

Decision 08-11-061

November 21, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Joint Application of SFPP, L.P. (PLC-9 Oil), CALNEV PIPE LINE, L.L.C., KINDER MORGAN, INC., and KNIGHT HOLDCO LLC for Review and Approval under Public Utilities Code Section 854 of the Transfer of Control of SFPP, L.P. and CALNEV PIPE LINE, L.L.C.

Application 06-09-016
(Filed September 18, 2006)

Joint Application of the Goldman Sachs Group, Inc., American International Group, Inc., Carlyle Partners IV, L.P., Carlyle/Riverstone Global Energy and Power Fund III, L.P., for Exemption Under Section 852 of the Public Utilities Code for Certain Future Transactions Involving Non-Controlling Interests in California Public Utilities.

Application 06-09-021
(Filed September 22, 2006)

ORDER DENYING REHEARING
OF DECISION 07-12-006

This decision addresses the application for rehearing of Decision (D.) 07-12-006 (or “Decision”), filed by Consumer Federation of California (“CFC”). We have reviewed each and every allegation set forth in the application and do not find grounds for granting rehearing. We modify the Decision to clarify references to the Administrative Law Judge’s (“ALJ”) preliminary ruling regarding CFC’s Notice of Intent to Claim Compensation (“ALJ ruling”) and Public Utilities Code section 1801.3(a). We also correct typographical errors. We deny the application for rehearing of D.07-12-006, as modified.

I. FACTS

In D.07-12-006 we denied CFC's request for intervenor compensation in regard to D.07-05-061 on the grounds that the statutory intervenor compensation program does not apply to oil pipeline utilities. These two decisions were issued in consolidated Applications (A.) 06-09-016 and A.06-09-021, involving Commission-regulated intrastate portions of SFPP, L.P. ("SFPP") and its affiliate, Calnev Pipe Line, L.L.C. ("Calnev"), public utility pipelines which serve as common carriers of refined petroleum products such as gasoline, diesel fuel and jet fuel.

D.07-05-061 does two things: (1) it approves, pursuant to Public Utilities Code section 854,¹ the transfer of indirect ownership and control over jurisdictional portions of SFPP and Calnev from Kinder Morgan, Inc. ("KMI") to Knight Holdco, LLC ("Knight Holdco"); and (2) it grants a limited exemption from the section 852 prohibition on purchase or acquisition of the capital stock of another public utility to Goldman Sachs Group, Inc. ("Goldman Sachs") and American International Group, Inc. ("AIG"),² two of the investors in Knight Holdco. The section 852 exemption covers only non-controlling, passive investments by Goldman Sachs and AIG in the stock of California utilities. It does not change their statutory obligation under section 854 to obtain advance Commission approval before acquiring controlling interests in such utilities. (D.07-12-006, p. 2.)

D.07-12-006 addresses only CFC's request for intervenor compensation, finding that the plain meaning of section 1801.3(a) is clear, that it lists the utilities covered by the intervenor compensation program and that oil pipelines are not among them. (D.07-12-006, p. 5.)

CFC timely filed an application for rehearing of D.07-12-006, alleging that the Commission errs by: (1) failing to interpret the section 1801 phrase "in any proceeding" to require awarding compensation in "any and all proceedings" of the

¹ Unless otherwise specified, all section references are to the Public Utilities Code.

² Subsequent events involving the financial health of these two entities have no bearing on the intervenor compensation matters at issue here.

Commission; (2) holding that the scope of the consolidated proceeding does not “encompass” electric, gas, water and telephone utilities; (3) finding that no common fund exists allowing the Commission to order California utilities not named as applicants here to pay intervenor compensation for work done in this docket; (4) rejecting CFC’s representation that in this proceeding the Commission was establishing precedent applicable to other utility transfers; and (5) interpreting section 1804(b)(2) as justification for reversing the ALJ ruling. CFC alleges further that, due to the doctrine of equitable estoppel, the Commission may not reverse the ALJ ruling finding CFC eligible for compensation. CFC also claims the doctrine of promissory estoppel requires payment of intervenor compensation.

II. DISCUSSION

A. **The section 1801 phrase “in any proceeding” does not justify finding that this oil pipeline proceeding is included in the intervenor compensation program.**

CFC asserts that the Decision errs in holding that section 1801.3(a) precludes awarding intervenor compensation in this oil pipeline proceeding, arguing that it was the clear intent of the legislature to award compensation “in any and all proceedings of the Commission.” (Reh. App., p. 2.) CFC claims we failed to give import to the statement of legislative purpose in section 1801:

The purpose of this article is to provide compensation for reasonable advocate’s fees, reasonable expert witness fees, and other reasonable costs to public utility customers of participation or intervention in any proceeding of the [C]ommission.

(Pub. Util. Code, § 1801, cited in part at Reh. App. p. 2, emphasis added.)

