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ORIGINAL

Decision No. 81237

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's own motion into methods of compliance with the Environmental Quality Act of 1970.	Case No. 9452 (Filed October 12, 1972)

John C. Morrissey, Malcolm H. Furbush, and J. Bradley Bunnin, by J. Bradley Bunnin, Attorney at Law, for Pacific Gas and Electric Company; Harold S. Lentz, Attorney at Law, for Southern Pacific Transportation Company and subsidiary companies; James M. Phillips, Attorney at Law, for The Pacific Telephone and Telegraph Company; Rollin E. Woodbury, John R. Bury, and Tom P. Gilfoy, by John R. Bury, Attorney at Law, for Southern California Edison Company; Rives, Bonyhadi & Drummond, by Richard D. Bach, Attorney at Law (Oregon), for Pacific Power and Light Company; James A. Moore, Attorney at Law, for The Western Union Telegraph Company; Bacigalupi, Elkus, Salinger & Rosenberg, by Claude N. Rosenberg, Attorney at Law, and A. K. Fuller, for California American Water Company; F. G. Pfrommer, L. E. Butler, Thomas I. McKnew, Jr., and Thomas A. Lance, Attorneys at Law, for The Atchison, Topeka and Santa Fe Railway Company; Orrick, Herrington, Rowley & Sutcliffe, by Robert J. Gloistein, Attorney at Law, and W. E. Whittaker, for Continental Telephone Company of California; Guenter S. Cohn, Attorney at Law, for San Diego Gas & Electric Company; Jose Rafael Ramos, Attorney at Law, for Southern California Gas Company; Walker Hannon, for Suburban Water Systems; and Marshall W. Vorkink, Attorney at Law, for Union Pacific Railroad Company; respondents.

Neal C. Hasbrook, for California Independent Telephone Association; Mark L. Kermit, for Contra Costa County; W. T. Meinhold, Herbert W. Hughes, and Arlo D. Poe, by W. T. Meinhold, Attorney at Law, for California Trucking Association; Peter W. Sly, for Public Advocates Inc., NAACP, MAPA, and San Francisco Tomorrow; Carl A. Smith, for Peninsula Commute and Transit Committee; Donald M. Haight, for Sacramento Municipal Utility District; Melvin R. Dykman, Attorney at Law, for State of California Highway Commission

and Department of Public Works; Loughran, Berol & Hegarty, by Ann M. Pougiales, Attorney at Law, for Sierra Club; Louis Possner, for the City of Long Beach; Norman N. Flette, Attorney at Law, for the Attorney General, Evelle J. Younger; Jarlath Oley, Attorney at Law, for Metropolitan Water District of Southern California; Gary R. Netzer, Attorney at Law, for Los Angeles City Attorney; and John R. Phillips, Attorney at Law, for Planning and Conservation League, High Desert Environmental Defense Fund, and Center for Law in the Public Interest; interested parties.

Tucker W. Peterson, Attorney at Law, Harold A. Sipe, and William L. Oliver, for the Commission staff.

O P I N I O N

This is an investigation on the Commission's own motion to adopt objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports (EIRs) pursuant to the California Environmental Quality Act of 1970, as amended (CEQA).

A duly noticed public hearing was held in this proceeding before Examiner Donald B. Jarvis in San Francisco on February 21, 22, and 23, 1973 and in Los Angeles on February 28 and March 1, 1973. The matter was submitted subject to the filing of memoranda on or before March 7, 1973.

The Legislature placed time constraints upon the Commission in adopting objectives, criteria, and procedures for EIRs. The Knox Bill (A.B. 889; Ch. 1154, Stats. 1972) became law on December 5, 1972. It amended the California Environmental Quality Act of 1970. Chapter 1154 required the Secretary of the Resources Agency to adopt guidelines within 60 days after enactment and all other public agencies to act within 60 days thereafter. (Pub. Res. Code §§ 21082, 21083.) On February 3, 1973, the Secretary of the Resources Agency adopted Guidelines for Implementation of the California Environmental Quality Act of 1970 (Guidelines). The Commission is required to act by April 4, 1973.

Since the Commission's action herein must be consistent with the Guidelines, it was not possible to calendar a hearing in this matter until after the Secretary of the Resources Agency had acted and interested persons had some opportunity to analyze the Guidelines. The Commission recognizes the time burden under which its staff and the other parties labored. At the outset of the hearing, the Presiding Examiner indicated that, because of the time problem, he would not provide for extensive briefing in the proceeding, but that he might provide a short period after the conclusion of the hearing for filing of memoranda. The last day of hearing was on March 1, 1973, and the Presiding Examiner submitted the matter subject to the filing of memoranda by March 7, 1973.

Public Advocates, Inc. appeared in the proceeding on behalf of The National Association for the Advancement of Colored People (Western Region), Mexican-American Political Association, and San Francisco Tomorrow. During its presentation on February 23, 1973, the representative of Public Advocates, Inc. sought, and the Presiding Examiner granted, permission to file a memorandum of authorities by February 28, 1973. Public Advocates, Inc. filed a memorandum on February 28, together with a request for permission to file an additional memorandum by March 16, 1973. The Presiding Examiner denied the request and indicated that Public Advocates, Inc. could, along with all other parties, file an additional memorandum by March 7. The Commission finds that the Presiding Examiner ruled correctly and did not abuse his discretion in declining to extend the time in which to file briefs herein beyond March 7, 1973.

Notice of the hearing was sent to 2,135 persons and entities, which included public agencies, utilities, and conservation groups. The Commission staff (staff) forwarded along with the notice a proposed change in the Commission's rules which was based on interim guidelines issued by the Secretary of the Resources Agency.

The Guidelines were issued between the time of notice and the hearing herein. The Presiding Examiner permitted the staff, and others who had submitted comments or proposals based on the interim guidelines, to revise their presentations in the light of the permanent Guidelines.

The material issues raised herein are as follows: (1) Is an EIR required in rate proceedings before the Commission? (2) What procedures should be adopted by the Commission for the preparation of EIRs and Negative Declarations? (3) Who should prepare the draft and final EIRs? (4) What is the function of the staff in connection with CEQA? (5) What review procedures should be established before the Commission adopts an EIR? (6) How should preliminary matters be determined? (7) What activities found to be categorically exempt under the Guidelines fall within the jurisdiction of the Commission? (8) When is the Commission the lead agency and required to prepare an EIR? (9) What rules should be adopted for the collection of fees for preparing EIRs?

Various parties contend that the EIR requirements of CEQA and the Guidelines apply to rate proceedings before the Commission, and any rules established herein which do not so provide will be deficient. The staff and others disagree with this contention. The controversy centers over whether a rate proceeding is a "project" within the meaning of CEQA and the Guidelines.

It is clear that the provisions of CEQA apply to the Commission. (Desert Environment Con. Ass'n. v Public Util. Com'n. (1973) ___ Cal 3d ___, 104 Cal. Rptr. 31; CEQA § 21168.6.) The policy sections of CEQA provide as follows:

"CHAPTER 1. POLICY

"21000. The Legislature finds and declares as follows:

(a) The maintenance of a quality environment for the people of this state now and in the future is a matter of statewide concern.

(b) It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man.

(c) There is a need to understand the relationship between the maintenance of high-quality ecological systems and the general welfare of the people of the state, including their enjoyment of the natural resources of the state.

(d) The capacity of the environment is limited, and it is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state and take all coordinated actions necessary to prevent such thresholds being reached.

(e) Every citizen has a responsibility to contribute to the preservation and enhancement of the environment.

(f) The interrelationship of policies and practices in the management of natural resources and waste disposal requires systematic and concerted efforts by public and private interests to enhance environmental quality and to control environmental pollution.

(g) It is the intent of the Legislature that all agencies of the state government which regulate activities of private individuals, corporations, and public agencies which are found to affect the quality of the environment, shall regulate such activities so that major consideration is given to preventing environmental damage.

"21001. The Legislature further finds and declares that it is the policy of the state to:

(a) Develop and maintain a high-quality environment now and in the future, and take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.

(b) Take all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise.

(c) Prevent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities and examples of the major periods of California history.

(d) Ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.

(e) Create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations.

(f) Require governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality.

(g) Require governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment."

