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Decision 07-07-040 July 26, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Chevron Products Company, Complainant, vs. Equilon Enterprises LLC, dba Shell Oil Products US, and Shell Trading (US) Company, Defendants.	Case 05-12-004 (Filed December 5, 2005)

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

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1. Summary

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

This case is closed.

2. Procedural Background

This proceeding concerns the 265-mile-long 20-inch heated oil pipeline running from the San Joaquin Valley to the Bay Area (the 20" Pipeline). On December 5, 2005, Chevron Products Company (Chevron) filed this complaint against Shell Trading (US) Company (Shell Trading) and Equilon Enterprises LLC, doing business as Shell Oil Products US (Equilon), which is the owner of the 20" Pipeline. The complaint accuses Equilon and Shell Trading of operating the 20" Pipeline as a public utility and argues that the pipeline should be subject to Commission rate regulation. Tesoro Refining and Marketing Company (Tesoro) intervened seeking the same relief and raising the same allegations.

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

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

ALJ Walker granted requests by the moving parties to file replies to the motion to dismiss.

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

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

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

3. Factual Dispute

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

In 2005, prior to filing its complaint with this Commission, Chevron disputed the prices of certain buy/sell agreements with Shell Trading. In accordance with the terms and conditions of the Proprietary Pipeline Contract, the dispute was submitted to arbitration. An arbitration decision was issued on June 20, 2005, establishing the price per barrel under the buy/sell agreements through December 31, 2005.

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

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

4. Motion to Dismiss

Equilon and Shell Trading move to dismiss on three grounds. First, they maintain that the doctrines of *res judicata* and collateral estoppel bar Chevron from maintaining the complaint because it was a party to an earlier adjudication before the California Court of Appeal in which the same 20″ Pipeline was deemed not to be a public utility. Second, defendants argue that the complaint is also barred by the doctrine of judicial estoppel, which under certain narrow circumstances prevents a party (in this case Chevron) from taking a position in

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

one case and then taking a contrary position on the same issue in a later case. Finally, Equilon and Shell Trading argue that this Commission since 1917 has declined to exercise jurisdiction over oil pipelines operating through buy/sell agreements and that a Commission investigation of pipelines between 1975 and 1979 was concluded without a change in the Commission's practice.

5. Prior Court of Appeal Decision

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

In 1991, most of the parties to the State Action settled, with five defendant oil companies agreeing to dedicate their crude oil pipelines in California as

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[2] *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* v. *Chevron Corporation, et al., Los Angeles Superior Court Case No. C587912, Consolidated with Case No. C661310* (the State Action).

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

common carriers subject to Commission regulation. However, the settlement did not include the 20″ Pipeline or two other heated crude oil pipelines. The parties disputed whether the three pipelines were private property exempt from Commission regulation or public utilities subject to such regulation. The parties agreed to litigate the status of the three pipelines in Superior Court.

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

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

Similarly here, Chevron alleges in its complaint:

> By purporting to provide transportation services on the Shell Pipeline pursuant to the Shell Trading Contracts, Defendants are attempting to create the impression that they are merely buying and selling crude oil rather than providing public utility pipeline transportation service on the Shell Pipeline. The buy-sell arrangement on the Shell Pipeline is a subterfuge, lacking economic substance, devised for the sole purpose of evading Commission jurisdiction.[5]

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[4] Long Beach Complaint, at 34.

[5] Chevron Complaint, at 10.

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

The California Court of Appeal decided in favor of Chevron, Mobil and Texaco. In its August 3, 1994 decision[8] (the Court of Appeal Decision), the Court held that "the oil companies' conduct here establishes these pipelines [including the 20" Pipeline] were private, not common carriers subject to PUC regulation."[9] The Court's conclusion was based on findings that (1) the pipeline companies always owned the crude oil in the pipelines and suffered any risk of loss, (2) crude oil purchases from other producers were made through legitimate arm's-length transactions, (3) the companies never offered to transport oil, but

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

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

8 Attachment 13 to the defendants' Request for Official Notice.

9 Court of Appeal Decision, at 11.

rather bought and sold based on their own needs and available pipeline capacity, and (4) the percentage of crude oil bought from other producers was very low. The Court analogized the transactions to that of a supermarket company:

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

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

The Court of Appeal Decision is not certified for publication, and under Rule 977 of the California Rules of Court, "[e]xcept as provided in (b), an opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." However, under Rule 977(b), "[a]n unpublished opinion may be cited or relied on…when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel…" The Commission thus may rely on the decision if defendants' motion to dismiss implicates one or more of these three doctrines.