CFC’s arguments are without merit. The Decision correctly holds that section 1801.3(a) is clear and not susceptible to dispute and that it does not include oil pipeline utilities among the listed utilities to which the statute applies. (D.07-12-006, p. 5.) The statute states:

The provisions of this article shall apply to all formal proceedings of the [C]ommission involving electric, gas, water, and telephone utilities.

(Pub. Util. Code, § 1801.3, subd. (a).)

Because the Legislature did not include oil pipeline utilities in the specified utilities covered by the intervenor compensation program, we must conclude that the Legislature intended to exclude them from the program. This interpretation of section 1801.3(a) is consistent with the principle *expressio unius est exclusio alterius*, which dictates that the express inclusion of some things in a statutory provision necessarily means that other things are excluded, even if the exclusion is not express. (See *Dean v. Superior Court* (1998) 62 Cal.App.4th 638, 641.)³

CFC offers no alternative interpretation of the plain language in section 1801.3(a) and its claim that we misinterpreted the section is without merit. As a general rule, the Commission’s “interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language” (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410.)

The interpretation that CFC advocates, i.e., that section 1801 reveals Legislative intent to award compensation in “any and all proceedings of the Commission,” would place sections 1801 and 1801.3(a) in direct conflict with each other and would render meaningless the list of specific utilities provided in section 1801.3(a). A statutory interpretation that renders a related statutory provision nugatory must be avoided. (*People v. Shabazz* (2006) 38 Cal.4th 55, 67.)

Further, it is reasonable to view section 1801 as addressing legislative intent regarding which categories of Commission proceedings are included in the

³ We have considered and rejected previous efforts to broaden the applicability of the intervenor compensation program beyond the utilities stated in section 1801.3(a). We have said that the program does not include proceedings involving household goods carriers. (*In the Matter of the Regulation of Used Household Goods Transportation by Truck* [D.99-06-030] (1999) 86 Cal.P.U.C.2d 641, 645, fn. 2; *Karrison v. A & P Moving* [D.00-09-070] (2000) __ Cal. P.U.C.3d __, p.4 (slip op.).) We also have held that the program does not include proceedings involving the Digital Infrastructure Video Competition Act of 2006. (*Order Modifying Decision 07-03-014 and Denying Rehearing of Decision as Modified* [D.07-11-049] (2007) __ Cal.P.U.C.3d __, p. 3 (slip op.).)

intervenor compensation program. Before being amended in 1992, section 1801 had authorized intervenor compensation only in ratemaking or rate-related proceedings. In 1992 the section was amended to remove the limiting phrase, “for the purpose of modifying a rate or establishing a fact or rule that may influence a rate,” that previously had followed the phrase “proceeding of the [C]ommission.” (Historical and Statutory Notes, 57A West’s Ann. Pub. Util. Code (1994 ed.) foll. Section 1801, p. 164.)

The 1992 amendment of section 1801 removed the limiting language as to the category of administrative proceedings in which participation could be compensated – i.e., the program is no longer limited to rate-related proceedings. This history suggests strongly that in its amended form, the phrase “in any proceeding,” refers to categories of administrative proceedings.

Because section 1801 addresses the categories of proceedings and section 1801.3(a) addresses types of utilities, we can implement both sections without finding that there is an inherent conflict or that one negates the other. CFC’s arguments to the contrary are without merit. Further, CFC’s suggestion that we were required to “give import” to section 1801 is without merit because, as discussed above, the section does not address the instant question of which utilities are included in the program.

CFC also argues that we made no attempt to “reconcile” section 1801.3 subsection (a) with subsections (b) and (d). (Reh. App., p. 2.) These subsections state the Legislature’s intent that:

The provisions of this article shall be administered in a manner that encourages the effective and efficient participation of all groups that have a stake in the public utility regulation process.

(Reh. App., p. 2, citing Pub. Util. Code, § 1801.3, subd. (b), emphasis in Reh. App.) And that:

Intervenors be compensated for making a substantial contribution to proceedings of the [C]ommission, as determined by the [C]ommission in its orders and decisions.

(Reh. App., p. 2, citing Pub. Util. Code, § 1801.3, subd. (d), emphasis in Reh. App.)

CFC does not provide grounds for finding error based on these provisions. Neither of the two subsections conflicts with our holding that section 1801.3(a) precludes awarding intervenor compensation in oil pipeline proceedings. It is evident that these statutory statements of intent can only apply to proceedings that the statute includes in the intervenor compensation program. The argument that it was necessary to reconcile the Decision's holding with these two statutory provisions is without merit.

B. This proceeding does not involve electric, gas, water and telephone utilities merely because the applicants sought and were granted permission to make non-controlling passive investments in the stock of California utilities.

CFC claims that we erred when we held that this proceeding does not involve electric, gas, water and telephone utilities within the meaning of section 1801.3(a). (Reh. App., p. 3.) CFC first takes issue with the following passage:

CFC's comments reiterate that the scope of this consolidated docket actually encompassed electric, gas, water, and telephone utilities – as well as oil pipelines.