The Legislature has provided that one way in which these policies are to be implemented is by requiring an EIR in certain situations. CEQA Section 21061 provides for an EIR to be "considered by every public agency prior to its approval or disapproval of a project."[1/] (Emphasis added.) Project is defined in CEQA Section 21065. The applicable portion of that section provides that project means "Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."[2/]

1/ "21061. 'Environmental impact report' means a detailed statement setting forth the matters specified in Section 21100. It includes any comments on an environmental impact report which are obtained pursuant to Section 21104 or 21153, or which are required to be obtained pursuant to this division.

"An environmental impact report is an informational document which, when its preparation is required by this decision, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which any adverse effects of such a project might be minimized; and to suggest alternatives to such a project."

2/ Section 21065 provides that:

"'Project' means the following:

(a) Activities directly undertaken by any public agency.
(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.
(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

The Commission, being a regulatory agency established by the Constitution, does not engage in activities contemplated by subsection (a). It does not appear that the Commission regulates activities comprehended by subsection (b). To the extent persons or entities regulated by the Commission might engage in activities subject to subsection (b), it would appear that the Commission would not be the lead agency or responsible agency (CEQA §§ 21067, 21105) with respect to the approval of such activities. Subsection (c) is the only portion of Section 21065 which relates to the activities of the Commission.

The Guidelines repeat the statutory definitions.[3/]

It is argued that CEQA is patterned after the Federal National Environmental Policy Act (NEPA);[4/] that the Commission should look to NEPA and the Federal Court decisions construing it in interpreting CEQA; that under NEPA an EIR[5/] may be required in a rate proceeding and that a similar construction should be adopted by the Commission. It is also argued that a Commission order which authorizes a change in rates is a "permit, license, certificate or other entitlement" within the meaning of CEQA and the Guidelines.

3/ "15027. EIR - Environmental Impact Report. Environmental Impact Report (EIR) means a detailed statement setting forth the environmental effects and considerations pertaining to a project as specified in Section 21100 of the California Environmental Quality Act. . . ."

"15037. Project.

"(a) Project means the whole of an action, resulting in physical impact on the environment, directly or utlimately, that is any of the following:

(1) an activity directly undertaken by any public agency including but not limited to public works construction and related activities, clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption of local General Plans or elements thereof.

(2) an activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(3) an activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

4/ 42 U.S.C.A. §§ 4321 et seq.

5/ Under NEPA the term for the statement is Environmental Impact Statement (EIS). See Guidelines § 15028.

The staff and others contend that the EIR requirements of CEQA are not as broad as those of NEPA and that the Legislature did not require EIRs in rate proceedings.

Before considering the point at issue - whether the EIR procedure is applicable to rate proceedings - we make the following observations. There is no doubt that environmental considerations may be involved in rate proceedings. (E.g., Students Challenging Reg. Agency Pro. v United States (1972) 346 F Supp 189 (D.C.D.C.) appeal pending; Re Detroit Edison Co., 94 PUR 3d 298.) It is also clear that, when appropriate, the Commission must consider environmental matters in rate proceedings. (CEQA §§ 21000, 21001.) However, it was not necessary for the Legislature in enacting CEQA to require EIRs in all or as many situations as did Congress in NEPA. (Dandridge v Williams (1970) 397 US 471, 486-87, 90 S. Ct. 1153, 1160-63; 25 L Ed 2d 491, 502-03.)

NEPA became effective on January 1, 1970. The Federal Interim Guidelines under NEPA were promulgated on April 30, 1970. (35 Fed. Reg. 7391.) CEQA became effective on September 18, 1970. The permanent Federal Guidelines were issued on April 23, 1971. (36 Fed. Reg. 7724.) Chapter 1154, which amended CEQA to its present content, became effective on December 5, 1972. Thus, each time the Legislature acted it had before it the Federal act and guidelines. The Legislature did not adopt the language of NEPA in toto. It made certain changes. We are here concerned in determining the meaning of the changes in one area.

Congress made the EIR provisions of NEPA applicable to "every recommendation or report on proposals for legislation and other major Federal actions...." (Emphasis added. 42 U.S.C.A. 4332(2)(C).)[6] The Legislature made the EIR provisions of CEQA applicable to projects state agencies, boards, and commissions "propose

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6/ "4332. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

* * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on--

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;"

to carry out or approve". (Section 21100.)[7] The Legislature also provided that the EIR requirements apply to discretionary projects and not to ministerial ones. (Section 21080.) An EIR is not required for a feasibility or planning study for possible future actions, although environmental factors must be considered therein. (Section 21102.) Furthermore, the Legislature also included in CEQA an important section not contained in NEPA - a provision for collecting fees for the preparation of an EIR from the proponent of a project.[8]

7/ "21100. All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:

(a) The environmental impact of the proposed action.
(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
(c) Mitigation measures proposed to minimize the impact.
(d) Alternatives to the proposed action.
(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
(f) Any irreversible environmental changes which would be involved in the proposed action should be implemented.
(g) The growth-inducing impact of the proposed action."

8/ "21089. A public agency may charge and collect a reasonable fee from any person proposing a project subject to the provisions of this division in order to recover the estimated costs incurred by the public agency in preparing an environmental impact report for such project."

The term rate, when used in connection with public utilities, means the price stated or fixed for some commodity or service measured by a specific unit or standard. (Pub. Util. Code § 210; Bird v Chesapeake & Potomac Tel. Co. (1962) 185 A 2d 917-18 (D.C. Mun. App.).) Traditionally, the setting of rates has not been considered to be a permit, license, certificate, or other entitlement for use. In the Public Utilities Code the Legislature has clearly delineated between the licensing and rate-making functions of the Commission. The Public Utilities Act provides for the issuance of certificates of public convenience and necessity to operate as a common carrier or public utility; construct or extend a line, plant, or system or exercise a right or privilege under a franchise in one group of statutes. (Pub. Util. Code §§ 1001, 1002, 1007, 1010, 1031, 1051, 1063.) In another group of statutes the Act provides for the regulation of rates by those persons or entities which are legally entitled to operate as public utilities. (Pub. Util. Code §§ 451 et seq., 491; 532.) Other portions of the Public Utilities Code also treat rate making as a function different than that of licensing: Passenger Air Carrier Act (§§ 2751(b), 2752); Highway Carriers' Act (§§ 3571 et seq., 3602. 3611, 3621, 3661 et seq.); For-hire Vessel Act (§§ 4532 et seq., 4571 et seq.); Household Goods Carriers Act (§§ 5131, 5191 et seq.); Passenger Charter-party Carriers' Act (§§ 5371 et seq., 5401, 5402).

The Commission regulates 20,670 persons and entities. (PUC Annual Report, 1971-72 Fiscal Year, Appendix C.) Those persons regulated encompass a range from small water, telephone, and trucking companies to large utilities having gross revenues of millions of dollars. The rates charged by these persons are for activities already authorized by the Commission. We do not believe that the

Legislature, which clearly has indicated a distinction between licensing and rate making, intended to eliminate that distinction in CEQA and require that all rate proceedings involving these 20,670 regulatees be subject to the EIR provisions of CEQA.[9] This conclusion seems appropriate in the light of the fee provisions of CEQA. In the case of a small utility, the fee charged for an EIR might be substantial in relation to the rate increase sought. Assuming the fee to be an allowable expense, this could cause a substantial rate increase for the utility's customers.[10]

Extensive research has unearthed but one case dealing with the question here under consideration.[11] In Students Challenging Reg. Agency Pro. v United States (1972) 346 F Supp 189 (D.C.D.C.),

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9/ It should also be noted that while the Commission has comprehensive jurisdiction over rates, it is only required to formally act in rate increase proceedings. (Cal. Const., Art. XII, Secs. 20, 21, 22; Pub. Util. Code §§ 454, 494.) Rate decreases and rates for new service may, on occasion, be effectuated by tariff filings without formal proceedings. (Pub. Util. Code §§ 455, 491.) If the EIR provisions of CEQA are held to be applicable, one result could be to convert tariff filings to formal proceedings.

10/ E.g., in Le Grand Water Co., Decision No. 67346 in Application No. 43981, unreported, the Commission found that the company's average depreciated rate base was $6,950 and its estimated operating revenues for the test year were $5,880. If the company had been required to pay a fee for the preparation of an EIR (or a negative declaration), it would have had a substantial impact on the company's revenues and rates.