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[10] *Id.*, at 12.

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

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

Defendants argue that between 1985 and 1994, Chevron in the State Action contended that transporting crude oil acquired using buy/sell agreements does

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[11] *Id.*, at 13.

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

[13] *Jackson* v. *County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 (citations omitted).

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

not qualify as providing transportation services for others and that Texaco's use of such agreements could not have resulted in the 20″ Pipeline being dedicated to the public use. Later, Chevron acquired an interest in the 20″ Pipeline, sold it to Equilon and ultimately sold its interest in Equilon to Shell Oil Company. According to defendants, Chevron now "seeks to obtain an unfair economic advantage by reversing the positions from which it benefited in the State Action."[15]

7. Commission Practice

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

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[15] Motion to Dismiss, at 22.

compensation.[16] The United States Supreme Court affirmed the state court decision on June 5, 1920.[17]

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

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

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

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16 *Associated Pipeline*, 176 Cal. at 529.

17 251 U.S. 228.

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

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

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

8. Discussion

The parties have submitted voluminous pleadings in support of their positions, providing for official notice dozens of decisions, rulings, transcripts and briefs from their earlier participation in arbitration and the State Action. ALJ Walker ruled that official notice would be accorded these documents. In

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

[20] D.91074 (1979) Order Discontinuing Proceedings.

addition, the parties have presented oral arguments to the ALJ and the assigned Commissioner. In essence, however, we are dealing with a dispute in which defendants have set buy/sell prices pursuant to contract higher than what complainant believes it should pay. This Commission rarely addresses contract disputes between parties, even when the parties are utilities, deferring instead to the civil courts on such matters.[21]

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

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

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

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[21] The Commission has stated, "Since the Commission has no jurisdiction to award damages, complaints alleging breach of contract are better served through the civil

Footnote continued on next page

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

For an oil company to be a public utility and common carrier subject to Commission regulation, in addition to the statutory requirements that it transport oil for others for compensation, the company must have dedicated its property to public use. Dedication requires that the pipeline owner, either expressly or impliedly, unequivocally offer transportation service on equal terms to all members of the public who might be able to use it.[22]

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

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courts." *Crystal River Oil and Gas* v. *Pacific Gas Electric Co.,* D.00-10-005, citing *Penaloza* v. *P.T. & T.,* 64 CPUC 496, 497.

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

has impliedly been dedicated to public use thus turns on the issue of whether buy/sell agreements are a subterfuge to mask the transportation of oil products for compensation.

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

In its narrowest aspect, *res judicata* precludes parties or their privies from relitigating a cause of action finally resolved in a prior proceeding. Collateral estoppel, which is sometimes referred to as a broader form of res judicata, "may preclude a party to prior litigation from redisputing issues therein decided against him or her, even when those issues bear on different claims raised in a later case." *Vandenberg* v. *Superior Court* (1999) 21 Cal 4th 815 Both *res judicata* and collateral estoppel, whether considered as separate doctrines or two aspects of the same doctrine, require that the party seeking to relitigate a claim or an issue in a subsequent proceeding must have had the claim or issue decided against it or its privies in the earlier litigation. The public policy behind these doctrines is to encourage judicial efficiency by prohibiting a losing litigant from rearguing its case in another forum. That is not the situation here. The Court of Appeal Decision found *in favor* of Chevron on the issue of the validity of the buy/sell agreements between the pipeline operator and the oil seller/buyer. Because the essential requirement of an earlier loss is lacking, neither *res judicata* nor collateral estoppel bars Chevron from asserting the invalidity of the buy/sell agreements in this proceeding. None of the three exceptions to the Rule being available, the Rule prohibits us from relying on the Court of Appeal Decision as a basis for denying relief to Chevron.[23] Accordingly, the motion to dismiss this action on the basis that Chevron is estopped from asserting the invalidity of the buy/sell agreements is denied.