(D.07-12-006, p. 7.) CFC implies that our use of the term “encompassed” raises an issue of interpretation. CFC proffers alternative words: “to include,” “to affect,” “to envelop or enfold;” finally arguing that the proceeding “affects” gas and electric utilities.⁴ (Reh. App., p. 3.) As stated in the above passage, the Decision uses the term “encompassed” only to characterize an argument in CFC's comments. It does not use the word “encompassed” to analyze or replace the word “involving,” as it appears in section 1801.3(a).

As noted in section II.A, above, we held that the plain meaning of section 1801.3(a) is clear and not susceptible to dispute. (D.07-12-006, p. 5.) There is no reason

⁴ CFC says that its argument about the meaning of the word, “involve” was “more fully stated” in its comments on the proposed decision. (Reh. App., p. 3.) A general reference to an earlier pleading is not sufficient to meet the requirements of section 1732, and Rule 16.1 (c) of the Commission's Rules of Practice and Procedure, both of which require applications for rehearing to “set forth specifically” the grounds on which the applicant considers the decision to be unlawful. CFC does not identify a specific argument or allege any specific basis for applying earlier arguments to D.07-12-006. If CFC intends to request that we incorporate by reference the arguments in its earlier pleading, we deny the implied request.

(and CFC offers none) why we should adopt CFC's preferred term, "affect[ing]" to replace "involving" in applying the statute to this proceeding. The word "involving" as it is used in the statute is clear and there is no merit in CFC's semantic arguments.

CFC argues that by allowing the applicants to purchase stock in electric and gas utilities, the Decision "affects" these utilities. (Reh. App., p. 3.) (Based on the semantic matters discussed in the preceding paragraphs, CFC presumably uses "affects" as a substitute for "involves" in this argument.) However, in making this argument, CFC does not identify any California electric or gas utility that would fall within the terms of section 1801.3(a) in this proceeding. It appears CFC's argument refers collectively to utilities whose stock these applicants may purchase in the future.⁵

The exemptions from section 852, approved for Goldman Sachs and AIG, permit them to purchase only non-controlling, passive investments in the stock of California utilities. The decision granting the limited exemptions explains that acquisitions of controlling interests will continue to require advance Commission approval. (D.07-05-061, p. 3.) It would not be reasonable to conclude, based on speculation about potential future, non-controlling, passive investments, that this proceeding "involves" all utilities whose stock one of these applicants might someday purchase. CFC's argument based on possible future stock purchases is without merit.

CFC also claims that because D.07-05-061 allows the applicants to acquire control of KMI, which CFC argues is "a natural gas and electric utility," the "ultimate" transfer we approved includes electric and gas utilities and, therefore, "affects all of Kinder Morgan's properties and includes, envelops and enfolds electric and gas utilities in the ultimate transfer approved by the Commission." (Reh. App., p. 3.) CFC does not provide reference to the record or any other basis for its claim that Kinder Morgan is a natural gas and electric utility that would give rise to a claim under California's statutory intervenor compensation program.

⁵ CFC's statements on this point are somewhat inconsistent in that it refers here to a category that includes "electric and gas" utilities, while it also explicitly disputes the Commission's holding that the proceeding does not include, "electric, gas, water and telephone utilities." (Reh. App., p. 3.) CFC does not offer an explanation of the apparent discrepancy.

The record reveals that Kinder Morgan Power, owned and operated by KMI, owns and operates five natural gas-fired electric generation facilities located in Michigan, Colorado and Texas. (Exhibit 11, p. 2 (Joint Applicants).) Out-of-state generation facilities are not at issue in this California proceeding, as evidenced by the statement in D.07-05-061 that it approves the transfer of “jurisdictional portions of two common carrier pipeline utilities.” (D.07-05-061, p. 2.) Out-of-state facilities are not “jurisdictional” in this California proceeding. CFC’s apparent claim that KMI is a natural gas and electric utility pursuant to section 1801.3(a) is without merit.

C. No common fund exists that would allow the Commission to order other California utilities, not named as applicants here, to pay intervenor compensation for work done in this docket.

CFC claims we committed error when we held:

We cannot interpret [section 1801.3(a)] to reach other California utilities, not named as applicants here, and then order such utilities to pay intervenor compensation for work done in this consolidated docket.

(D.07-12-006, p. 7, cited at Reh.App., p. 4.) CFC argues that in D.00-01-020 we established an intervenor compensation fund to award compensation in policy proceedings where no specific respondents are named and, consequently, that it is an error for us to hold that “no common fund exists from which the [C]ommission might order intervenor compensation payments.” (Reh.App., p. 4, quoting D.07-12-006, p. 8.)