11/ Cases such as Friends of Mammoth v Board of Sup'rs. of Mono County (1972) 8 Cal 3d 247; Environmental Def. Fund, Inc. v Coastside Cty. U. Dist. (1972) 27 CA 3d 695; Calvert Cliffs' Coord. Com. v United States A. E. Com'n. (1971) 449 F 2d 1109 (D.C. Cir.) and Natural Resources Defense Council, Inc. v Grant (1972) 341 F Supp 356 (E.D.N.C.) involve situations which are clearly projects within the meaning of CEQA and are not instructive on the question of rate proceedings.

appeal pending, a three-judge Federal Court enjoined the implementation of a temporary, across the board 2.5 percent surcharge in freight rates authorized by the Interstate Commerce Commission as to certain rates.[12/] The Court found that the approval by the ICC of the temporary surcharge without an EIS was a violation of NEPA. The ICC in approving the increase made a finding that "the involved general increase will have no significant adverse effect on...the quality of the human environment within the meaning of the Environmental Policy Act of 1969." In the proceeding the ICC had required the applicant railroads to submit a statement regarding the environmental impact of their proposals. The ICC circulated a draft EIS but did not issue a final one. (346 F Supp at p. 193.) The Court in granting the injunction found that the action of the ICC in approving the temporary rate increase was a major Federal action which significantly affected the environment. (346 F Supp at pp. 198-99, see also p. 192.)

If the Legislature had used the same language in CEQA as did Congress in NEPA and made the EIR requirements applicable to major actions of state agencies, boards, and commissions significantly affecting the environment, the Commission would have to consider whether to apply the rationale of the Students case to the rules established herein.[13/] As indicated, the Legislature, with the language of NEPA before it, chose more restrictive language and made the EIR requirements of CEQA applicable only to projects.

12/ "However, in light of the fact that plaintiff objects to the surcharge only insofar as it increases the shipping costs of recyclable materials, we are restricting our injunction to the movement of these goods. The railroads will be permitted to continue exacting the 2.5 percent surcharge on the movement of all goods which are not being transported for purposes of recycling." (346 F Supp at p. 192.)

13/ Under CEQA all rate proceedings would be included. The determination of whether there would be a significant affect on the environment would be made by a negative declaration. (Guidelines § 15033.)

In the light of the foregoing analysis the Commission concludes that the policy provisions of CEQA (§§ 21000, 21001) apply to rate proceedings but the EIR provisions (§§ 21100 et seq.) do not. The Commission will consider potential environmental impact in rate matters. When such issues are brought to light by the staff or other parties, appropriate findings will be made thereon. (Pub. Util. Code § 1705.)

In determining what procedures should be adopted by the Commission for the preparation of EIRs and Negative Declarations, we must first consider the function of the staff and determine who should prepare these documents. The procedures adopted should be subject to and, insofar as possible, consistent with the Commission's Rules of Practice and Procedure (Rules).

The staff appears in most formal proceedings before the Commission. In investigations on the Commission's own motion it is the moving party which has the burden of proof.[14/] (Rule 57; Shivell v Hurd (1954) 129 CA 2d 320, 324; Ellenberger v City of Oakland (1943) 59 CA 2d 337.) In application and complaint proceedings the staff often takes a position contrary, in whole or in part, to other parties. To the extent the staff opposes, or is opposed by, other parties in a proceeding, it would be inappropriate for it to write the final EIR. The Commission finds that it is the function of the staff to analyze all matters before the Commission with respect to whether or not environmental matters are involved; to analyze a proponent's (other than its own) Environmental Data Statement (EDS); to request the proponent to correct any deficiencies which may be found in the EDS and to prepare such independent staff studies,

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14/ The question of who is a proponent for the purposes of providing environmental data information and the payment of fees for an EIR is hereinafter discussed.

reports, or exhibits as may be necessary to assist the Commission in the preparation of an EIR. (See Greene County Planning Board v Federal Power Com'n. (1972) 455 F 2d 412 (2d Cir.); Calvert Cliffs' Coord. Com. v United States A. E. Com'n. (1971) 449 F 2d 1109 (D.C. Cir.); Natural Resources Defense Council, Inc. v Grant (1972) 341 F Supp 356 (E.D.N.C.).)

The EIR is an informational document which must be considered by the Commission prior to its approval or disapproval of a project.[15/] However, the Commission is not limited to just considering the environmental data contained in the EIR. Because of the adversary nature of formal Commission proceedings, parties may produce evidence relating to environmental matters by testimony and exhibits not related to an EIR.[16/] In addition, environmental factors are to be considered

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15/ CEQA Section 21061 provides:

"'Environmental impact report' means a detailed statement setting forth the matters specified in Section 21100. It includes any comments on an environmental impact report which are obtained pursuant to Section 21104 or 21153, or which are required to be obtained pursuant to this division.

"An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which any adverse effects of such a project might be minimized; and to suggest alternatives to such a project."

16/ It is not necessary herein to pass upon the question of the weight or status of an EIR prepared by another agency (where the Commission is not the lead agency) where other environmental evidence is produced in the course of a proceeding before the Commission.

along with economic and technical factors and long and short term benefits and costs. (CEQA § 21001(g).) Ordinarily, in a contested matter this would be done at a hearing on all the issues. The Guidelines provide, that where the Commission is the lead agency,[17/] it shall prepare an EIR or Negative Declaration, unless the project is an exempt one.[18/] (Guidelines § 15066.)

The EIR process includes the preparation of a draft EIR and a final EIR. (Guidelines § 15085.) Thus, in the ordinary course of events, the final EIR will be prepared at the conclusion of the hearing in a matter. The final EIR must then be presented to the Commission for its adoption. (Guidelines § 15085(f).) Elementary fairness and good procedure indicate that the parties to a contested proceeding should have the opportunity to submit comments on or exceptions to the final EIR before it is adopted by the Commission.

The record also discloses a need for preliminary procedures to determine whether or not the Commission is required to prepare an EIR or Negative Declaration in a particular matter. Certain classes of projects are exempt from the EIR requirements of CEQA. (CEQA § 21084; Guidelines §§ 15100-15114.) Emergency repairs to public service facilities necessary to maintain service and ministerial projects are also exempt. (CEQA §§ 21080(b), 21085.) When a proposed project falls within a category for which an EIR is required, there

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17/ The question of lead agency is hereinafter considered.

18/ The question of exemptions is hereinafter considered.

may be a question of whether or not the Commission is the lead agency required to prepare an EIR. (CEQA § 21165; Guidelines § 15065.) Also, when an EIR is required, a Negative Declaration may be issued when a public agency finds that a project "will have no significant effect on the environment due to circumstances peculiar to the specific project". (Guidelines § 15083.)

It is important for all parties to have determined as soon and expeditiously as possible whether a project is exempt from EIR requirements or may be the subject of a Negative Declaration and, if an EIR or Negative Declaration is required, whether or not the Commission is the lead agency. This is particularly significant because of the informational data filing requirements and fee requirements in the rules herein adopted. (See CEQA § 21089; Guidelines §§ 15020, 15085(a).) The expeditious way to provide for the prompt determination of these preliminary matters is to provide that the proponent or opponent of a project involved in any application, investigation, or complaint before the Commission may file an appropriate motion seeking a determination of whether or not an EIR or Negative Declaration is required and, if one be required, whether the Commission is the lead agency.

The Guidelines require the Commission to include in the rules adopted herein a list of specific activities that fall within the categorical exemptions established in the Guidelines. (Guidelines § 15116.) Various parties have submitted suggestions for activities which they urge should be included in such enumeration. The

Commission has reviewed these suggestions. There will be included in the rule hereafter set forth a list of activities which clearly fall within the categorical exemptions.[19] This list will be subject to further review and revision as warranted. This is particularly so because the Secretary for Resources may add or delete categorical exemptions. (CEQA §§ 21086, 21087; Guidelines § 15115.) It should also be noted that, since this is a new area, there may be certain general categorical exemptions which, when applied to matters before the Commission, may have substantial environmental impact. For example, Section 15102 of the Guidelines establishes the following categorical exemption:

> "Class 2: Replacement or Reconstruction. Class 2 consists of replacement or reconstruction of existing structures and facilities where the new structure will be located on the same site as the structure replaced and will have substantially the same purpose and capacity as the structure replaced, including but not limited to:
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> * * *
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> (b) Replacement of a commercial structure with a new structure of substantially the same size and purpose."