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

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

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

buy/sell agreements with some producers;[25] and that Equilon and Shell Trading do not make service available to all potential customers on equal terms.[26]

Given these undisputed facts, the remaining question is whether either party is entitled to judgment as a matter of law. We conclude that Chevron is so entitled. This case really boils down to a single issue: are Equilon and Shell Trading providing oil transportation services to the public for a fee? If they are, then the use of buy/sell agreements in place of straightforward transportation contracts will not avoid the conclusion that defendants have dedicated the pipeline to public use. Evidence developed during the proceeding established unequivocally that Equilon and Shell Trading routinely hold themselves out as oil shippers. The paper transfers of title and risk of loss and the refusal to do business on the same terms with all customers should be seen for what they are: attempts to mask the fact that they are engaged in the business of transporting oil for a fee.

At the oral argument, Chevron introduced statements made by Shell executives during a failed 2005 arbitration between the parties before an arbitrator from the Judicial Arbitration and Mediation Service (JAMS). Shell executives testifying at the JAMS arbitration repeatedly referred to Equilon as being in the business of transporting crude oil for third parties. For example, Dan Martinez of Shell Trading described his organization as charged with "trying to enhance the utilization of all the assets; otherwise keeping it as full as

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[25] Chevron's Response to First Data Request, at 9, Request for Admission No. 18; Tesoro Response, at 5.

[26] Chevron Complaint, at 12; Tesoro Response, at 6.

possible."[27] Martinez was even more explicit about how Shell Trading deals with third parties in this exchange:

> Q: In transacting business with third parties on behalf of the pipeline, what's your objective with respect to price there?
>
> A: Enhance revenues, get the highest price possible on the tariff or the rates that we charge, and get the most volume we can move through the system.[28]

To achieve these goals, Shell and Equilon typically make about 50% of the pipeline's capacity available to third parties.[29] The amount of pipeline capacity made available to third parties is the amount left after Shell has made provision for transporting its own oil.

A crucial fact is that Shell is regularly transporting large quantities of third-party oil. At many times during the year, the amount of third-party oil in the pipeline exceeds the amount of Shell-produced oil in the pipeline, sometimes accounting for as much as 83% of the oil shipped in a given month.[30] Undisputed testimony establishes that Shell's revenues from selling excess pipeline capacity are in the range of $50 million per year.[31] In short, Shell is operating a large business providing transportation service to a number of oil

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[27] Chevron-Equilon oral argument March 13, 2007, Transcript (Oral Argument Transcript), p. 7.

[28] 2005 JAMS Arbitration Report Transcript at 24:25-25:2.

[29] Oral Argument Transcript, pp. 7-8.

[30] Oral Argument Transcript, p. 8.

[31] *Id.*

producers and documenting the transactions in a way that attempts to disguise the actual nature of the business.

The facts in this case strongly resemble those in *PG&E* v. *Dow Chemical Corp.* (1994) 55 CPUC 2d 430. In that case, Dow Chemical and a subsidiary used a gas pipeline to deliver gas to industrial customers through a combination of leases and exchange agreements. Under the leases, the "lessees" purportedly took a possessory interest in a portion of the pipeline, purportedly transporting their own natural gas for themselves. Under the "exchange" agreements, customers delivered gas to the gas field end of the pipeline and in exchange received gas delivered at the other end of the pipeline adjacent to their own facilities. The agreements specifically disclaimed dedication of the pipeline. Based on these facts, the Commission found irrelevant Dow Chemical's contractual provision disclaiming dedication, instead looking to Dow's conduct as determinative. The Commission concluded that Dow Chemical's conduct "unequivocally shows a dedication of excess capacity for the life of the pipeline."[32]