The fund CFC refers to is described as follows:

To summarize, in quasi-legislative rulemaking proceedings where no specific respondents are named, we determine under [section]1807 that the “subject of the hearing, investigation, or proceeding” is all utilities in the affected industry. We will establish an intervenor compensation program fund from which awards in proceedings where the Commission is establishing policy affecting an industry or all regulated industries (generally quasi-legislative rulemakings) where no specific respondents are named will be paid. We will seek authority to fund the program from the fees collected on an annual basis from regulated energy, telecommunications, and

water utilities under the authority granted us in [section] 401 et seq.

(*Interim Opinion on Payment of Intervenor Compensation Awards* [D.00-01-020] (2000) 4 Cal.P.U.C.3d 20, 24.) The Commission said its goal for this fund was to ensure equitable application of section 1807 in the intervenor compensation program. (*Id.* at p. 25, Finding of Fact 2.) D.00-01-020 also identifies the specific utilities to which the program applies, i.e., “electric, gas, water, and telephone.” (*Id.* at p.26, Conclusion of Law 1.)

CFC’s suggestion that we could have applied the funding mechanism adopted in D.00-01-020 to the instant proceeding is misplaced. Section 1807 is part of the statutory intervenor compensation scheme. We adopted the D.00-01-020 funding mechanism as a component of the intervenor compensation program, not as an alternative to it. As discussed in section II.A, above, because this is a pipeline utility proceeding, the intervenor compensation program cannot be applied to it.

Further, the instant proceeding is not a “quasi-legislative rulemaking proceeding where no specific respondents are named.” Rather, this is an application proceeding with named applicants and it is formally categorized as a ratesetting proceeding. (*Scoping Memo and Ruling of Assigned Commissioner*, A.06-09-016/06-09-021, January 23, 2007 (“Scoping Memo”) p. 7.) CFC’s claim of error based on D.00-01-020 is without merit.

CFC further claims, in concluding its argument regarding the D.00-01-020 funding mechanism, that D.07-12-006 “is unsupported by substantial evidence and is an abuse of discretion.” (Reh. App., p. 4.) This vague assertion is offered without specific grounds or explanation. Because CFC’s argument regarding D.00-01-020 involves a legal rather than an evidentiary question; its concluding claim that D.07-12-006 was not supported by substantial evidence on this point is without merit.

D. There is no error in the Decision’s holding, “the Commission may not establish precedent for utilities at large in an application that names a single company.”

CFC takes issue with our rejection of one of CFC’s arguments made in an earlier pleading; CFC had claimed:

The precedent set in this case is applicable not only to oil pipeline corporations, but also to every electric, gas, water and telephone utility whose ownership is transferred to a multi-state holding company.

(*Reply of the Consumer Federation of California to the Response of the Joint Applicants to the Consumer Federation’s Request for Intervenor Compensation, and Motion for Sanctions*, August 31, 2007.) In responding to the above assertion, we stated that, pursuant to section 1701.1(c), a ratesetting proceeding such as this concerns “a specific company,” whereas a quasi-legislative proceeding “may establish rules affecting an entire industry.” (D.07-12-006, p. 6.) We also explained that section 1708 requires “actual notice and an opportunity to be heard before the Commission may change existing rates or practices applicable to either a specific utility or some larger group.” (*Ibid.*)

We summarized as follows:

In other words, the Commission may not establish precedent for utilities at large in an application that names a single company.

(D.07-12-006, p. 6.) In challenging this statement, CFC quotes a U.S. Supreme Court decision that addresses the role of adjudicated cases in administrative procedure. CFC provides the following quotation:

Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. [Citation omitted.] They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of stare decisis in the administrative process, they may serve as precedents.

(Reh. App., pp. 4 – 5, citing *National Labor Relations Board (NLRB) v. Wyman-Gordon Co.* (1969) 394 U.S. 759, 766.) The foregoing passage does not contradict or reveal

error in the Decision’s statement summarizing the distinction between this ratesetting proceeding and a quasi-legislative one. Further, CFC omitted the final sentence in the quoted paragraph. The Court continued to explain:

But this is far from saying . . . that commands, decisions, or policies announced in adjudication are “rules” in the sense that they must, without more, be obeyed by the affected public.

(*NLRBV v. Wyman-Gordon*, *supra*, 394 U.S. at p. 766.)

Our comments about categories of proceedings are consistent with the opinion of the *NLRB* Court. CFC’s apparent claim that the *NLRB* opinion supports CFC’s claim of error in D.07-12-006 is without merit. CFC also cites *Agricultural Labor Relations Board v. California Coastal Farms* (“*ALRB*”) (1982) 31 Cal.3d 469 in reference to the above quotation, but does not explain the purpose of the *ALRB* citation in that context.⁶

CFC also argues that when an agency “has no experience with a particular situation, as in this case,” an adjudicative proceeding is particularly well suited to the development of policy.⁷ (Reh. App., p. 5, citing *ALRB*, *supra*, 31 Cal.3d at p. 479.) This general statement about the use of adjudicative proceedings does not identify an error in the Decision. Further, it is a well-settled principle of administrative law that:

in discharging its delegated responsibilities the choice between proceeding by general rule or by ad hoc adjudication ‘lies primarily in the informed discretion of the administrative agency.’

