U.S. 342, 349.) Strict application of the statute of limitations is not warranted for those purposes. Here, the Pipeline would have used the same facts and witnesses, whether they were being sued by one, two or all three of the complainants. The material issues were identical in all three complaints. Like Chevron and Tesoro, Valero entered into buy-sell contracts with the Pipeline many years prior to 2005, and based its complaint on the same set of facts as the other two complainants. All three suffered from the Pipeline's unlawful transactions well before 2005. There is no evidence to suggest that the SPBPC or STUSCO suffered further prejudice as a result of the additional complaint being filed by Valero in terms of their

ability to gather evidence to defend themselves. Under these circumstances, we are justified in concluding that the statute of limitations was tolled for Valero's complaint.

Furthermore, as the Decision states, our calculations of the extent of the Past Period are based on the fact that "all parties including Applicant treated April 1, 2005 as the earliest date for which refunds could be sought." (D.11-05-026, p. 14.) SPBPC consented to the refund period extending back to April 1, 2005. On February 13, 2009, Chevron and SPBPC filed a joint motion to consolidate proceedings and agreed that the issues would be: "(a) whether the rates Defendants charged from April 1, 2005 until the effective date of their approved tariff were unjust and unreasonable, and (b) if so the amount of any refund Defendants should pay shippers." The joint motion refers to shippers in the plural, anticipating the eventual consolidation with the complaint cases filed by Valero and Tesoro. Valero's subsequent motion to consolidate – which SPBPC stipulated to – notes that the claims in the Valero complaint case "directly relate to the rate case proceedings, to wit: pipeline demands for retroactive rate increases and appropriate refunds for past periods of utility service." (*See* "Motion of Valero Marketing and Supply Company for Consolidation of Proceedings, p. 2, and Attachment 1.) Thus, SPBPC consented to the April 1, 2005 date as the refund period for Valero's complaint case. Similarly, SPBPC did not object to the Scoping Ruling issued in the consolidated proceedings on April 27, 2009, which defined the "Past Period" for refunds as extending to April 1, 2005. Accordingly, SPBPC obviously waived any objections on statute of limitation grounds.

We note that the discussion in D.11-05-026 lacks a clear and thorough explanation of our rationale for applying April 1, 2005 as the start date for refunds for all three Independent Shippers. Although the Decision makes references to D.07-07-040 (that was challenged in Court on the issue of public utility status,) and to the fact that SPBPC agreed to treat April 1, 2005 as the earliest date for which refunds could be sought (see D.11-05-026, pp. 13-14.), the Decision is ambiguous, and thus, must be modified based on the discussion above, and as set forth in the Ordering Paragraphs below.

D. The rule against retroactive ratemaking is inapplicable to refunds in this proceeding.

Both SPBPC and STUSCO assert that ordering any refund in this proceeding constitutes illegal retroactive ratemaking. (SPBPC Rehrg. App., p. 21; STUSCO Rehrg. App., p. 22-25.) This assertion is wrong as a matter of fact and law. The law is clear that retroactive ratemaking prevents retroactive changes to previously-established rates. (see Pub. Util. Code, §728.) The facts in the instant proceeding show there were no previously Commission-approved rates for the utility. Since at least April 1, 2005, the Pipeline has operated as a common carrier without a valid tariff or rates on file, in violation of California law. (See e.g., Pub. Util. Code § 451.) By definition therefore, ordering refunds in this instance cannot constitute retroactive ratemaking as they do not adjust an established general and basic rate. The Decision's refunds merely set an initial rate for service after April 1, 2005.

In the past, we have found that rate increases that have not been specifically approved by the Commission, such as in this matter, are invalid and *per se* unreasonable, thus warranting an order of refunds. *(*See e.g., *Ortega v. AT&T Commc'ns of California, Inc* [D.98-10-023] (1998) 82 Cal.P.U.C. 2d, 310, 312-313; see Pub. Util. Code, §454, which requires all public utilities to obtain Commission approval prior to increasing rates.) Under section 734, these refunds constitute reparations to the complainants for previously unapproved unjust and unreasonable charges.

The rehearing applicants reliance on Section 728 and *Pacific Telephone and Telegraph Company v. Public Utilities Commission*, (1965) 62 Cal.2d 634 and *Southern California Edison Co. v. Public Utilities Commission*, (1978) 20 Cal.3d 813 (STUSCO Rehrg. App., p. 22) for the proposition that the Commission can only establish rates prospectively does not support their retroactive ratemaking argument. Unlike in this instance, those authorities apply to situations where the Commission had previously approved the utilities rates.

Were the rule as SPBPC and STUSCO contend, companies like them would have an incentive not to file their rates with the Commission because failure to file

would immunize the rates from challenge and allow them to evade their refund obligations. Moreover, every order of refunds for unlawful charges by any utility would be illegal retroactive ratemaking, which would be contrary to section 734. This argument has no merit, and accordingly, we reject it.

E. The Decision correctly holds that STUSCO is jointly and severally liable for the refunds

The Decision imposed a refund obligation "jointly and severally" "upon the parties to whom the past period overcharges were paid, namely, Equilon and/or STUSCO." (D.11-05-026, pp. 13-14, 30, & 36 [Ordering Paragraph No. 3].) STUSCO claims that the Commission lacks legal authority to impose these refund obligations upon it, because it does not own the Pipeline or other assets or facilities over which the Commission has jurisdiction, and because it is not a pipeline corporation, public utility, or common carrier. (STUSCO Rehrg. App., pp. 21-22.). STUSCO is wrong on the facts and as a matter of law.