While *PG&E* v. *Dow Chemical* may be distinguishable from the case before us by virtue of being a natural gas case, we do not think that fact is determinative of the outcome. The similarities between the business arrangements in *PG&E* v. *Dow Chemical* and those in this case are much greater than the differences. In both instances, a pipeline owner is selling excess capacity to unrelated third parties in order to make a profit. The articles of incorporation of Dow Chemical and the LLC Certificate of Equilon state that the respective companies are in the

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32 *Dow Chemical,* 55 CPUC 2d at 444.

business of transporting petroleum products, in the one case natural gas and in the other crude oil, both "without restriction." Furthermore, there is a compelling policy reason to impose common carrier status on Equilon and Shell Trading. Shell Oil is both a provider of services to other Bay Area refiners and a competitor. Through its monopoly control of the only heated pipeline between San Joaquin and the Bay Area, Shell Oil is in a position to damage its competitors by denying them access to the pipeline or charging them an exorbitant price to use it.[33]

In holding that *PG&E* v. *Dow Chemical* controls this case, we necessarily decline to rely on *Associated Pipeline*. As is true in this case, Associated Pipeline both produced and purchased oil in the central valley. It transported that oil to itself at the other end of the pipeline where it sold some and refined the rest. In declining to look beyond the terms of the sale documents, the California Supreme Court deliberately elevated form over substance, ignoring the actual business Associated Pipeline Company was conducting in favor a legal fiction. But we need not follow that example. Rather, as we did in *PG&E* v. *Dow Chemical*, we may look to the substance of the transaction rather than its form. Even if the initial sale of oil from a producer to a third party is a genuine transfer of title and risk of loss, that is not the end of the inquiry. We need to look at the business context in which the purported "sale" takes place and when we do, we recognize that it is merely a subterfuge to conceal the actual business of transporting oil for third parties.

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[33] *Transcript,* pp. 22-24.

Accordingly, we find that Chevron's motion for summary adjudication should be granted.

9. Defendants' Motion for Summary Adjudication

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

10. Category and Need for Hearing

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

11. Comments on Alternate Proposed Decision

The alternate proposed decision of Commissioner Peevey in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Comments were filed on May 2, 2007, and reply comments were filed on May 7, 2007. Shell and Equilon raise three objections to the Alternate's conclusion that they have dedicated the 20" Pipeline to public use. We address these in turn.

1. *Associated Pipeline controls the present case.*

   On the contrary, *Associated Pipeline* is distinguishable from the present case. Associated delivered oil only to itself and did not use buy/sell agreements. Equilon and Shell Trading deliver oil to others and use buy/sell agreements.

2. *By providing transportation service to itself or related entities, Shell does not become a common carrier. Chevron is in a separate class from other shippers because Shell inherited an existing contractual relationship with Chevron when it bought the pipeline.*

   The Alternate does not address the terms on which Shell deals with itself. It concerns only the terms on which Shell makes excess pipeline capacity available to third party shippers. Although Shell inherited the Chevron relationship when it bought the pipeline, Chevron is no different from any other arm's length third party for whom Shell ships oil for a fee.

3. *Findings of Fact and Conclusions of Law are Insufficient*

We concur to a limited degree and have added additional Findings of Fact and Conclusions of Law to the opinion.

12. Assignment of Proceeding

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

Findings of Fact

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

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

3. Defendants use the pipeline to transport oil they produce themselves and, when capacity permits, oil purchased from other producers through buy/sell agreements.

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

5. Defendants aggressively market the excess capacity of the 20″ Pipeline to other oil producers in the San Joaquin Valley.

6. The price of oil re-sold by Defendants to a producer pursuant to a buy/sell agreement exceeds the San Joaquin Valley price paid by Defendants to acquire the oil from the producer.

7. The buy/sell price differential represents a fee for transporting the oil from the San Joaquin Valley to the Bay Area.

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

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

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

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

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

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

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

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

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

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

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

19. 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.

20. 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.

21. There are no material issues of disputed fact.

Conclusions of Law

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

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

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

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

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

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

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

8. Equilon and Shell Trading are in the business of transporting oil for a fee through the use of buy/sell agreements.

9. Equilon and Shell Trading have manifested an unequivocal intention to dedicate the 20" Pipeline to public use by engaging in the business of transporting oil for a fee.