If an electric corporation sought to reconstruct a generating plant using one type of fossil fuel with another plant substantially the same size which would utilize a different type of fossil fuel or nuclear power, it would seem that the project might be covered by the categorical exemption. Even if this be so, and an EIR is not required under CEQA and the Guidelines, the Commission would exercise its general jurisdiction and require a

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19/ A party may by appropriate motion raise the question of whether a project not listed in the rule falls within a categorical exemption.

full development of environmental considerations in the proceeding. (Pub. Util. Code §§ 701, 702, 761, 762, 762.5, 768, 1001, etc.; CEQA §§ 21000, 21001; General Order No. 131; Northern Cal. Assn. v Public Util. Com. (1964) 61 C 2d 126.)

The Guidelines permit the determination of what is a ministerial project exemption by enumeration or on a case-by-case basis. (Guidelines § 15073.) The Commission is of the opinion and finds that these determinations should be made on a case-by-case basis. The motion procedure, heretofore discussed, provides an expeditious way for a prompt determination of whether a particular project does not require an EIR because it falls under the ministerial exemption.

The question of when the Commission is the lead agency and must prepare an EIR is a complex one. Section 15065 of the Guidelines provides:

> "Designation of Lead Agency. Where two or more public agencies are involved with a project, which agency shall be the Lead Agency shall be determined by the following principles:
>
> (a) The Lead Agency shall be the public agency which proposes to carry out the project.
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> (b) If the project is to be carried out by a nongovernmental person, the Lead Agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole. The Lead Agency will generally be the agency with general governmental powers rather than an agency with a single or limited purpose which is involved by reason of the need to provide a public service or public utility to the project; in such cases, the single or limited purpose agency will, upon request, provide data concerning all aspects of its activities required to furnish service to the project to the agency drafting the EIR, and no separate EIR will be required in regard to such activities.

(c) Where more than one public agency equally meet the criteria set forth in paragraph b above, the agency which is to act first on the project in question shall be the Lead Agency (following the principle that the environmental impact should be assessed as early as possible in governmental planning).

(d) In the event that the designation of a Lead Agency is in dispute among public agencies, any public agency may submit the question to the Office of Planning and Research which shall designate the Lead Agency based on consideration of the above priorities, along with consideration of the capacity of such agency to adequately fulfill the requirements of the CEQA."

There is no doubt that if an application for a certificate of public convenience and necessity to construct and operate a water system is filed for the purpose of providing water to a proposed residential subdivision, the primary question involved is whether the subdivision should be built. In this instance, the agency which has jurisdiction to determine whether the subdivision should be built would be the lead agency. However, if an operating water utility needs to increase its plant in order to provide adequate service to its customers (see Solemint Water Co. (1968) 68 CPUC 111; A. and M. J. Sterkin (1967) 66 CPUC 740) the matters raised in such proceeding are within the purview of the jurisdiction of the Commission. It is the Commission which must weigh the service needs of the customers along with environmental, technical, and economic considerations to determine whether new plant should be constructed. When an EIR is required in this situation, the Commission would be the lead agency.

The foregoing is particularly true in the case of electric generation or transmission systems, which are parts of an interconnected grid. While a generating plant may be situated in a

particular locality, it is designed to serve the entire system. While other agencies may have jurisdiction over certain aspects of the proposed project (see Orange County Air Pol. Con. Dist. v Public Util. Com'n. (1971) 4 Cal 3d 945), the primary determination - whether the project is necessary, considering social, economic, environmental, and technical factors - is to be determined by the Commission. (Orange County Air Pol. Con. Dist. v Public Util. Com'n., supra, at p. 23; General Order No. 131.) When an EIR is required in connection with an electric generating plant project, the Commission would be the lead agency.

Electric transmission lines are another example of a situation where the Commission would be the lead agency if an EIR is required. Transmission lines are part of the interconnected grid. They generally run through the territory of many public agencies. The question of whether a transmission line should be constructed is within the primary jurisdiction of the Commission.

The Department of Public Works, City of Los Angeles, and Southern Pacific Transportation Company helped develop the record with reference to lead agency determinations in transportation matters. Attention was focused on Guidelines Section 15065(a) which makes a public agency carrying out a project the lead agency. For example, if the State Highway Commission adopts a freeway route which will require grade separations where the freeway would cross railroad tracks, the Department of Public Works which would carry out the construction of the freeway would be the lead agency and be required to prepare the EIR for the entire project, including the grade separations.

The Commission will, in the rules hereinafter adopted, set forth the situations where it clearly is or is not the lead agency. A ruling on situations not enumerated may be obtained under the motion procedure heretofore discussed.

Various parties urged the Commission to include in the rules time limits in which the Commission would be required to act. The EIR requirements of CEQA apply to a myriad of situations before the Commission ranging from applications for authority to construct nuclear generating plants to applications for authority to operate as a highway common carrier. The Commission has had no experience in preparing EIRs. While we recognize the concern of the parties for prompt processing of EIRs, we also recognize that the EIR procedures require the Commission to take an appropriate amount of time to do its job under CEQA.[20/] The Commission finds that it is not appropriate at this time to include time limits in the rules herein adopted. We believe the motion procedure, heretofore discussed, will remove many of the concerns expressed by the parties advocating time limits.

Section 21089 of CEQA provides that:

> "A public agency may charge and collect a reasonable fee from any person proposing a project subject to the provisions of this division in order to recover the estimated costs incurred by the public agency in preparing an environmental impact report for such project."

Since the Legislature has not provided funds for the Commission to implement the EIR provisions of CEQA and the Guidelines, the rules herein adopted will provide for the collection of an appropriate fee. However, various questions are presented in connection with the adoption of a rule dealing with fees.

20/ "Of course, independent review of the 'detailed statement' and independent balancing of factors in an uncontested hearing will take some time. If it is done properly, it will take a significant amount of time. But all of the NEPA procedures take time. Such administrative costs are not enough to undercut the Act's requirement that environmental protection be considered 'to the fullest extent possible,'...." (Calvert Cliffs' Coord. Com. v United States, supra, at p. 1118.)

The statute provides that a fee may be collected from "any person proposing a project". The staff proposed a rule requiring a fee from the "proponent" of a project. Who is a proponent?

There are three principal types of formal proceedings before the Commission: applications, complaints, and investigations on the Commission's own motion. It is clear that when an application is filed with the Commission seeking a permit, license, certificate, or other entitlement of use, the applicant is a proponent and may be subject to the fee provisions. Complaint and investigation cases pose problems.

The subject matter of a complaint or investigation is often directed to requiring a utility to do something for which a permit, license, certificate, or other entitlement of use would be required if the utility sought to do the act voluntarily. (E.g., Town of Woodside v P.G.&E. (1965) 64 CPUC 51; Angell v P.G.&E. (1970) 70 CPUC 748; Undergrounding Electric Utilities (1970) 71 CPUC 134.) The EIR provisions of CEQA would apply to these situations.[21/]

Section 1702 of the Public Utilities Code provides in part that:

> "Complaint may be made by the commission on its own motion or by any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or any body politic or municipal corporation, by written petition or complaint, setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission."

21/ Instead of ordering the action or project directly, the Commission could order the utility to file an appropriate application to do it. (So. Cal. Freight Lines (1961) 58 CPUC 610, 621, Ordering Paragraph 7; Packard v P.T.&T. and P.G.&E. (1970) 71 CPUC 469, 473.)

While a complainant is the moving party under Section 1702, it is difficult to see how his right to complain under the law can be qualified by charging him for the preparation of the EIR if the relief requested requires one. The same is true when the Commission on its own motion investigates a violation of law or commences an investigation after the filing of an application to give it jurisdiction to make an order considering all alternatives.

There may be situations where the Commission institutes an investigation and is the proponent of a project within the meaning of CEQA Section 21089. The same may be true in some instances for complainants, intervenors, or interested parties. However, there may be other instances where the respondent or defendant should be considered the proponent because the proceeding arose from its failure to do that which was required by law. (City & County of San Francisco v Public Util. Com'n. (1971) 6 Cal 3d 119, 129; Breidert v Southern Pac. Co. (1964) 61 Cal 2d 659, 662.)

The Commission finds that the motion procedure, heretofore discussed, should include a motion to determine which party in a particular proceeding is the proponent with respect to the payment of the fee for the preparation of an EIR.