A pipeline corporation "includes every corporation or person owning, controlling, operating, or managing any pipeline for compensation within this state." (Pub. Util. Code, §228.) A public utility includes "every . . . pipeline corporation." (Pub. Util. Code, §216.) Common carrier "means every person and corporation providing transportation for compensation to or for the public or any portion thereof." (Pub. Util. Code, §211.) STUSCO satisfies all these legal definitions.

We have already found that STUSCO is a pipeline corporation, a public utility and a common carrier. (D.07-07-040, *supra*, at p. 26 [COL 8 and 9] (slip op.).) That is the law of this case. STUSCO cannot escape its refund obligation by now claiming the contrary. Equilon and STUSCO must remain jointly and severally liable for payment of refunds to ensure that the Independent Shippers are compensated for their losses. Otherwise, every public utility could evade regulation by this Commission if it has a parent company that holds all of its assets and revenue.

F. Although the use of the STUSCO market-based rate as a proxy for the just and reasonable rate for the refund period is lawful and appropriate, a limited rehearing is granted to establish the appropriate refunds so as to reflect the variable monthly charges to STUSCO.

In determining a just and reasonable rate for the refund period, and in order to even the playing field for all shippers, we used the STUSCO market-based rate as a proxy to calculate refunds. (D.11-05-026, p. 18.) This was the rate SPBPC's witness swore the pipeline "negotiated" with its affiliate STUSCO for transportation service during the relevant period. (D.11-05-026, p. 18 [COL 6-9;] RT. 650, Vol. 4, pp. 6-651:24 (LaBorne/SPBPC).) This determination is well within our ratemaking discretion. SPBPC, however, while not citing any authority that suggests otherwise, alleges, for the reasons discussed below, that the refund rate is unlawful. (SPBPC Rehrg. App., pp. 21-32.) Only one of SPBPC's claims has merit.

SPBPC presents three arguments on this issue. It argues: (1) the refund rate should be cost-based, and not an "economically based rate" (SPBPC Rehrg. App., p. 24); (2) the proxy rate should be based on actual monthly variations in the transportation charges ("SMR Rate") for deliveries of SJVH Blend to the Shell Martinez Refinery, and not, as the Decision determined, on two, single monthly invoices (one from April 2005 and one from January 2006) (SPBPC Rehrg. App., p. 25); and (3) the rate should include line fill and heated service charges (SPBPC Rehrg. App., p. 28.).

We hereby grant rehearing on the second issue only, because there is merit to SPBPC's argument that the Decision appears arbitrary in that it provides no reasonable explanation for fixing the rates for the entire refund period on two single monthly invoices when in fact the rate charged STUSCO for transportation of SJVH Blend is adjusted on a monthly basis. Consequently, without modifying the Decision's determination that the STUSCO proxy rate is the correct measure (see below), limited rehearing is granted to determine the calculation of the refunds based on the monthly rate variations during the refund period.

1. The use of the STUSCO market-based rate as a proxy to calculate refunds is consistent with the use of traditional cost of service principles for the going-forward rate.

SPBPC asserts the Decision's use of the proxy STUSCO market-based rate for refunds is "arbitrary" and inconsistent because the Decision set the going-forward rate based on traditional cost of service principles. (SPBPC Rehrg. App., p. 24.) This argument has no merit.

The adoption of traditional cost of service principles for the going forward rate followed D.10-11-010.[15] In that decision, we held that the Pipeline possesses and has exercised market power over the Independent Shippers, and therefore, could not charge market-based rates. (Id. at p. 16 (slip op.).) Because there was no evidence that the Pipeline exercised market power over its affiliate, STUSCO, we are not obliged to adopt traditional cost of service principles to determine the refund.

SPBPC also argues it is "arbitrary" to use the STUSCO rate because that rate was not for undiluted SJV Heavy, as the Decision on page 18 states, but reflected what STUSCO would have paid if it shipped the light and heavy crude that makes up its blend separately. (SPBPC Rehrg. App., pp. 24-25.) This argument, although technically correct in terms of stating that Shell did not charge STUSCO to ship SJVH, but SJV Blend, is a red herring and we reject it. The Pipeline is heated regardless of whether the stream is a batch of heavy or a blend of heavy and light. (RT Vol. 3, p. 415 (Dompke/SPBPC).) If the pipeline were run as an unheated pipeline when Shell was shipping Blend, then the price charged by the pipeline to its affiliate would not be a good proxy for the just and reasonable price to the shippers. But all oil in the pipeline is shipped heated, so the price charged to Shell's affiliate for shipping heated SJV Blend is a

[15] *Application of San Pablo Bay Pipeline Company LLC for Approval of Tariffs for the San Joaquin Valley Crude Oil Pipeline – Interim Decision Denying Application to Charge Market-Based Rates* [D.10-11-010] (2010) ___ Cal.P.U.C.3d ___.

good proxy for the just and reasonable price to the shippers for shipping heated SJV Heavy, even though different types of oil are being shipped.