(*Agricultural Labor Relations Bd. v. Superior Court*, (1976) 16 Cal.3d 392, 413 cited at *ALRB*, *supra*, 31 Cal.3d at p. 478.) Consistent with this principle, we determined in this

⁶ It should be noted that, while the *ALRB* Court does discuss administrative agency proceedings, the matter at issue is one of trial court power, not agency power. The Court explained, “[t]he true focus of this case is on the power of the trial court” (*ALRB*, *supra*, 31 Cal.3d at p. 475.)

⁷ CFC does not explain its suggestion that the Commission has no experience with “a particular situation” involved in this proceeding. (Reh. App., p. 5.) However, even if there were a new policy issue to resolve in the proceeding, it would not alter our conclusion that, in this proceeding, we are not establishing precedent for utilities at large.

proceeding's scoping memo, and affirmed in D.07-12-006, that this is a ratesetting proceeding. (*Scoping Memo*, p. 7, see also, D.07-12-006, p. 6.)

CFC also argues that the scoping memo "envisioned establishing precedent for utilities at large." CFC refers to the following statement:

If the Commission were to grant the [section] 852 exemption, how might it define "control" for purposes of future transactions, given the lack of a bright line definition in prior Commission decisions? Should an exemption be conditioned upon some kind of notice or report to the Commission if exempted transactions occur?

(*Scoping Memo*, p. 5, quoted in part at Reh. App., p.5, emphasis in Reh. App.) CFC misconstrues the above passage. On its face, the phrase "future transactions" refers to future transactions conducted pursuant to the section 852 exemption being sought in this proceeding. There is no apparent basis for CFC's suggestion that the scoping memo refers to future transactions of utilities at large. CFC's claims that this proceeding is really establishing precedent applicable to "utilities at large," are without merit.

CFC concludes its discussion of this topic by asserting that the Commission acted "unreasonably, without regard to established rules and standards, arbitrarily and capriciously, when it unlawfully denied CFC's request for intervenor compensation." (Reh. App., p. 5.) On the contrary, D.07-12-006 explains the Commission's reasoning and explicitly relies on applicable law in addressing the categorization issue CFC raised. (D.07-12-006, p. 6.) CFC's assertion has no merit and does not identify a basis for granting rehearing.

E. The holding in D.07-12-006 is not based on section 1804(b)(2).

CFC argues that we erred in interpreting section 1804(b)(2) as "justification" for reversing the ALJ ruling on eligibility. (Reh.App., p. 7, referencing Administrative Law Judge's Ruling Regarding Notice of Intent to Claim Compensation ("ALJ Ruling") (March 7, 2007) .) Section 1804(b)(2) includes in pertinent part:

. . . Failure of the ruling to point out similar positions or potential duplication or any other potential impact on the

ultimate claim for compensation shall not imply approval of any claim for compensation. A finding of significant financial hardship in no way ensures compensation. . . .

(Pub. Util. Code, § 1804, subd. (b)(2) quoted in part at Reh. App., p. 7, emphasis added.)

CFC asserts that, although the above-quoted statute enumerates specific omissions, it does not state that the ALJ's finding of eligibility may be reversed in a final decision and that this would "subvert the entire purpose of the process of filing a notice of intent." (Reh. App., p. 8.) These arguments regarding the interpretation of section 1804(b)(2) do not establish error in the Decision.

The Decision denies CFC's request for compensation and states that section 1801.3(a) prevents us from granting compensation in a pipeline utility matter. (D.07-12-006, pp. 5, 8, Conclusions of Law 1 and 2.) We did not "reverse" the ALJ ruling and we did not address the specific matters related to CFC's eligibility and status. However, section 1804(b)(1) describes the ruling as "preliminary" and section 1804(b)(2) explains that the ruling does not ensure compensation for intervenors; even if it fails to state a potential impact on the ultimate claim for compensation, the ruling does not imply approval of such a claim. In fact, section 1804(b)(2) anticipates factors that may be omitted from the preliminary ruling and that may undermine the ultimate claim for compensation using the extremely broad category: "any other potential impact on the ultimate claim for compensation."

CFC's claim that we interpreted section 1804(b)(2) "as justification for reversing the ALJ ruling on eligibility" mischaracterizes the Decision. We cited section 1804(b)(2) to reiterate the "preliminary" nature of the ruling and we explained that the ALJ ruling was not "dispositive." (D.07-12-006, p. 5.) However, the holding denying intervenor compensation is based explicitly on section 1801.3(a). (D.07-12-006, p. 5.) CFC's claim of mistaken reliance on section 1804(b)(2) is without merit.