The staff proposed a rule dealing with the collection of fees by the Commission for the preparation of an EIR. The suggested rule provides for the payment of a minimum deposit at the time a proceeding involving a project is filed with the Commission. The amount deposited is subject to increase or refund depending on the actual costs incurred by the Commission. In transportation matters the deposit is set at $500. In other utility matters the deposit is based on the estimated cost of the project, and installment payments are permitted.

At the hearing many of the parties expressed concern about how a determination would be made as to whether or not a deposit would be required when it was not clear in a particular situation whether an EIR was required or the Commission was the lead agency. The Commission is of the opinion that the motion procedures, heretofore considered, adequately deal with the problem.

Various parties contend that the staff proposal is erroneous insofar as it bases the fee proposed to be charged for an EIR on the actual costs incurred by the Commission. It is argued that the Legislature intended in CEQA Section 21089 to have a proponent of a project apprised in advance of the cost of the EIR so that he might consider this cost in evaluating whether or not to proceed with the project. Under this contention, the estimated cost would be collected by the Commission whether it was less than or in excess of the actual cost. The Commission concludes that this contention is not correct for the reasons hereinafter set forth.

The Commission concludes that the words "estimated costs" in Section 21089 were intended to help avoid accounting disputes and provide latitude for public agencies in arriving at costs where their accounting and bookkeeping systems were not set up to segregate out each and every cost for an EIR, including general overheads. Section 21089 does not provide that the estimated costs must be determined in advance of the preparation of the EIR. Furthermore, it is clear from CEQA and the Guidelines that the Commission cannot at the time of the filing of a proceeding know the magnitude of the EIR which may be required. CEQA Section 21104 provides that prior to completing the EIR the Commission shall consult with other public agencies and may consult with others having special expertise prior to completing an EIR.[22/] The Guidelines set up procedures for

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22/ "21104. Prior to completing an environmental impact report, the responsible state agency shall consult with, and obtain comments from, any public agency which has jurisdiction by law with respect to the project, and may consult with any person who has special expertise with respect to any environmental impact involved."

circulating and obtaining comments on the draft EIR before the final EIR is prepared. (Guidelines §§ 15085, 15146, 15144.) The Commission is required to evaluate the comments received from those who evaluated the draft EIR. (Guidelines § 15085(d).) It is obvious that such comments may bring forth facts and issues which would require enlarging the scope of the EIR. The Legislature could not have intended that fees for an EIR should be determined before the magnitude of the EIR was known.

The staff's proposed rule would make the fee provision applicable to Negative Declarations. Some of the parties contend that this is illegal because there is no statutory basis therefor. They argue that CEQA Section 21089 only authorizes a fee in connection with EIRs and that it does not apply to Negative Declarations. There is no merit in this contention.

A Negative Declaration is one type of EIR. The term Negative Declaration does not appear anywhere in CEQA. The term

is established and defined in Section 15083 of the Guidelines.[23/] It is clear that a Negative Declaration is an abbreviated EIR, which indicates that, after consideration, the project is found to be one which does not significantly affect the environment. It is proper to apply the fee provision of the rules herein adopted to Negative Declarations.

23/ "15083. Negative Declaration. A Negative Declaration shall be prepared for a project which would ordinarily be expected to have a significant effect on the environment, but which the Public Agency finds will have no significant effect on the environment due to circumstances peculiar to the specific project.

(a) A Negative Declaration must include a description of the project as proposed, and a finding that the project will not have a significant effect on the environment.

(b) The Negative Declaration followed by notice of the action taken regarding the approval or disapproval of the project must be filed with the Secretary for Resources, if the responsible agency is a state agency, board or commission. If the responsible agency is a local agency, as defined in these Guidelines, these documents shall be filed with the county clerk of the county, or counties, in which the project will be located. The Negative Declaration shall be filed with sufficient time before the project is approved to provide an opportunity for members of the public to respond to the finding. The Negative Declaration should not exceed one page in length.

(c) After completing a Negative Declaration, the responsible agency shall file a copy of the Negative Declaration and a Notice of Determination. The Notice of Determination shall include the decision of the agency to approve or disapprove the project, the determination of the agency whether the project will have a significant effect on the environment, and whether an EIR has been prepared pursuant to the provisions of CEQA.

(1) If the responsible agency is a state agency, the Notice of Determination shall be filed with the Secretary of Resources.

(2) If the responsible agency is a local agency, the Notice of Determination shall be filed with the county clerk of the county or counties in which the project will be located."

CEQA and the Guidelines provide that an agency required to prepare an EIR may prepare it itself or contract for the preparation of all or a portion thereof. (CEQA § 21100, Guidelines § 15066.) Various parties contend that to the extent a proponent is required to pay a theoretically unlimited fee for the preparation of an EIR, over which the proponent has no control, it amounts to the taking of property without due process of law. The Commission finds that the EIR fee provisions do not violate the Federal or California Constitutions.

CEQA Section 21089 provides for the charge and collection of a reasonable fee. Reasonableness is an accepted constitutional and legal standard which may be determined by applying it to the facts of each case. (See cases collected at 36 Words and Phrases, pp. 405-664.) Among the factors in determining reasonableness of a fee for the preparation of an EIR are the magnitude of a proposed project and the environmental implications of the project. Furthermore, while the relative cost with relation to the proposed project to a proponent for preparing an EIR is one factor in considering the reasonableness thereof, this factor cannot be used to prevent the Commission from preparing a proper EIR as mandated by law. (Calvert Cliffs' Coord. Com. v United States, supra, at p. 1118.) A proponent cannot be permitted to control how the Commission prepares or causes the EIR to be prepared.

Due process does require that a proponent, upon whom the Commission proposes to assess a fee for the preparation of an EIR, be afforded the opportunity to challenge the reasonableness of the fee. (Randone v Appellate Department (1971) 5 Cal 3d 536, 558; Endler v Schutzbank (1968) 68 Cal 2d 162.) Proponents will be afforded the opportunity to challenge the reasonableness of a proposed deposit or fee under the motion procedure, heretofore discussed.

It will be necessary to formulate procedures for contracting for portions of an EIR, where appropriate, on a case-by-case basis. Questions arising under this section may be determined under the aforesaid motion.

Some parties contend the minimum deposits recommended by the staff in connection with the proposed fee rule are improper because they are not supported by any evidence of record. There is no merit in this contention.

A staff utilities engineer testified about the schedule pertaining to non-transportation utilities. He testified that the Commission presently had no funds in its budget for the preparation of EIRs; that in preparing the proposed schedule he had considered the costs the Commission might incur in utilizing the services, under contract, of other state agencies such as the Air Resources Board, Department of Water Resources, and Division of Mines and Geology; that he had examined a fee schedule prepared by the Resources Agency for a licensing proceeding; that he had examined a fee schedule of the Atomic Energy Commission and that he had examined the costs expended by Southern California Edison Company in preparing an environmental statement in connection with one of its projects. A transportation engineer testified that he prepared the minimum deposit section relating to transportation matters. He indicated that he based his recommendation on his knowledge of the types of transportation matters handled by the Commission and consideration of those which might require an EIR or Negative Declaration. The Commission finds that the minimum deposits proposed by the staff are fair and reasonable. If a proponent in a particular matter believes that the minimum deposit required is not reasonable, he may file a motion in connection with the deposit and obtain a ruling on the reasonableness thereof.

There is disagreement among the parties regarding the proper elements to be included in calculating the fee for the EIR. The staff contends that the time of all Commission personnel involved in connection with the preparation of an EIR[24/] and the cost of contracting out, when applicable, are properly includable. Some parties contend that if the position of the staff is adopted they could be placed in a situation of financial detriment by their opposition, which they claim would be unconstitutional. The function of an EIR is to insure that environmental issues are properly considered as mandated by CEQA. The responsibility for so doing is placed upon the Commission and not the proponent of a project. The hearing process is one way to inquire into, test, and develop environmental data. In general, the time spent at hearings by Commission personnel in connection with an EIR is properly includable in the fee. The Commission recognizes that, on occasion, an opponent of a project may attempt to unnecessarily extend a hearing. If this were to occur, the question of whether such additional hearing time should reasonably be included in the fee can be raised by the motion in connection with fees, provided for herein. However, the Commission will not permit the specter of a higher EIR fee to be used to limit reasonable opposition to a project.