Since the Decision mistakenly identifies the rate the Pipeline charged STUSCO as pertaining to SJVH, we will further modify the Decision to reflect that the proxy rate refers to the rate the Pipeline charged STUSCO for shipping SJVH Blend. Also, an additional finding of fact is added which states: "All oil on the Pipeline, whether heavy, light, or blended, is shipped heated."

2. The exclusion of line fill and heated service in the refund proxy rate is not contrary to the record and does not constitute an abuse of discretion.

SPBPC claims that it is an "abuse of discretion" for the Commission not to add two cost elements to the STUSCO market rate used as the refund proxy. (SPBPC Rehrg. App., pp. 28-32.) These two cost elements are line fill and an incremental cost for heating SJV Heavy. There is no merit to this argument.

SPBPC argues that in order to properly determine the just and reasonable rate to be charged by SPBPC during the refund period, that the relevant inquiry for the Commission was, with respect to pipeline utility transportation services provided during the refund period: (1) Are the Independent Shippers responsible for line fill costs with respect to such utility service; and (2) Have the Independent Shippers either provided line fill or reimbursed SPBPC for line fill costs at any time during the refund period. (SPBPC Rehrg. App., p. 30.) It goes on to argue that because the evidence demonstrates that Independent Shippers have not borne their share of line fill costs during the refund period, the refund rate must be adjusted on rehearing to include such line fill costs. (SPBPC Rehrg. App., p. 31.)

SPBPC cites the testimony of Chevron witness O'Loughlin to support this claim. (SPBPC Rehrg. App. at 28.) Mr. O'Loughlin acknowledged that the cost of line fill should be added to his calculation of the appropriate refund rate. (Chevron Exh. 50 (O'Loughlin), MPO_93.) He testified however, that the cost of line fill should be

included as part of a cost of service calculation. The STUSCO rate that we adopted, however, is a "market" rate, not a cost of service rate, so this testimony is irrelevant.

There is no logical reason – and SPBPC offers none – to add a cost element to a market rate, except to try to make the rate higher. Also, there is no evidence demonstrating that the buy/sell rate did not incorporate an implicit charge for line fill. The Decision properly relies only on the record evidence in this regard. Furthermore, all line fill was provided by the Pipeline itself. (SPBPC Rehrg. App., p. 28.) It took title to all crude in the Pipeline. (Chevron Exh. 28.) SPBPC has failed to offer any evidence of its actual costs of line fill, and it has the burden to do so. It provided no direct or rebuttal testimony on this issue. There is no basis, therefore, for adding a line fill charge to the STUSCO rate when calculating the refunds due the Independent Shippers.

SPBPC argues further that the Decision is "unlawful in its allegedly arbitrary exclusion of heating costs from its calculation of the refund rate." (SPBPC Rehrg. App., pp. 31-32.) This also lacks merit. As discussed above, the STUSCO rates the Decision uses for the refund calculations are largely based on the rates the Pipeline charged the Independent Shippers for SJV Heavy – rates that both included heating and that reflected the Pipeline's exercise of market power. There is no basis in the record for SPBPC's claim that failing to add heating costs is "arbitrary" or that would justify adding heating or any other cost to the STUSCO proxy rate. SPBPC asserts that "[i]t is factually inaccurate and contrary to the evidence of record to assert that SJVH Blend requires heating in order to be transported on the Pipeline." (SPBPC Rehrg. App., p. 32.) This is not the point. Whether heating is "required" or not, the evidence shows, as confirmed by the Pipeline's own witness, that the Pipeline is heated regardless of whether the stream is a batch of heavy or a blend of heavy and light. (RT Vol. 3, p. 415 (Dompke/SPBPC).) The Decision is therefore correct that "[a]ll oil in the pipeline, whether heavy or light, is shipped heated. Therefore there is no cost differential." (D.11-05-026, p. 32.) Accordingly, SPBPC's argument on the need to add heating costs to the proxy rate is unjustified and we reject it.

G. The forward-going rate established by the Decision is lawful.

SPBPC argues that "[t]he Decision's establishment of a forward-going rate of $1.34/bbl. is unlawful in various respects: (1) the Decision is in conflict with Commission precedent and not supported by record evidence because the adopted $1.34 cost-based rate arbitrarily assumes a rate base for SPBPC based upon depreciated original cost rather than the fair value of the utility assets; and (2) the Commission arbitrarily and contrary to the evidence imposes the same rate for heated SJVH and unheated SJVH Blend service, ignoring the undisputed evidence of higher costs related to heated service. (SPBPC Rehrg. App., p. 33.) Again, these arguments have no merit.

The Decision states that "[b]ecause Applicant's proposed rate is based on its erroneous contention that it lacks market power, we reject it and limit our discussion to consideration of Chevron's proposed rate and its underlying justification." (D.11-05-026, pp. 18-19.) SPBPC chose to only support its case for market-based rates, which we rejected in D.10-11-010. Shell as a family of companies submitted cost of service rates for Commission consideration only in the rebuttal testimony of Mr. Van Hoecke. (SP Exh.38 (Van Hoecke).) That testimony however, is partial, derivative, and inaccurate in many ways. "It is a fundamental principle of public utility regulation that the burden rests heavily upon a utility to prove it is entitled to rate relief and not upon the commission, its staff or any interested party . . . to prove the contrary." (*Application of Golden State Water Co.* [D.08-01-020] (2008) __ Cal. P.U.C.3d __, p. 2 (slip op.). Commission precedent has long established that the applicant has the burden to show that its rates are just and reasonable. (Pub. Util. Code § 451; see e.g., *Application of Southern California Edison Company for Authority to, Among Other Things, Increase Its Authorized Revenues For Electric Service in 2009, And to Reflect That Increase In Rates, and Related Matter* [D.09-03-025] (2009) __ Cal. P.U.C.3d __, p. 8 (slip op.).) SPBPC failed to carry this burden, and the Decision correctly finds that Chevron's evidence was more credible and consistent with Commission precedent than SPBPC's.