10. Chevron's motion for summary adjudication should be granted and this proceeding should be closed, effective immediately.

O R D E R

IT IS ORDERED that:

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

2. The motion of Chevron Products Company for summary adjudication is granted.

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

4. No hearing is necessary in this proceeding.

5. Case 05-12-004 is closed.

This order is effective today.

Dated July 26, 2007, at San Francisco, California.

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

I will file a dissent.

/s/ RACHELLE B. CHONG
Commissioner

Commissioner Rachelle B. Chong, dissenting:

Complainant Chevron claims that the Equilon/Shell pipeline, which runs from San Joaquin production fields to Bay Area refineries, is a public utility subject to this Commission's regulation. I believe the facts show otherwise, and for that reason the Commission should not undertake to regulate this oil pipeline.

Under Sections 211 and 216(b) of the Public Utilities Code, the Commission would regulate this pipeline if its owners were transporting oil for others and had dedicated the pipeline to public use. I believe that the facts demonstrate that these tests are not met in this case. Unlike the majority, I agree with the assigned Administrative Law Judge's finding that this oil pipeline is not dedicated to public use.

As complainant Chevron agrees, public utility dedication cannot be presumed without evidence of unequivocal intention (Proposed Decision of ALJ Bemesderfer, Mimeo p. 18). Complainant has produced no such evidence in this case. It is undisputed that the owners do not provide pipeline access to all who seek it; furthermore they have only provided access where there are agreed-upon terms and conditions of service, including price, which may differ from customer to customer. The "buy-sell" arrangements involve a transfer of the 1) risk of loss, 2) the risk of property damage, and 3) the risk that the purchaser might not accept the oil when tendered for delivery. Finally, the pipeline owners are making available to third parties only their excess capacity, specifically the amount of pipeline capacity remaining over after Equilon has transported oil produced by Shell.

Much is made of the fact that the pipeline often carries fifty percent or more in excess capacity purchases. However a specific number is not determinative in showing unequivocal intention of dedication. While fifty percent is not *de minimis*, that is not the correct standard. Rather the facts show that these pipeline owners are trying to generate incremental revenue from an asset operated in the first instance for their own benefit. This effort, no matter how aggressive, does not convert their operations to common carriage.

Nor do I find *PG&E v. Dow Chemical Corp* (1994), 55 CPUC 2d 430, relevant to this case. In that decision, the Commission disregarded defendant's claims of private carriage via leases and exchange agreements, but it did so in the interests of protecting PG&E, which has the obligation to serve customers in a monopoly franchise territory from unfair competition. As the Administrative Law Judge's Proposed Decision notes, the Commission considered Dow's conduct as manifesting the intention to compete with PG&E for gas transmission services. These are not the same facts we confront in this case.

A final argument is made that there is a compelling policy reason for regulating this oil pipeline, based on a point made by Tesoro during oral argument after evidentiary hearings had concluded. Tesoro argues that through Shell's monopoly control of the only heated pipeline between the San Joaquin Valley and the Bay Area, Shell Oil may be in a position to use the pipeline in an anticompetitive manner. Quite simply, this is a claim based on argument, not actual evidence in the record, and it should not sway the ultimate outcome in an adjudicatory proceeding.

I believe it is unwise to change fundamental Commission policy on oil pipeline regulation in a complaint proceeding resolving what I believe to be essentially a commercial dispute. A broader regulatory perspective of the oil pipeline industry is needed before making such an important policy shift. The Commission has wisely followed this course in the past. Both in 1917 and again in 1975-1979, the Commission conducted industry-wide reviews so that it could properly assess the merits of its regulatory approach to this industry, as well as the market and economic effects of its decision-making. The Commission should follow this approach again, instead of choosing a reregulation path without the benefit of an industry-wide review.

For these reasons, I respectfully dissent from the majority decision.

Dated July 26, 2007, at San Francisco, California.

/s/ RACHELLE B. CHONG
Rachelle B. Chong
Commissioner