CFC also argues that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. (Reh. App., p. 7.) Here, CFC argues that section 1804(b)(2) does not explicitly state that a finding of eligibility

may be reversed in a final decision and that such a reversal would “subvert the entire purpose of the process of filing a notice of intent.” (Reh.App., p. 7 – 8.) CFC’s interpretation is incorrect because the failure of the ruling to point out possible problems, characterized as, “any other potential impact on the ultimate claim for compensation,” is extremely broad. The Commission could reverse the preliminary ruling and remain in compliance with section 1804(b)(2). However, in this instance we did not do so. If CFC intends to argue that section 1804(b)(2) prevents us from applying the terms of section 1801.3(a) to this proceeding, the argument is without merit.

F. Equitable remedies do not prevent the Commission from applying section 1801.3(a) to this proceeding.

1. Equitable Estoppel

CFC argues that we are estopped from reversing the ALJ ruling which found that CFC was eligible for compensation in this proceeding. (Reh. App., p. 5, citing ALJ ruling.) The claim that we “reversed” the ALJ ruling mischaracterizes our holding in the Decision. CFC’s argument also ignores the fact that the ruling is defined by statute as, “preliminary.” (Pub. Util. Code, § 1804, subd. (b)(1).)

As noted in the previous section, we did not alter or reverse the eligibility findings in the ALJ ruling. The ruling explicitly enumerated and discussed applicable statutory requirements; specifically addressing whether CFC qualified as a customer and whether it had established significant financial hardship. (ALJ Ruling, pp. 2 – 5.) The ruling concluded:

. . . [CFC] is a customer as that term is defined in [section] 1802(b)(1)(C) and has met the eligibility requirements of [section] 1804(a), including the requirement that it establish significant financial hardship. CFC is found eligible for compensation in these consolidated applications.

(ALJ Ruling, p. 6.)

Pursuant to section 1804(b)(1), the ruling accepted the rebuttable presumption flowing from a finding of financial hardship in an earlier ALJ ruling in

another proceeding. The March 7, 2007 ALJ ruling in this proceeding explained that on May 11, 2006 an ALJ had:

. . . made a finding of significant hardship in connection with CFC's participation in Commission Rulemaking . . . 06-03-004, the California Solar Initiative. Because CFC filed this NOI within a year of that eligibility finding, a rebuttable presumption exists that CFC should be found eligible here.

(ALJ Ruling, p. 4.) And further:

Absent changed circumstances, the significant hardship finding continues to apply to CFC.

(ALJ Ruling, p. 5.)

CFC claims that it "had a right" to believe the ALJ ruling "meant it would be awarded compensation if it made a substantial contribution." (Reh. App. p. 6.) This claim is countered by the ruling's express cautionary language:

. . . a finding of significant financial hardship in no way ensures compensation.

(ALJ Ruling, p. 5, citing Pub. Util. Code, § 1804, subd. (b)(2), emphasis added.) Again, section 1804(b)(2) cautions:

. . . Failure of the ruling to point out similar positions or potential duplication or any other potential impact on the ultimate claim for compensation shall not imply approval of any claim for compensation.

(See Pub. Util. Code, §1804, subd. (b)(2), emphasis added; see also, D.07-12-006, p. 5.)

In summary, the ALJ ruling was "preliminary," as defined by section 1804(b)(1), and included language that cautioned against relying on it as a basis for anticipating compensation.

The ALJ ruling did not consider or rule on whether the proceeding itself involved a specified utility pursuant to section 1801.3(a). In D.07-12-006 we addressed the section 1801.3(a) issue for the first time and noted that the ALJ ruling had "failed to consider" it. (D.07-12-006, p. 5.) Pursuant to section 1801.3(a), the intervenor

compensation program does not include this pipeline proceeding, therefore, the eligibility findings in the ALJ ruling, which in any case are only preliminary, here are moot. However, substantively, the ruling itself was not in error and we have not reversed it.

For all of these reasons, applying the doctrine of estoppel to preserve the ruling would not alter the outcome of D.07-12-006 regarding the application of section 1801.3(a). However, even assuming, *arguendo*, that the Decision did reverse the ruling, the doctrine of equitable estoppel would not operate to prevent us from complying with the mandates of the Public Utilities Code.

CFC includes the following quotation regarding the doctrine of estoppel:

The doctrine of equitable estoppel is founded on concepts of equity and fair dealing. It provides that a person may not deny the existence of a state of facts if he intentionally led another to believe a particular circumstance to be true and to rely upon such belief to his detriment. The elements of the doctrine are that (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel has a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

(Reh. App., pp. 5 – 6, citing *Greene v. State Farm Fire & Casualty Co.* (1990) 224 Cal.App.3d 1583, 1590.)