1. The Decision's use of the depreciated original cost (DOC) approach for the forward-going rate is consistent with traditional ratemaking principles.

The Decision adopts an original cost rate base of $110.5 million. (D.11-05-026, p. 34 [FOF 13].) SPBPC wants an enhanced rate base that is more than twice that amount – $239 million. (SPBPC Rehrg. App., p. 36.) SPBPC's claim is based on the argument that Commission precedent and policy establish that fair market value ("FMV") is the measure of rate base in cases involving the conversion of proprietary pipeline assets to public utility status. (SPBPC Rehrg. App., p. 33.) SPBPC, however, presented no evidence of the actual "value" of the Pipeline, so its position -- that the use of original cost is contrary to Commission precedent and policy and is not supported by any reliable evidence -- has no merit and we reject it.

The Commission has a "long-established practice that utility assets are to be valued at depreciated original cost at the time such assets are first dedicated to public service." (*Application of Red and White Fleet, Inc*, [D.97-06-066] (1997) 72 Cal.P.U.C.2d 851, 866l, citing *Application of Southern Pacific Pipe Lines, Inc.* [D.88-11-059] (1988) 29 Cal.P.U.C.2d 635, 640 & *Application of California Water Service Co.* [D.94-02-045] (1994) 53 Cal.P.U.C.2d 287, 290). The Decision rightly concludes that Chevron's witness O'Loughlin's analysis is the only one that is consistent with these ratemaking principles. (D.11-05-026, pp. 19-20.)

SPBPC relies on *City of Long Beach v. Unocal California Pipeline Co.* ("*Unocal*") [D.96-04-061] (1996) 66 Cal.P.U.C.2d 28, and *Atlantic Richfield Co.* [D.88640] (1978) 83 Cal.P.U.C. 582, 1978 Cal.P.U.C.LEXIS 837, to argue that the Commission should deviate from its standard ratemaking and instead adopt what SPBPC calls a "fair value" rate base. While we have occasionally allowed a pipeline voluntarily undertaking public utility service to use a "fair value" rate base with the agreement of its shippers, neither case supports SPBPC's position as they are clearly distinguishable on the facts.

In both the *Unocal* and *Atlantic Richfield* cases, the utility voluntarily committed the assets to public use as part of a settlement. There was no evidence the assets had been dedicated earlier than the date of voluntary dedication. The evidence in this case shows the Pipeline was dedicated before 1996 in that, by 1996, an average of 60.6% and as high as 82.6% of capacity was devoted to third party service. (Chevron Exh.48 (O'Loughlin), MPO_14.) The Pipeline did not prove the contrary, and therefore, its allegations that the Decision unlawfully and without record support assumes that the Pipeline was dedicated to utility service since 1996 is incorrect.

Moreover, in the *Unocal* decision, we did not establish cost-of-service rates using a "fair value" rate base. Rather, the Commission held that, where the evidence showed Unocal's rates were "subject to market discipline," it was appropriate to evaluate the reasonableness of Unocal's proposed initial market-based rates by comparing the achieved return on a "fair value" rate base. (*Unocal* [D.96-04-061], *supra*, 66 Cal.P.U.C.2d at pp. 35-37.) The only statement in the case supporting a "fair value" rate base under any circumstance is that "where a new oil pipeline company is dedicating its facilities to public use for the first time, the circumstances may merit the use of fair value rate base." (*Id.* at p. 30, citing *Atlantic Richfield, supra*.) In this case, the Pipeline did not dedicate its facilities to public use for the first time on August 1, 2007, as SPBPC maintains.

Regarding SPBPC's numerous assertions that the record does not provide support for the Decision's treatment of the forward-going rate, the testimony and exhibits of the Independent Shipper witnesses O'Loughlin for Chevron and Ashton for Tesoro provided a detailed study of the assets, the value of the assets, appropriate return and other traditional COS elements. The Decision recognizes this in its analysis. For instance, the Decision finds it appropriate for Mr. O'Loughlin to depreciate the original cost of assets added to the rate base in 1996 and afterwards, as we specified this date in a final, non-appealable decision, based on the ample record evidence before us in D.07-07-040. (D.11-05-026, pp. 19-20; see also, Chevron Exh. 48 (O'Loughlin), MPO_14.) The Decision also adopts Chevron's analysis of the cost of equity and

pipeline loss allowance ("PLA") as the analysis is consistent with Commission policy. Notably, the Decision states, "There is no good policy reason for the estimated PLA to differ significantly from the actual PLA." (D.11-05-026, p. 23.) This observation is logical and consistent with ratemaking principles, utilizing actual costs of service.