The rule proposed by the staff would require proponents to include in the required EDS a list of the persons responsible for compiling the data therein and their qualifications together with a list of witnesses who will testify in behalf of the EDS in the event of a hearing. Various parties attack the proposed requirement of enumerating witnesses at this stage of a proceeding. They argue that, in the usual case, there may be several persons qualified to

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24/ This would include the time spent by the staff in reviewing a proponent's EDS, the investigation and preparation of independent staff environmental exhibits, the Examiner's time in preparing a final EIR, and the time at the hearing of the staff and Examiner devoted to the consideration of matters relating to the EIR.

testify in support of an EDS; that the hearing may be many months in the future, and it would be difficult to ascertain which of these persons would be available at the time of the hearing and that the question of enumerating witnesses is more properly left to a pre-hearing conference. There is merit in this contention, and the witness enumeration provision will not be adopted.

The Commission realizes that the rules herein established deal with new subject matter. Experience under the rules may indicate the need for additions or revisions. Furthermore, actions by the Secretary for Resources, who is authorized to revise the Guidelines (CEQA § 21086; Guidelines § 15115), may require changes. The Commission will, when appropriate, inquire into the need for revision of the rules established herein.

No other points require discussion. The Commission makes the following findings and conclusions.

Findings of Fact

1. The procedures adopted by the Commission for complying with the EIR requirements of CEQA should be subject to and, insofar as possible, consistent with the Commission's Rules of Practice and Procedure.

2. It is the function of the staff to analyze all matters coming before the Commission with respect to whether or not environmental questions are involved; to analyze a proponent's (other than its own) Environmental Data Statement (EDS); to request the proponent to correct any deficiencies which may be found in the EDS and to prepare such independent staff studies, reports, or exhibits as may be necessary to assist the Commission in the preparation of an EIR. To the extent the staff opposes, or is opposed by, other parties in a proceeding, it would be inappropriate for it to write the final EIR.

3. The Presiding Officer to whom a matter is assigned should have the duty and responsibility pursuant to Rule 63 of preparing a final EIR or Negative Declaration which may be required in connection therewith.

4. The parties should have an opportunity to file exceptions to the final EIR and as provided in Rules 80 and 81.

5. With respect to a project involved in a proceeding before the Commission, motions to determine whether the project is exempt from EIR requirements, whether the Commission is the lead agency required to prepare the EIR, whether a Negative Declaration is required, and in case of dispute, motions to determine who is the proponent of the project under consideration, should be permitted subject to the provisions of Rule 63.

6. The establishing of time limits in connection with the preparation of EIRs is not appropriate at this time.

7. The Legislature has not provided funds for the Commission to implement the EIR provisions of CEQA and the Guidelines. The Commission should establish reasonable fees for the preparation of EIRs pursuant to CEQA Section 21089.

8. The minimum deposits in connection with fees proposed by the staff are just and reasonable.

9. Ministerial exemptions should be determined on a case-by-case basis.

10. The rules hereinafter set forth should list those activities which clearly appear to be categorically exempt from EIR requirements under the Guidelines.

11. The rules hereinafter set forth should list those situations in which the Commission clearly is or is not the lead agency for the preparation of an EIR or Negative Declaration under the Guidelines.

12. The fee to be charged for an EIR or Negative Declaration should include, but not be limited to, the time of all Commission personnel, including time spent at public hearings, reasonably spent in connection with the preparation of the EIR or Negative Declaration and the reasonable costs of contracting for the preparation of all or a portion of an EIR or Negative Declaration.

13. It is not necessary to require the proponent of a project to include in an EDS a list of prospective witnesses who will appear at the hearing in support thereof.

14. The rules set forth in Appendix A attached hereto are fair, just, and reasonable and comply with the requirements of CEQA and the Guidelines.

Conclusions of Law

1. A rate-making proceeding before the Commission is not a project within the meaning of CEQA Section 21065(c).

2. CEQA Sections 21000 and 21001 apply to rate-making proceedings before the Commission.

3. The EIR sections of CEQA (§21100 *et seq.*) do not apply to rate-making proceedings before the Commission.

4. CEQA Section 21089 authorizes the charging of actual costs in determining a reasonable fee to be charged for an EIR. The words "estimated costs" in Section 21089 were intended to help avoid accounting disputes and provide latitude for public agencies in arriving at costs where their accounting and bookkeeping systems were not set up to segregate out each and every cost for an EIR, including general overheads.

5. A Negative Declaration is one type of EIR and the Commission may charge a reasonable fee for the preparation thereof.

6. The fee provisions provided for in CEQA Section 21089 and under the rules herein adopted requiring the proponent of a project to pay a reasonable fee for the preparation of an EIR cannot be applied to defeat the right to complain of any act or thing done or omitted to be done by any public utility in violation or any claimed to be violation of any provision of law or order or rule of the Commission as provided in Public Utilities Code Section 1702.

7. The provisions of CEQA, the Guidelines, and the rules herein adopted which authorize the collection of a reasonable fee from a proponent of a project for the Commission preparing an EIR do not violate the Federal or California Constitutions. The procedures established in the rules herein adopted afford a proponent due process of law to challenge the reasonableness of a fee or deposit required therein.

8. The Commission should adopt the rules set forth in Appendix A attached hereto.

O R D E R

IT IS ORDERED that the Commission's Rules of Practice and Procedure are hereby amended to include therein Rule 17.1 which is set forth in Appendix A attached hereto and is hereby adopted.

The Secretary is directed to cause an adequate number of copies of this decision to be made available for Commission use and for service upon and distribution to the appearances herein and to others concerned therewith.

The effective date of this order is the date hereof.

Dated at San Francisco, California, this 3rd day of APRIL, 1973.

President

Commissioners

17.1 (Rule 17.1) Special Procedure for Implementation of the California Environmental Quality Act of 1970. (Preparation and Submission of Environmental Impact Reports.)

A. In General

This rule was developed and issued pursuant to the California Environmental Quality Act of 1970 (CEQA) and the Guidelines for Implementation of the California Environmental Quality Act promulgated by the Office of the Secretary for Resources (Guidelines). It shall be the general policy of the Public Utilities Commission to adopt and adhere to the principles, objectives, definitions, and criteria of the CEQA and of the Guidelines promulgated thereunder in its regulations under its constitutional and statutory authority. The CEQA requires the Commission to prepare, or cause to be prepared by contract, and to certify the completion of an Environmental Impact Report (EIR) for any non-ministerial activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use, for which the Commission has the principal responsibility for approving and which may have a significant effect on the environment.

B. Objectives

1. To carry out the legislative intent expressed in the CEQA, Pub. Resources Code Sections 21000 and 21001, and specifically

2. To ensure that environmental issues are thoroughly, expertly, and objectively considered within a reasonable period of time, so that environmental costs and benefits will assume their proper and co-equal place beside the economic, social, and technilogical issues before the Commission, and so that there will not be undue delays in the Commission's decision-making process.

3. To assess in detail, as early as possible, the potential environmental impact of a proposed project in order that adverse effects are avoided, alternatives are investigated, and environmental quality is restored or enhanced, to the fullest extent possible.

4. To achieve an appropriate accommodation between these procedures and the Commission's existing planning, review, and decision-making process.

C. Proponent's Environmental Data Statement

In compliance with the CEQA, and except as provided in Sections E, I, K, L, and M of this Rule, each proceeding concerning a project which requires the construction, alteration, modification, expansion, extension, relocation, or elimination of facilities shall include an exhibit entitled "Environmental Data Statement". Such statement shall be prepared by the proponent of the project for which Commission approval is sought. An applicant, complainant, intervenor, interested party, or the Commission staff may be the proponent of a project in a given proceeding.

D. Filings

1. Form - In addition to meeting the requirements of the Commission's Revised Rule of Practice and Procedure No. 2, the proponent's Environmental Data Statement (EDS) shall be a separate exhibit not physically attached to the application or pleading, but accompanying such application or pleading. Except where the Commission is the proponent, proponent shall file the original and 12 copies of its EDS.

2. Content and Criteria - The Environmental Data Statement shall contain the information necessary to enable the Commission to evaluate a project and to prepare an EIR, as provided herein:

a. In particular, as part of the EDS, proponent will include a statement as to whether the project may have a "significant effect" on the environment. If the proponent's position is that the project will not have a significant effect, then the EDS will include a motion requesting a Negative Declaration and supporting material. Specifically, proponent must provide a description of the environment existing before commencement of the project, and detailed information supporting the contention that the project will not have a significant effect on the environment.

b. If the proponent's position is that the project may have a significant effect on the environment, the Environmental Data Statement shall provide sufficient information fully developing the following:

(1) The environmental impact of the proposed action.