CFC argues that the ALJ was “fully apprised of the purpose of CFC’s intended participation in the case,” and that she “necessarily intended that CFC would rely upon [the] ruling. . . .”⁸ (Reh. App. p. 6.) However, CFC does not allege or show that there were material facts of which the ALJ was apprised, and of which CFC was ignorant. CFC does not allege that these essential elements of estoppel are met and they are not. Further, the ALJ ruling did not contain error regarding whether CFC met eligibility criteria and it included appropriate cautionary language to discourage

⁸ CFC prefaces this argument by stating that it was “more fully discussed” in CFC’s comments. (Reh. App., p. 6.) This may be a request that we incorporate by reference the arguments in CFC’s earlier pleading. As discussed above in footnote 4, a general reference to an earlier pleading is not sufficient to meet the requirements of section 1732, and Rule 16.1 (c). We deny the implied request.

unreasonable reliance on its findings. Therefore, reasonable reliance on the analysis and the narrow findings of the eligibility ruling would not have injured CFC as it now claims.

On the other hand, if the ruling were not moot and if it contained error, we would be obliged to correct the error. “When a regulation or other statutory interpretation of an administrative agency appears to be erroneous, it becomes the agency’s duty to conform to the correct interpretation.” (*Pacific Motor Transport Company v. State Board of Equalization* (1972) 28 Cal.App.3d 230, 242.)

However, regarding the equitable remedy of estoppel, courts have held: the government may not be estopped so as to ‘frustrate the purpose of its laws or thwart its public policy.’ [Citation omitted.]

(*Joseph George Distributor v. Department of Alcoholic Beverage Control* (1957) 149 Cal.App.2d 702, 713.)

Here, estoppel applied to prevent us from reversing the ALJ ruling would have no effect on our application of section 1801.3(a) in D.07-12-006. However, estoppel asserted to prevent us from applying section 1801.3(a) in the proceeding (which CFC has not proposed) would improperly frustrate the purpose of the law.

Further, CFC is represented by counsel⁹ and the applicable statutory provisions are published in the Public Utilities Code. Courts have found equitable relief to be unavailable in such situations:

[Where] one acts with full knowledge of plain provisions of law, and their probable effect upon facts within his knowledge, especially where represented by counsel, he can neither claim (1) ignorance of the true facts or (2) reliance to his detriment upon conduct of the person claimed to be estopped, two of the essential elements of equitable estoppel. [Citation omitted.]

⁹ See CFC’s request for compensation in this proceeding. (*Request of the Consumer Federation of California for an Award of Compensation for its Substantial Contribution to D.07-05-061*, July 29, 2007, p. 14.)

(*California Cigarette Concessions, Inc. v. City of Los Angeles* (1960) 53 Cal.2d 865, 871.)

CFC argues that it was injured by its continued participation in the proceeding and implies, but does not allege explicitly, that it would not have continued its participation if it had not expected compensation.¹⁰ (Reh.App., p. 6.) However, the elements of estoppel are not met here. Moreover, imposing estoppel to preserve the ALJ ruling, as CFC proposes, would not alter the outcome of D.07-12-006. Further, imposing estoppel to prevent us from complying with the terms of section 1801.3(a) would frustrate the purpose of the law. For all of these reasons, the remedy of equitable estoppel is not applicable here and the fact that CFC continued to participate in the proceeding does not alter that analysis.

We note that the Decision characterizes as “error” the fact that the ALJ ruling did not consider section 1801.3(a). (D.07-12-006, p. 5.) By using the term “error,” this passage may contribute to a mistaken impression that the Decision reverses or corrects the preliminary ruling, although it does not. Considering section 1801.3(a) earlier in the proceeding would have been desirable, however, there is no requirement or directive to include a finding pursuant to section 1801.3(a) in the preliminary ruling. The fact that participants did not recognize the limitation imposed by section 1801.3(a) until later in the proceeding does not alter our duty to comply with its terms.¹¹

As discussed above, although the analysis and conclusions in the ruling are not erroneous, the limitation stated in section 1801.3(a) renders the ruling moot. While we regret that the section 1801.3(a) bar was not identified sooner, we have no choice but

¹⁰ It may be noted that the ALJ Ruling was issued after the conclusion of evidentiary hearings. It states: “[s]ince receiving party status, CFC has conducted discovery, served prepared testimony and conducted cross-examination at evidentiary hearing.” (ALJ Ruling, p. 5.) Therefore, CFC elected to participate in the proceeding before the ALJ Ruling as well as after it.

¹¹ Until the joint applicants filed their response to CFC’s request for compensation, no party had raised the question of whether this proceeding involved a qualifying utility pursuant to section 1801.3(a). In that response, the applicants argued that the statute precludes granting such compensation. (*Response of Joint Applicants to the Consumer Federation’s Request for Intervenor Compensation*, August 29, 2007.)

to apply the applicable law to this proceeding. We will modify the Decision to refine our discussion of the ALJ ruling.

2. Promissory Estoppel

CFC also claims that under the doctrine of promissory estoppel it would be entitled to “reasonable compensation for hours spent litigating the case, in reliance on the finding of eligibility to collect compensation. (Reh. App., p. 6, fn. 3, citing *Toscano v. Greene Music* (2004) 124 Cal.App.4th 685, 692.) This claim is offered in isolation without explanation of how the cited opinion applies to these facts or discussion of any specific grounds to apply this equitable remedy. Therefore, the argument is insufficient as a basis for granting rehearing and is without merit.