Contrary to SPBPC's assertions, the record evidence supports the Decision's determinations as to the rates. The Independent Shippers presented evidence to demonstrate rates for service in a range of $1.34 using one method and $1.42 using a similar and complementary approach. These two numbers are the only rates supported by detailed testimony in this matter. The Decision selects the approach used by Chevron's witness supporting the rate of $1.34. The record evidence shows that the Pipeline vastly exaggerated its numbers, e.g. rate base (Chevron Exh. 48, p. 23); equity capital structure (Chevron Exh. 48, pp. 53 and Chevron Exh. 49, pp. 27-29); operating expenses and income tax allowance (Chevron Exh. 49, p. 73, Figure 12); depreciation expense (Chevron Exh. 49, p. 73, Figure 12) and overall cost of service (Chevron Exh. 49, Attachment MPO_84.) Shell Pipeline witnesses underestimated throughput by more than 5,000,000 barrels per year, thereby artificially inflating the per-barrel rate. (*Compare* SP Exh. 23, at Att. A, to Chevron Exh. 32, Shell Monthly Shipper Data, at p. 5.) Therefore, the Decision correctly concluded that the just and reasonable rate is $1.34/bbl, and is based on a detailed analysis in the record of actual costs of service of all cost categories consistent with Commission precedent. (D.11-05-026, p. 37 [Ordering Paragraph No. 7.)

2. The rate established in the Decision does not result in an unlawful taking.

SPBPC asserts that our adoption of a depreciated original cost of the Pipeline's utility assets to determine the rate base value and the associated forward-going rate constitutes an unlawful taking. (See SPBPC Rehrg. App., pp. 36-37.) Again, their argument is premised on an allegation of involuntary conversion. However, as discussed above, the Pipeline was converted to public utility status by the voluntary actions of SPBPC's predecessors, Equilon and STUSCO. (See D.07-07-040, *supra*, at pp. 26

[COL 8 and 9] (slip op.).) With the Pipeline becoming a public utility, its assets that were used and useful became public utility property. Thus, there was no taking.

Even if SPBPC were correct that the Pipeline had been "involuntarily" converted to public utility status, the Fifth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, does not proscribe any taking, only the taking of private property for public use "without just compensation." The U.S. Supreme Court has held that just compensation is received when a public utility is authorized to charge rates for its services that are not "so 'unjust' as to be confiscatory." (*Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 307.) As long as the rate affords sufficient compensation, there is no unlawful taking. (*Id.* at p. 308.)

Furthermore, the Fifth and Fourteenth Amendments to the U.S. Constitution nowhere state that the Commission is required to use a fair market value approach to determine the rate base of a public utility. Similarly, Sections 7(a) and 19 of Article I of the California Constitution contains no such language. It is well-established that "[m]erely asserting in general language that rates are confiscatory is insufficient; the facts relied on must specifically demonstrate that the rates necessarily deny plaintiff just compensation and deprive it of its property without compensation." (*In the Matter of the Application of Apple Valley Ranchos Water Company Etc.* [D.06-06-039] (2006) ___ Cal.P.U.C.3d ___, p. 14 (slip op.), 2006 Cal. PUC LEXIS 209, *25.) SPBPC provided no evidence that demonstrated that the rate proposed by Chevron – and adopted by the Commission – fell below the constitutional standard. Thus, SPBPC's constitutional taking claim has no merit.

SPBPC asserts that the Decision's adopted rate of $1.34 denies SPBPC the opportunity to earn a return on the full market value of its investment in the Pipeline at the time when the Commission ordered the Pipeline to be placed in pubic utility service in August 2007. (SPBPC Rehrg. App., p. 36.) However, the Supreme Court has long established that public utilities are not guaranteed a fair rate of return: (*Pub. Service Comm'n of Montana v. Great Northern Utilities Co.* (1933) 289 U.S. 130, 135.) Case law provides that a "regulated utility has no constitutional right to a profit, and a company

that is unable to survive without charging exploitative rates has no entitlement to such rates." (*See Jersey Central Power & Light Co. v. FERC* (D.C. Cir. 1987) 810 F.2d 1168, 1180-81.) The Commission is not required to guarantee a revenue stream or rate of return to Shell Pipeline. (*See Public Serv. Com. of Monatana v. Great Northern Util. Co.* (1933) 289 U.S. 130, 136-137.) Rather, we must afford the Pipeline the opportunity to earn a return on its investment. The Decision does just that, given that the Pipeline will earn a reasonable 10.71% return on its investment under the traditional cost of service analyses submitted in this matter. (D.11-05-026, p. 34 [FOF 18].) The evidence shows that this return covers all of the actual operating costs of Shell Pipeline. (Chevron Exh. 48, pp. 53:24-57:4 and Chevron Exh. 49, pp. 27-29.) Under the fair market value approach and $1.73/bbl rate that SPBPC proposes, it would earn a 21.1% return on its actual investment. This return is well above those approved by this Commission for regulated entities, and is contrary to ratemaking principles where the pipeline and its marketing affiliate are combined in ownership and operation of regulated assets.[16]

3. The Decision's adoption of the same rate for both heated and unheated service is lawful.

SPBPC claims it is "unlawful" for the Commission to adopt a single rate for all shipments on the Pipeline, whether they be for SJV Heavy or SJV Heavy Blend. As the Decision correctly points out, all crude shipped on the Pipeline is in fact heated throughout its shipment. (D.11-05-026, p. 32.) As discussed above, the Pipeline's witness stated that the Pipeline is heated regardless of whether the stream is a batch of heavy or a blend of heavy and light. (RT Vol. 3, p. 415 (Dompke/SPBPC).) Thus, the actual cost of shipping SJV Heavy Blend is the same as the cost of shipping pure SJV Heavy.