(2) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

(3) Mitigation measures proposed to minimize the impact.

(4) Alternatives to the proposed action.

(5) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(6) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.

(7) The growth-inducing impact of the proposed action.

In addition, the EDS shall discuss the extent of the conformity of the proposed project with all legally applicable environmental quality standards. The EDS shall deal fully with not only the alternative courses of action to the proposal, but also, to the

maximum extent practicable, the environmental effects of each alternative. Further, the EDS shall specifically discuss plans for future development related to the application under consideration. The above-listed factors should be considered to be illustrative and not necessarily exclusive.

c. The EDS shall include a list of persons and their qualifications responsible for compiling the information as to a given area of environmental concern, and a discussion of the methods and procedures used to produce the information.

E. Motions

1. Any proponent of a project within the purview of CEQA which is the subject of an application, complaint, or order instituting investigation or any person or entity who has appeared or is entitled to appear in such proceeding as a respondent, protestant, intervenor, or interested party (See Rules 53 and 54) or the Commission staff may file in such proceeding the following motions:

a. A motion to determine whether or not the project is included under the categorical exemptions established in the Guidelines which would exempt the project from the EIR requirements of CEQA.

b. A motion to determine whether or not the project is an emergency project as defined in CEQA and the Guidelines and is exempt from the EIR requirements of CEQA.

c. A motion to determine whether or not a project is a ministerial project as defined in CEQA and the Guidelines and is exempt from the EIR requirements of CEQA.

d. A motion to determine whether or not the Commission is the lead agency, as defined in the Guidelines, and responsible for the preparation of an EIR which is required by CEQA.

e. A motion to determine whether or not, where the Commission is the lead agency, a Negative Declaration rather than an EIR should be issued in the proceeding.

f. A motion by the Commission staff or any applicant or complainant in any application, complaint, or order instituting investigation or any person or entity who has appeared or is entitled to appear in such proceeding as a respondent, protestant, intervenor, or interested party to have determined who is the proponent in the proceeding for purposes of Sections D.1. and O.

g. A motion in connection with determining the reasonableness of a deposit or fee required under Section O. A proponent who is required under these rules to pay a fee or deposit on account thereof for the preparation of an EIR may file a motion to have determined the reasonableness of such fee or deposit.

2. If a motion made under this Section E is filed in a proceeding seeking ex parte action or prior to hearing in other proceedings, it shall be served upon all parties upon which service of the application, complaint, order instituting investigation, or other order was made or required to be made. If the motion is made during the course of a hearing, it shall be served on all parties of record.

Except for motions to determine whether or not an emergency exemption (Section E.1.b.) exists, the parties upon whom the motion is served and the Commission staff shall have 15 days in which to respond to the motion. In the case of a motion dealing with an emergency exemption, the time shall be 7 days. The Commission or the Presiding Officer, pursuant to Rule 63, may in an appropriate proceeding, for good cause shown, shorten or enlarge the time in which a response may be filed.

Action shall be taken on the motion in accordance with Rule 63.

F. Preparation of Draft EIR

1. After receipt of the proponent's EDS, and prior to any hearing on the project concerned, the Commission will determine in accordance with Section E on motion by a party or on its own motion whether the Commission is the public agency which has the principal responsibility for approving the project as defined in the Guidelines, and whether it should therefore be considered to be the "lead agency" responsible for preparation of the Negative Declaration or the Final EIR. Notice of the determination that the Commission is the lead agency as to the specific project will be included in the Notice of Completion filed pursuant to Section F.5. of this Rule.

2. If it is determined that the Commission is the lead agency, the Commission in accordance with Section E will determine on motion by a party or on its own motion whether the project may have a significant effect on the environment.

3. If it is determined in accordance with Section E that the proposed project will not have a significant effect on the environment, a Negative Declaration, prepared in conformance with the CEQA and the applicable Guidelines, shall be issued by the Presiding Officer, pursuant to Rule 63, unless the Commission by order otherwise provides, and filed immediately thereafter, but not less than 30 days before the project is approved, with the Secretary for Resources. Specifically, the Negative Declaration shall be prepared after consultation with all other public agencies which must approve the project in question or a part of the project. The Negative Declaration shall reflect the comments of all public agencies so involved.

4. If it is determined that the proposed project may have a significant effect on the environment, the staff shall make an initial review of the proponent's EDS for form, adequacy, and objectivity and, if necessary, request proponent to correct any deficiencies found therein. The EDS reviewed, corrected, or amended by the staff may become the Commission's "draft EIR". When issued, the staff will arrange for circulation of the draft EIR for comment to all public agencies which have jurisdiction by law over the proposed project. It may also be circulated for comment to any person who has special expertise with respect to any area of environmental concern involved in the project. The staff may also consult with and request the services of state agencies or others who have special expertise with respect to any area of environmental concern involved in the project.

The identity of all federal, state, or local agencies, other organizations, and private individuals consulted in preparing the EIR, and the identity of the persons, firm, or agency preparing the EIR, by contract or other authorization must be included in the Final EIR.

5. As soon as the draft EIR is completed, but before copies are sent out for review, an official notice, entitled the Notice of Completion and stating that the draft EIR has been completed, must be filed with the Secretary of the Resources Agency. The notice shall include a brief description of the project, its proposed location, and an address where copies of the draft EIR are available.

6. Notice of completion of the draft EIR shall also be given by the staff to: the county and municipal planning commissions and the county and municipal legislative bodies for each county or city affected by the proposed facility, the state highway engineer, other interested parties having requested such notification; and to the Department of Public Health, to the Water Resources Control Board, to the California Regional Water Quality Control Board, to the Air Resources Board, to the Air Pollution Control District, if any, in whose jurisdiction the proposed facility will be located, to the Department of Public Works, to the Department of Aeronautics, and to the State Lands Commission.

Notice shall also be given to the general public by advertisement, not less than once a week, two weeks successively in a newspaper or newspapers of general circulation in the county or counties in which the proposed facility will be located. Copies of the draft EIR shall be available to members of the public and may be purchased for their actual cost of reproduction and handling.

7. In the event the proposed project is the subject of a hearing, such hearing shall be held not less than 30 days after the draft EIR has been made available for comment and for inspection by the public.

G. Environmental Impact Report

1. Evidence in support of the proposed project based on proponent's EDS shall be presented by the proponent at any hearing ordered by the Commission. Staff and all other parties taking a position on environmental matters may offer formal evidence for the record in support of their environmental positions.

2.a. Unless the Commission by order otherwise provides, a Final Environmental Impact Report shall be prepared and filed, after hearing, in conformance with CEQA and the Guidelines, by the Presiding Officer.

b. The Commission or the Presiding Officer, pursuant to Rule 63, in its or his discretion may provide for hearings solely on environmental issues.

3. The parties shall have the opportunity to file exceptions and replies to the Final EIR as provided in Rules 80 and 81.

4. The Final EIR shall be included as part of the Commission's regular hearing record.

5. Copies of the Final EIR shall be made available to the Legislature. The Final EIR shall also be available for inspection by the general public who may secure a copy thereof by paying for the actual cost of reproducing and handling such copy. It shall also be filed with the appropriate local planning agency of any city, county, or city and county which will be affected by the project. In addition, the Secretary's office shall cause copies of the EIR to be served upon all parties to the proceeding.

6. Except where the staff is the proponent, and subject to applicable provisions of law, a reasonable fee will be charged the proponent of a project subject to the provisions of the Environmental Quality Act of 1970 in order to recover the actual or estimated costs incurred by the Commission in preparing a Final EIR for such project as established and set forth in Section O of this Rule.

H. Ex Parte Proceedings

If no protests are received within thirty days of the date of the certificate of service of any proceeding subject to the EIR provisions of the CEQA, the matter may be considered ex parte; however, all portions of this Rule, except those relating specifically to hearings shall apply.

I. Projects Involving Major Federal Actions Or As To Which The Commission Is Not The Lead Agency

1. When an EIS has been, or will be, prepared for the same project pursuant to the National Environmental Policy Act of 1969 (NEPA), all or any appropriate part of such statement may be submitted by a proponent in lieu of all or any part of an EDS required by this Rule, provided that the federal EIS fully develops the factors in Section D.2.b. of this Rule.

