



The Hearsay Rule Matters in California Public Utilities Commission Proceedings

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Just last week, the California Court of Appeal issued its decision in *The Utility Reform Network v. Public Utilities Commission (TURN v. PUC)*, in which the Court established a clear rule that hearsay evidence in-and-of-itself cannot support a finding of fact by the California Public Utilities Commission ("Commission"). The case concerned an application by Pacific Gas and Electric Company ("PG&E") seeking Commission approval to acquire a new 586 MW gas-fired power plant in Oakley, California (the "Oakley Project"). To support its application, PG&E was required to show that there was a need for the Oakley Project. PG&E submitted evidence from the California Independent System Operator ("CAISO") in the form of a declaration and a petition filed with a federal agency. However, PG&E did not present testimony from anyone at CAISO and, therefore, its evidence from CAISO was hearsay. Nonetheless, the Commission ruled that there was substantial evidence to support a finding of need for the Oakley Project in Decision 12-12-035, and denied rehearing by Decision 13-04-032.

Although the procedural and factual background of the case is complex, the issue before the Court boiled down to one key question: whether PG&E's hearsay evidence was sufficient to support the Commission's finding that there was a need for the Oakley Project. The Court answered this question in the negative:

[T]he Commission's finding of need is unsupported by substantial evidence, because it relies on uncorroborated hearsay materials the truth of which is disputed and which do not come within any exception to the hearsay rule. Under established California law, such uncorroborated hearsay evidence does not constitute substantial evidence to support an administrative agency's finding of fact.

***TURN v. PUC*, (Feb. 5, 2014, A138701), at 2.**

The Court examined the standards governing the admission and weight of hearsay evidence in Commission proceedings to determine whether it was proper for the Commission to have based its finding of fact solely on hearsay evidence. The Commission's procedures provide that hearsay evidence is admissible in its

proceedings. (Rule 13.6(a).) The Court did not challenge this procedure, but noted that admissibility is not the same thing as substantiality. The Court pointed to several Commission decisions that have addressed the weight that may be placed on hearsay evidence and that have held that hearsay evidence may be relied upon if substantiated by other credible evidence. Based on these decisions, the Court held that the Commission has followed the "residuum rule," a rule applied by California courts to reviews of administrative agency decisions, whereby the "substantial evidence supporting an agency's decision must consist of at least a residuum of legally admissible evidence." (*TURN*, at 15-16.) The Court thus concluded that under California law, and based on the Commission's prior decisions, "uncorroborated hearsay cannot constitute substantial evidence to support an agency's decision . . ." (*Id.* at 17.)

In applying that rule to the case at hand, the Court concluded that regardless of the "reliability" of the CAISO hearsay evidence, that evidence could not support a finding of fact without corroboration. (*Id.* at 19.) The Court held that PG&E's hearsay evidence was uncorroborated and, therefore, was insufficient to support a Commission finding of fact. (*Id.* at 22.)

The Court's decision is significant because investor-owned utilities and other applicants frequently support requests for Commission action by the use of hearsay evidence. Going forward, entities seeking approvals or authorizations from the Commission should be careful to corroborate such hearsay evidence to ensure that the Commission may properly find that there is substantial evidence to support a finding of fact.

Please contact Nossaman LLP for additional information or guidance from attorneys with expertise in practicing before the Commission.