[16] *See* Chevron Exh. 4, Excerpts from Department of Justice 1986 Report, *Oil Pipeline Deregulation*, (1986), p. 37, where the U.S. Department of Justice states, "When such a pipeline and refinery have a common owner, however, the cost to the combined facility is the actual cost of transporting the crude on the pipeline and the nominal tariff is irrelevant."

The record reflects that Shell, through its marketing arm, benefits from the use of the heated assets and that the system needs to be heated for SJVH (Independent Shippers) and San Joaquin Valley Blend ("SJVB") volumes. To provide a rate differential for blended service to STUSCO to relieve it of heating costs will grant unwarranted rate benefits to Shell Pipeline's marketing affiliate and require a rate subsidy from SJVH shippers.[17] Therefore, the record supports the conclusion that one rate applies to heated and unheated service.

4. The Commission has authority to adopt a tariff that addresses market power concerns, and by establishing equal treatment of all shippers, including STUSCO, the adopted tariff terms and conditions are lawful.

The rehearing applicants' challenges to the Commission-approved tariff provisions fail to provide a legal or factual basis to revise the Decision, and we reject them. A fundamental impediment to their arguments is that they ignore the fact that the Decision's adopted tariff terms and conditions are to a large extent the result of our concerns with the Pipeline's historical exercise of market power, as recognized in D.10-11-010. The tariffs apply the principle that all shippers should receive non-discriminatory service on an equal footing. This is both an ordinary principle of public utility operation, (Pub. Util. Code, § 454, subds. (a) & (c),) and a necessary corrective to the years of affiliate favoritism and abuse that have characterized the operation of this Pipeline. The Decision appropriately provides protection for a competitive market in the adopted tariff, while treating the Pipeline affiliate, STUSCO, equally with all other shippers. (D.11-05-026, pp. 26-27.)

SPBPC contends we acted "unlawfully" by "uncritically embrac[ing] all of the Independent Shippers' tariff proposals." (SPBPC Rehrg. App., p. 39.) However, the Independent Shippers' tariff was the only one supported by detailed testimony explaining

[17] *See, e.g., Opening Brief of Tesoro Refining and Marketing Company,* filed June 21, 2010 ("Tesoro Opening Brief"), pp. 44-45.

its provisions. (Chevron Exh. 46 (Lee); Tesoro Exh. 25 (Grimmer); Tesoro Exh. 32 (Miller).) In contrast, STUSCO never presented testimony or evidence on these or any other matters. SPBPC's proposed tariff was supported by limited testimony that did not explain or defend the provisions, and with later testimony that only suggested strongly that the parties confer to develop a consensus tariff. (*See* SP Exh. 20 (Ralph), pp. 4-6, 9-10, 12-13.) On the critical issues of nominations and the maintenance of heated service for the undiluted SJVH crude oil, Shell Pipeline's testimony merely "acknowledges that various issues . . . remain," and that they "present challenges to both the carrier and shippers." *(See* SP Exh. 20 (Ralph), pp. 9 &13.) Finally, the applicants' arguments on tariff issues rely exclusively on arguments of counsel which, as a matter of law, fail to carry their burden of proof.[18] Given this paucity of worthwhile testimony from the rehearing applicants on this issue, their complaints that the tariffs are unlawful and that the Decision's analysis lacks merit are rejected.

Both rehearing applications further charge that the Decision's adopted tariff is "discriminatory" against STUSCO. (SPBPC Rehrg. App., pp. 38-50; STUSCO Rehrg. App., pp. 14-17.) There is no merit to this accusation. As the Decision notes, "The Independent Shippers tariff is a marked-up version of the SPBPC tariff that departs from it in certain specific respects, particularly with regard to guaranteeing that all shippers have equal access to the pipeline." (D.11-05-026, p. 32.) The Decision points out that "the revisions [to the tariff terms and conditions] proposed by Independent Shippers are aimed at eliminating or reducing the opportunity for the Pipeline to be operated in ways that favor the Pipeline's affiliates or disadvantage Independent Shippers." (D.11-05-026, p. 26.) The Decision adopts a fair and reasonable tariff that treats all shippers equally,

[18] *See In the Matter of the Order Instituting Investigation and Order to Show Cause on the Commission's own Motion into the Operations and Practices of Fan Ding (aka Ding Fan or Lisa Ding), Etc*, [D.05-07-037] (2005) __ Cal.P.U.C.3d ___, p. 23 (slip op.), 2005 Cal. PUC LEXIS 309, *33 ["CPSD offered no testimony at hearing, only the statements of counsel which are not evidence"); D.10-11-010, *supra*, at p. 4, fn. 3 (slip op.), citing to *Golden State Water Company for An Order Authorizing It to Increase Rates for Water Service Etc*. [D.08-01-020] (2008) ___ Cal.P.U.C.3d __.

(D.11-05-026, pp. 24-28, Appendix A.) and is consistent with section 453(a), that provides that no public utility shall grant a preference or advantage to any corporation or person, or subject them to any prejudice or disadvantage. (Pub. Util. Code, §453, subd. (a).)