Similarly, such an EIS prepared pursuant to NEPA may be filed in lieu of all or any part of a Final EIR required by the CEQA provided that it fully develops the factors in Section D.2.b. of this Rule.

2. Whenever a Final EIR or Negative Declaration has been, or will be, prepared for the same project by a public agency other than the Commission, copies shall be submitted in lieu of the EDS required by Sections C and D.1. of this Rule.

Such an EIR prepared pursuant to the CEQA may be filed in lieu of a Final EIR required by the CEQA to be prepared by the Commission, but shall be considered by the Commission prior to approving or disapproving the project.

J. Final Commission Action

The Commission shall adopt a Final EIR and consider the contents of the report in making a decision on the project.

1. The final order of the Commission approving or disapproving a proposed project shall include findings of fact and conclusions of law based upon the environmental factors enumerated in Section D.2.b. of this Rule and the views and comments expressed in conjunction therewith by the proponent and all those making formal comment pursuant to the provisions of Section G.3.c.

2. After making a decision on a project as to which an EIR was prepared by the Commission, the Commission shall file a notice, specified the Notice of Determination, with the Secretary for Resources. Contents of the notice shall be as provided in the Guidelines. The notice shall also be filed with the planning agencies of any city, county, city and county which will be affected by the project, as soon as possible.

K. Ministerial Projects

Only "discretionary projects", as defined in the Guidelines, require the preparation of an EIR. The Commission shall determine on a case-by-case basis what projects it proposes to approve are "ministerial", as defined in the Guidelines, and therefore not subject to the CEQA. A motion may be filed under Section E.1.c. to have determined whether a project is a ministerial one.

L. Emergency Projects

Emergency Projects are not subject to the EIR requirement. Applications for approval of projects which come within the Guidelines' definition of "emergency projects" need not include an environmental data statement. A motion may be filed under Section E.1.b. to have determined whether a project is an emergency project.

M. Categorical Exemptions

1. The following specific projects are within the classes of projects which the Secretary for Resources has exempted from the EIR requirements of CEQA:

a. Class 1 Exemptions.

(1) Restoration and repair of existing structures when they have deteriorated or are damaged, in order to meet current standards of public health and safety under the rules of the Commission or other public authority, where the damage is not substantial and did not result from an environmental hazard.

(2) The operation, repair, maintenance, or minor alteration of existing facilities used to convey or distribute electric power, natural gas, water, or other substance.

(3) The maintenance of landscaping around utility facilities.

(4) The maintenance of native growth around utility facilities.

b. Class 2 Exemptions. The replacement or reconstruction, including reconductoring, of existing utility structures and facilities where the new structure or facility will be located on the same site as the replaced structure or facility and will have substantially the same purpose and capacity as the structure replaced.

c. Class 3 Exemptions.

(1) Stores and offices for utility purposes if designed for an occupant load of 20 persons or less, if not in conjunction with the building of two or more such structures.

(2) Water main, sewage, electrical, gas and other utility extensions of reasonable length to serve such construction.

(3) Accessory (appurtenant) structures to utility structures including garages, carports, patios and fences.

d. Class 4 Exemptions. New gardening or landscaping in conjunction with utility facilities or structure, not to include the removal of trees, the filling of earth into previously excavated land, with material compatible with the natural features of the site, and minor temporary uses of land having negligible or no permanent effect on the environment.

e. Class 5 Exemptions. Projects which require the issuance of street opening permits to permit minor alterations in land use limitations.

f. Class 6 Exemptions. The preparation and filing of basic data, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource. This includes the filing of informational reports with the Commission.

g. Class 7 Exemptions. Commission decision-making activities which are intended to assure the maintenance, restoration, or enhancement of a natural resource.

h. Class 8 Exemptions. Commission decision-making activities if they consist of action taken to assure the maintenance, restoration, enhancement, or protection of the environment, for example, in connection with the issuance of instructions or orders having to do with existing utility facilities.

2. The Commission may, at any time, request that a new class of Categorical Exemptions be added, or an existing one deleted, as provided in the Guidelines.

N. Lead Agency Determinations

1. The following are determinations of when the Commission is or is not the Lead Agency for the preparation of an EIR or Negative Declaration:

a. Non-Transportation Utility Projects

The Commission is the Lead Agency for the following projects:

(1) Electric generation projects covered by G.O. 131.

(2) Electric transmission line projects covered by G.O. 131.

(3) Gas storage projects.

(4) Major gas transmission projects.

(5) New and non-contiguous utility facility projects (independent of subdivision projects).

(6) Radiotelephone utility projects.

(7) Telephone service area expansion projects.

(8) Applications for exemptions from undergrounding requirements.

(9) Applications, complaints, or OIIs directly relating to new construction of utility facilities.

b. Transportation Utility Projects

(1) Grade Separations. If grade separation is part of a project to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other grade separation projects.

(2) New Street Crossings. If new street crossing is part of a project to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other new street crossings.

(3) New Railroad Track Crossing. If new railroad track crossing is part of a project to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other such projects.

(4) Railroad Crossing Relocations. If the project is to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other such projects.

(5) Railroad Crossing Widenings. If the project is to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other such projects.

(6) Railroad Crossing Protection Installation or Alteration. If the project is to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other such projects.

(7) Railroad Agency Curtailment. If the project is to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other such projects.

(8) Track Removal. If the project is to be carried out by a public agency, state or local, the PUC would not be the Lead Agency. PUC would be the Lead Agency as to all other such projects.

(9) Certification Proceedings. The PUC would be the Lead Agency in the following proceedings:

(a) Air - common carrier certification.

(b) Bus - common carrier certification.

(c) Bus - Class B charter certification.

(d) Rail - common carrier certification.

(e) Truck - common carrier certification.

(f) Vessel - common carrier certification.

2. A motion may be filed under Section E.1.d. for a determination of whether the Commission is the Lead Agency with respect to a project not specifically enumerated herein.

C. Fees for Recovery of Costs Incurred in Preparing EIRs

1.a. For any project other than a transportation utility project, where the Commission is the Lead Agency responsible for preparing the EIR, and for which a certificate of public convenience and necessity or other authority to construct utility facilities is required, a deposit will be charged the proponent as set forth below:

A deposit of thirty dollars ($30) for each one thousand dollars ($1,000) of the estimated capital cost of the project up to one hundred thousand dollars ($100,000), ten dollars ($10) for each one thousand dollars ($1,000) over one hundred thousand dollars ($100,000) and up to one million dollars ($1,000,000), five dollars ($5) for each one thousand dollars ($1,000) over one million dollars ($1,000,000) and up to five million dollars ($5,000,000), two dollars ($2) for each one thousand dollars ($1,000) over five million dollars ($5,000,000) and up to ten million dollars ($10,000,000), one dollar ($1) for each one thousand dollars ($1,000) over ten million dollars ($10,000,000) and up to one hundred million dollars ($100,000,000), and fifty cents ($0.50) for each one thousand dollars ($1,000) over one hundred million dollars ($100,000,000). A minimum deposit in every case of five hundred dollars ($500) will be collected to cover the estimated costs to be incurred in preparing an Environmental Impact Report.

b. The minimum deposit will be charged and collected whenever a Negative Declaration is requested. The costs of preparing the EIR or Negative Declaration shall be paid from such fee. If the costs exceed such fee, the proponent shall upon disposition of the proceeding by the Commission pay the excess costs, and if the actual costs are less than such fee, the excess shall be refunded to the proponent.

c. Proponent may elect to pay the applicable deposit in progressive payments due as follows: A one-third deposit at the time the application or pleading is filed, an additional one-third upon notification that the initial deposit has been expended in connection with the preparation of the Environmental Impact Report, and the remaining one-third upon notification that previously collected amounts have been expended.

2. For any other project, including transportation utility projects, where the Commission is the Lead Agency responsible for preparation of the EIR, the Commission shall determine under Rule 63 on a case-by-case basis the reasonable deposit to be charged and collected from the proponent of the project, with a minimum deposit of $500 to be charged in every case. The costs of preparing the EIR or Negative Declaration shall be paid from such fee. Upon disposition of the proceeding, if the costs exceed such deposit, the proponent shall pay the actual costs in excess of the deposit, and if the actual costs are less than such deposit, the excess shall be refunded to the proponent.

3. A proponent may file an appropriate motion under Section E.1.g. to have determined whether any fee or deposit required hereunder is reasonable.