In brief summary, the elements required for the equitable remedy of promissory estoppel in California are: (1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) his reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance. (*Ernest Laks v. Coast Federal Savings and Loan* (1976) 60 Cal.App.3d 885, 890.)

Here, there was no promise from the Commission to CFC that it would receive intervenor compensation for participating in the proceeding. To the contrary, the terms of section 1801.3(a) do not include pipeline utility proceedings. In addition, both section 1804 (b)(2) and the ALJ ruling cautioned that “a finding of significant financial hardship “in no way ensures compensation.” (ALJ Ruling, p. 5.) CFC cannot claim reasonably that there was a “clear and unambiguous promise” of compensation. CFC’s statement regarding promissory estoppel is without merit.

3. Additional Arguments

In conjunction with its equity arguments, CFC argues that the Commission has in the past:

refused to construe its rules, “as a trap for the unwary,” or allow[ed] opposing parties to wield the rule to defeat [an intervenor’s] claim.

(Reh. App., p. 7, citing, *Opinion regarding San Diego Gas & Electric. Co. in Application 98-05-019* (“*San Diego*”) [D.00-07-013] (2000) 7 Cal P.U.C.3d 153, p. 6 (slip op.), quotations and brackets in Reh. App.) It is not clear what aspect of the law or procedure CFC considers a “trap.” Because section 1801.3(a) is a published California statute with unambiguous language, it is not a “trap for the unwary.”

Moreover, regarding the second assertion, parties here did not “wield the rule” in the sense the Commission used the phrase in the *San Diego* decision.¹² CFC’s arguments related to *San Diego* are offered without explanation or reference to this record and are, therefore, impermissibly vague. For these reasons, CFC’s reliance on the *San Diego* decision is without merit.

CFC also asserts that we failed to acknowledge equitable principles that, if applied, would have justified an award of compensation. This assertion has no merit because we did acknowledge CFC’s equitable claims. The Decision notes that CFC had made equitable claims and explained:

Neither do CFC’s equitable arguments permit a different result. Even if the Commission were to find that CFC had made a substantial contribution to D.07-05-061 and that an award would not conflict with the California Supreme Court’s [*CLAM*] decision, no common fund exists from which the Commission might order intervenor compensation payments.

(D.07-12-006, pp. 7 –8, citing *Consumers Lobby Against Monopolies v. PUC (CLAM)* (1979) 25 Cal.3d 891.) Thus, we acknowledged CFC’s equitable arguments, and

¹² The argument in *San Diego* involved an effort to prevent intervenor compensation based on a disputed characterization of the issues addressed in the hearing and the application of a Commission rule to that dispute. In contrast, this matter involves only the application of an unambiguous statute.

explained that, regardless of such arguments, there is no common fund to support the compensation payments CFC seeks.

F. CONCLUSION

Based on the above, we find no merit to the arguments raised in CFC's rehearing application. However, we modify D.07-12-006 to clarify the discussion of the ALJ ruling and section 1801.3(a) and also to correct typographical errors. We deny the application for rehearing of D.07-12-006, as modified.

THEREFORE, IT IS ORDERED that:

1. D.07-12-006 is modified for clarification as follows:
 - a. The second full sentence on page 5 is replaced by two sentences that read as follows:

“Here CFC, the ALJ and other participants failed to consider the application of § 1801.3(a). The ALJ reviewed CFC's eligibility and significant financial hardship showings, largely on the basis of preliminary rulings of eligibility in two prior rulemakings.”
 - b. The third full sentence on page 5 is replaced by two sentences that read as follows:

“Although there is no error in the ALJ's March 7, 2007 ruling on CFC's unopposed NOI, the ruling is moot due to the limitation stated in § 1801.3(a). While we regret that the § 1801.3(a) bar was not identified sooner, the ALJ's ruling included appropriate cautionary language to discourage unreasonable reliance on its findings.”
 - c. The first sentence in the last paragraph on page 6 is modified to read as follows:

“Since § 1801.3(a) requires us to deny CFC's request, we need not consider the merits of its claimed substantial contribution to D.07-05-061.”
2. D.07-12-006 is modified to correct typographical errors as follows:

- a. In the second sentence in the third full paragraph on page 7, the citation Section 1801.3(c) is modified to read as follows:

“Section 1801.3(a)”

- b. In the sixth sentence in the third full paragraph on page 7, the citation § 1801.3(c) is modified to read as follows:

“§ 1801.3(a)”

- c. In Conclusion of Law number 1 on page 8 the citation “Section 1801.3(c)” is modified to read as follows:

“Section 1801.3(a)”

3. Rehearing of D.07-12-006, as modified, is denied.

This order is effective today.

Dated November 21, 2008, at San Francisco, California.

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