SPBPC also complains that our adoption of the Independent Shippers' mark-up of its tariff, specifically Items 55, 55.1, 20-B and 130, "improperly intrude[s] upon and interfere[s] with utility management authority and operating discretion." (SPBPC Rehrg. App., p. 42.) SPBPC cites *Pacific Tel. & Tel. Co. v. Pub. Util. Com.* (1950) 34 Cal.2d 822, to support its argument that rejection of its proposed tariff in favor of one that treats all shippers equally is an "improper intrusion upon utility management authority." (SPBPC Rehrg. App., p. 44.) However, we have stated that "[t]he 'invasion of management rationale is widely discredited . . . ." (*OIR to Establish Policies and Cost Recovery Mechanism for Generation Procurement and Renewable Resource Development* [D.03-06-074] (2003) __ Cal. P.U.C. __, p. 13 (slip op.).) Furthermore, we have explicitly broadened our authority over utilities and their affiliates since *Pacific Tel.* issued in 1950. (*OIR to Develop Standard Rules and Procedures for Regulated Water and Sewer Utilities Governing Affiliate Transactions and the Use Of Regulated Assets for Non-Tariffed Utility Services* [D.10-10-019] (2010) __ Cal.P.U.C.3d __, p. 31 (slip op.), citing *Pacific Telephone and Telegraph Co. v. Public Utilities Com., supra* ; see also Pub. Util. Code, §701.)

Current Commission policy favors the supervision of utilities and their affiliates to ensure against market gaming and manipulation. Particularly when the public interest is at stake, we have the authority to require a utility to revise tariff provisions concerning the utility's operations. (*Order Instituting Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning* [D.04-12-048] (2004) __ Cal. P.U.C. 3d __, pp. 128-129 (slip op.) [mandating competitive solicitations to protect consumers from any anti-competitive conduct between utilities and their non-utility affiliates].)

Both rehearing applicants object to specific tariff provisions that eliminate unfair advantages they previously enjoyed. None of the challenges to these tariff provisions have merit, either for the reasons discussed above, or because they do not amount to a claim of legal error. In their responses to both applications for rehearing, all the Independent Shippers identify the extensive record evidence that supports the Decision's adoption of just, reasonable and non-discriminatory tariffs. (*See* Chevron Opposition, pp. 26-38; Tesoro Response, pp. 31-39; and Valero Response, pp. 9-16.) Since our Decision is based on record evidence that supports the adopted tariffs, and because we discussed the basis for our adoption of those tariffs, it is not unlawful or discriminatory. Accordingly, the applicants' arguments are rejected.

H. The request for oral argument should be denied.

In its rehearing application, SPBPC requests oral argument on the grounds that we have changed existing precedent, and the rehearing application "presents legal issues of exceptional controversy and complexity, and raises questions of first impression that are likely to have significant precedential impact." (SPBPC Rehrg. App., p. 1, fn. 2.)

Rule 16.3(a) of the Commission's Rules of Practice and Procedure permits rehearing applicants to submit requests for oral argument on a rehearing application. (Cal. Code of Regs., tit. 20, §16.3, subd. (a).) We have complete discretion to determine the appropriateness of oral argument in any particular matter. (*Ibid*.)

In the instant case, SPBPC does not specify the issues that it claims needs oral argument. It also fails to provide a detailed analysis as to why oral argument should be granted. Thus, SPBPC's request for oral argument is denied.

I. The partial stay granted in D.11-10-019 should not be lifted.

On August 8, 2011, SPBPC and STUCSCO jointly filed a motion for partial stay of D.11-05-026, asking for a stay from the order that requires them to pay refunds. We granted a stay pending our resolution of the applications for rehearing. (*Order Granting Motion for Partial Stay of Decision (D.) 11-05-026* [D.11-10-019]

(2011) ___ Cal.P.U.C.3d, p. 3 (slip op.). Since we are granting limited rehearing on the proper methodology to be used to determine the refunds, the partial stay will remain in effect pending the outcome of the limited rehearing.

III. CONCLUSION

Based on the discussion above, limited rehearing of D.11-05-026 is granted on the issue regarding the correct methodology for determining the refund. The Decision is also modified to add findings of fact and conclusions of law regarding the public utility status of SPBPC; to correct an error on page 18 to reflect that the proxy rate refers to the rate the Pipeline charged STUSCO for shipping SJVH Blend; to add a finding of fact that all oil on the Pipeline is shipped heated. The Decision is also modified to provide a clear explanation and two conclusions of law regarding the equitable tolling of the statute of limitations. As to all other issues, the rehearing applications of SPBPC and STUSCO of D.11-05-026, as modified, should be denied, as no legal error has been demonstrated.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of D.11-05-026 is granted on the sole issue of how to calculate the appropriate refunds using the actual monthly variations in the transportation charges for deliveries of SJVH Blend to the Shell Martinez Refinery during the refund period.

2. The discussion beginning in the second paragraph on page 13 and ending on page 14 in section entitled "3. Extent of the Past Period" should be deleted and replaced by the following:

> We further note the statute of limitations in section 736 was tolled by the filing and pendency of Chevron's C.05-12-004. That complaint, like all the others filed and consolidated into this docket, sought refunds from April 1, 2005, putting the Pipeline on notice of the claim. Chevron filed C.05-12-004 in December 2005, seven months into the limitations period. Tesoro intervened in that proceeding on December 12, 2005, and adopted Chevron's Complaint as its own. The statute of limitations remained tolled until August 20, 2008, when the court challenges to D.07-07-040 and D.07-12-021 filed by SPBPC's

predecessors, Equilon and STUSCO, in the California Court of Appeal and the California Supreme Court were finally denied. (*See Equilon Enterprises LLC Et al. v. Public Utilities Commission of the State of California*, California Court of Appeal, Second Appellate District, Division Five, Case No. B203949 – Order denying petition for writ of review (June 26, 2008); *Equilon Enterprises LLC Et al. v. Public Utilities Commission of the State of California*, California Supreme Court, Case No. S164909 – Order denying petition for review (August 20, 2008) [2008 Cal. Lexis 10214].) Because of the tolling of the statute of limitations mandated in section 736, Chevron and Tesoro had another two years and five months from August 20, 2008 to file their subsequent complaints based on the same facts and claims set forth in their 2005 complaints. Thus, C.08-03-021 by Chevron and C.09-02-007 by Tesoro were timely filed on March 27, 2008 and February 13, 2009, respectively.

Equitable tolling "is a judge-made doctrine which operates independently of the literal wording of the Code of Civil Procedure to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370, quoting *Addison v. State of California* (1978) 21 Cal.3d 313, 318-319) [holding statute of limitations tolled where plaintiff first filed in federal court and, after federal case was dismissed and statute had run, filed state claim in state court]; see also *Bollinger v. National Fire Ins. Co.* (1944) 25 Cal. 2d 399, 405 & 411 ["When claims are honestly made, care should be taken to prevent technical forfeitures . . . ."].) The doctrine works "to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." (*Lantzy*, 31 Cal.4th at p. 370.)

We believe that equitable tolling should also apply to Valero's complaint, C.09-03-027, which was filed March 23, 2009, as amended by Valero on June 16, 2009, asserting a claim under § 494. The tolling of the statute of limitation for Valero's complaint would "prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." *(Lantzy*, *supra*.) We should keep in mind that the record shows that long before 2005, the

> Pipeline, while engaging in public utility activities, consistently violated the Public Utilities Code, thereby unlawfully profiteering to the detriment of all three complainants. To cut short Valero's right to legitimate refunds even further by not tolling the three year statute of limitation would be unjust, because under the circumstances of this case, the rationale and purpose of that statute would not be served.
>
> Moreover, when the assigned Administrative Law Judge (ALJ) consolidated the complaints filed by Chevron, Tesoro and Valero with the San Pablo Bay Pipeline Company rate case, all parties including Applicant treated April 1, 2005 as the earliest date for which refunds could be sought. Accordingly, all refund claims will be measured from that date forward.

3. On page 34, D.11-05-026 is modified to add Finding of Fact No. 19, with the following language: "April 1, 2005 is a reasonable start date for measuring the amount of refunds."

4. On page 35, D.11-05-026 is to add Conclusion of Law No. 10, which shall contain the following language: "D.07-07-040 and D.07-12-025 established that SPBPC, as a successor of Equilon, became a public utility before 2005."

5. On page 35, D.11-05-026 is modified to add Conclusion of Law No. 11, with the following language:

> "The Commission determined in D.07-07-040, as affirmed by D.07-12-021, that Equilon (SPBPC's predecessor) and STUSCO had manifested an unequivocal intention to dedicate the 20" Pipeline to public use by engaging in the business of transporting oil for a fee, and that the Pipeline had been dedicated to public use in that its capacity has been provided to third parties since 1996."

6. On page 35, D.11-05-026 is modified to add Conclusion of Law No. 12, which shall state the following: "The statute of limitations in Public Utilities Code Section 736 was tolled by the filing and pendency of Chevron's C.05-12-004, and the Court resolution of the challenges to D.07-07-040."

7. On page 35, D.11-05-026 is modified to add Conclusion of Law No 13, with the following language:

> "Complaints filed under § 494 must be brought within the three-year limitation period set forth in Public Utilities Code § 736."

8. On page 35 D.11-05-026 is modified to add Conclusion of Law No 14, with the following language:

> "Under the doctrine of equitable tolling, the complaints of all three Independent Shippers were timely filed."

9. On page 35, D.11-05-026 is modified to add Conclusion of Law No 15, with the following language:

> SPBPC nevertheless waived its right to object to all three complaints on the ground that they violated the statute of limitations, by agreeing to April 1, 2005 as the start date for measuring each complainant's refund claims, as stated in their respective complaints.

10. D.11-05-026 is modified to add Finding of Fact No. 20, with the following language:

> "All oil on the Pipeline, whether heavy, light, or blended, is shipped heated."

11. The first full sentence on page 18 in D.11-05-026 is modified to read as follows: "We look instead to the rate the Pipeline charged its affiliate STUSCO to ship SJVH Blend to the Shell Martinez refinery during the same period."

12. The partial stay granted in D.11-10-019 shall remain in effect pending the outcome of the limited rehearing.

13. Except for the granting of rehearing on the sole issue of how to calculate the appropriate refunds set forth in Ordering Paragraph No. 1, rehearing of D.11-05-026, as modified, is denied in all other respects.

This order is effective today.

Dated February 16, 2012, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners