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Decision 89 12 049 DEC 1 8 1989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for a certificate of public convenience and necessity to construct and operate an expansion of its existing Natural Gas Pipeline System.

Application 89-04-033 (Filed April 14, 1989)

(U 39 G)

OPINION

On April 14, 1989, Pacific Gas and Electric Company (PG&E, applicant) filed the instant Application for a Certificate of Public Convenience and Necessity (CPCN) seeking Commission authorization for PG&E's construction of its portion of the PGT-PG&E Expansion Project. The Expansion Project involves the expansion of existing interstate and intrastate gas pipeline facilities owned by Pacific Gas Transmission Company (PGT) and PG&E. PGT filed an application with the Federal Energy Regulatory Commission (FERC) for its portion of the Expansion Project on December 20, 1988.

The potential environmental impacts of the PGT and PG&E portions of the Expansion Project must be studied under the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA), respectively. On June 16, 1989, the Commission and FERC executed a Memorandum of Understanding (MOU) wherein it was agreed that a combined analysis of the Expansion Project would be conducted satisfying the CEQA requirement for an Environmental Impact Report (EIR) and the NEPA requirement for an Environmental Impact Statement (EIS), with the Commission acting as the lead agency.

On October 2, 1989, PG&E filed a Supplement to the Application whereby the project was redesigned to provide the

quantities committed to shippers on a year round rather than an annual average basis. A similar change to PGT's FERC application was filed.

On November 13, 1989, PG&E filed a "Request for Waiver of Time to Prepare Combined Environmental Impact Report -- Environmental Impact Statement Under Cal. Govt. Code Section 65951 and Cal. Pub. Res. Code Section 21083.6" (Request) and served copies of the Request on parties who are on the service list for this proceeding. No protest or other response to the Request has been received.

PG&E has asked that the one-year time limit for completion and certification of the EIR provided by Pub. Res. Code Section 21100.2 and the one-year time limit for approval or disapproval of the PG&E application under Govt. Code Section 65950 "be waived with respect to the original application acceptance date" (April 14, 1989). PG&E requests that the time for certification and approval begin on November 17, 1989, allowing approximately six weeks after the October 2, 1989 Supplement was filed for the Commission to review it for completeness.

PG&E also states, "Pursuant to Cal. Govt. Code Section 65957, the one-year time limit may be extended for 90 days with PG&E's concurrence, which shall not unreasonably be withheld. PG&E agrees that if this request is granted the same time limit would apply even in the event the MOU is terminated."

#### Discussion

The Commission's approval of the proposed expansion of the PG&E gas transmission system constitutes a "project" (Pub. Res. Code Section 21065) for which the Commission is the lead agency. The proposed expansion project also constitutes a "development" (Govt. Code Section 65927) which the Commission must approve or disapprove within one year from the date on which the application requesting approval has been received and accepted as complete by the Commission. (Govt. Code Section 65950.) The maximum one-year

period for completing and certifying an EIR shall also begin on that date (Pub. Res. Code Section 21100.2).

Section 65951 of the Govt. Code<sup>1</sup> provides that as the lead agency, the Commission may waive the one-year deadline if a combined EIR/EIS is being prepared pursuant to Pub. Res. Code Section 21083.6.<sup>2</sup> An MOU has been executed by the staffs of this Commission<sup>3</sup> and the FERC. Following the prehearing conference of

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1 Gov. Code Section 65951 states:

In the event that a combined environmental impact report-environmental impact statement is being prepared on a development project pursuant to Section 21083.6 of the Public Resources Code, a lead agency may waive the time limits established in Section 65950. In any event, such lead agency shall approve or disapprove such project within 60 days after the combined environmental impact report-environmental impact statement has been completed and adopted.

2 Pub. Res. Code Section 21083.6 states:

In the event that a project requires both an environmental impact report prepared pursuant to the requirements of this division and an environmental impact statement prepared pursuant to the requirements of the National Environmental Policy Act of 1969, an applicant may request and the lead agency may waive the time limits established pursuant to Section 21100.2 or 231151.5 if it finds that additional time is required to prepare a combined environmental impact report-environmental impact statement and that the time required to prepare such a combined document would be shorter than that required to prepare each document separately.

3 The Commission is represented by the staff of its Commission Advisory and Compliance Division (CACD).

July 28, 1989, the Administrative Law Judge ruled that "The Environmental Impact Report required for the pipeline project shall be prepared based upon the Environmental Study prepared by this Commission in conjunction with the FERC pursuant to the MOU dated June 16, 1989 (attached as Appendix A to the ALJ's Ruling)...."

The MOU provides for the preparation of a single environmental statement by the CPUC and the FERC through their representatives, who select a contractor to prepare the document. The terms of the MOU are intended to avoid duplication of effort while enabling each agency to address environmental issues to the full extent required by their respective statutory mandates. Public review will be conducted jointly by representatives of both agencies. The FERC agrees to cooperate with the CPUC in maintaining the schedule and time limits required of the CPUC. Costs incurred for the contractor are to be borne not by the FERC but by the CPUC, which will be reimbursed by the applicant. It appears that the administrative process of a joint state and federal study will unavoidably enlarge the time needed to complete the environmental review under CEQA.

In addition to the joint CEQA/NEPA review process, the Commission must bear in mind its own investigation into the interstate natural gas pipeline supplies and capacity available to California (I.88-12-027, the OII). The issues of how much incremental need exists for interstate supply, the preferred sources of new supply, and the feasible alternatives for serving that need are among the matters addressed in I.88-12-027. A decision in that case is expected shortly. The resolution of issues posed by the OII will certainly affect the scope of the EIR because the PGT/PG&E Expansion Project is but one of the alternatives by which California's incremental need for natural gas may be served. Thus, while the environmental review studies are indeed underway, there is a real possibility that completion of the

studies may be delayed due to the Commission's findings in the OII decision.

Due to these considerations, we conclude that the time required to properly prepare a combined EIR/EIS exceeds the one year provided by Pub. Res. Code Section 21100.2. We also find that the time required to prepare a combined EIR/EIS is shorter than the time that would otherwise be needed by the Commission and the FERC to individually prepare separate environmental statements. Therefore, this Commission, as lead agency, will waive the one-year time limit for preparation of an EIR pursuant to Govt. Code Section 65951.

Govt. Code Section 65951 vests the authority for waiver in the lead agency, based upon specific findings listed in Section 21083.6 of the Pub. Res. Code. The statute is silent on whether the waiver of the time limit postpones the commencement of the otherwise applicable time limit or otherwise adjusts the environmental review period. In the absence of statutory direction, the lead agency appears to have wide discretion to impose a deadline on its development review process. Based on PG&E's request, and in particular, PG&E's filing of its Supplement to the Application on October 2, 1989, we will impute an application acceptance date of November 17, 1989.

However, PG&E cites Govt. Code Section 65957 as enabling it to extend "the one-year time limit for 90 days." Section 65957 states:

"The time limits established by Sections 65950, 65950.1, and 65952 may be extended once for a period not to exceed 90 days upon consent of the public agency and the applicant."

PG&E assumes that Section 65957 still operates with respect to its development after waiver of the one-year time limit established by Section 65950. This assumption is misplaced, because once the deadline has been waived, there is no time limit with respect to the development which can be extended pursuant to

Section 65957. If we were to agree that PG&E may subsequently assent to a 90-day extension of a "one-year time limit" that has commenced to run from November 17, 1989, then there has been no waiver of the time limit.

Sections 65950 and 65952 establish time limits of one year and 180 days, respectively, within which approval or disapproval must be granted by the lead agency, and responsible agency, respectively.<sup>4</sup> Section 65957 provides a one-time extension of 90 days for any of these agencies to perform their review. No basis for the 90-day extension is provided in the statute, only the consent of the public agency and the applicant are required.

Section 65951, on the other hand, is addressed specifically to a lead agency in the position of reviewing a development project that is subject to both state and federal environmental regulation. The exemption from the one-year limit established in Section 65950 is intended to accommodate the longer study period that may be required for a comprehensive, coordinated joint review (see Pub. Res. Code Section 21083.6). The extension is not limited to 90 days. The extension of time to accommodate the needs of a joint EIR/EIS study is not subject to any limit.

Amendments to CEQA, adding Sections 21083.6 and 21100.2 to the Public Resources Code and corresponding Sections 65950 through 65957 of the Government Code, were enacted by Chapter 1200, Statutes of 1977. We must construe each section of the statute in a way that gives effect to each section and harmonizes it with the whole, especially since the statutory authority for PG&E's request was enacted as a comprehensive piece of legislation. Given the

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<sup>4</sup> Section 65950.1 clarifies that in case of an extension of time pursuant to Pub. Res. Code Sections 21100.2 or 21151.5 to certify the EIR, the lead agency shall approve or disapprove the project within 90 days after certification of the EIR.

differences in the role of the public agency, the purpose for extension, and period of the extension contemplated in Govt. Code Sections 65957 and 65951, it is clear that the two statutes operate independently of each other. Govt. Code Section 65957 should not be construed to reimpose a one-year time limit, subject to a 90-day extension, once a one-year time limit has been waived under Govt. Code Section 65951. Our reading of the statutes is the only way to logically give effect to each section of the legislation.

The October supplement has required a revision of the MOU timetable. A review of the potential for additional transportation facilities beyond the pipeline has been necessitated by PG&E's increase in pipeline capacity. The staff of the CACD and the FERC now expect to circulate a draft EIR in the summer of 1990. Allowing time for the service of testimony, public and evidentiary hearings, the filing of briefs, and the circulation of the ALJ's draft decision under Section 311 of the Public Utilities Code, the final EIR may not be adopted until late 1990 or early 1991. As it turns out, this timeframe is compatible with that sought by PG&E. The applicant contemplates action by November 17, 1990 plus ninety days, or February 16, 1991.

We perceive that PG&E has relied on its interpretation of Section 65957 in an attempt to limit the extension of time which PG&E has triggered by its waiver under Section 65951. The applicant's desire for timely action on its application for CPCN and environmental review is entirely understandable. PG&E's preferred schedule for completion of the EIR and action on the CPCN coincides very closely with the "working schedule" agreed to by the CACD and FERC. PG&E understandably does not wish to be subject to unending delays due to the waiver under Section 65951, but it need not assert that a one-year time limit is still in effect. This Commission recognizes the need for prompt and decisive action in bringing additional supplies of natural gas to California. However, no regulatory action is effective if the decision makers

have failed to adequately address the environmental issues presented by CEQA, as those deficiencies may be targets for judicial challenge.

Therefore, we grant PG&E's Request pursuant to Government Code Section 65951 for a waiver of the one-year time limit for approval/disapproval of a development project set forth in Government Code Section 65950. We will deem the application complete as of November 17, 1989. We do not recognize PG&E's asserted authority to grant a 90-day extension to the "one-year time limit" because no one-year time limit exists with respect to this project. Instead, we intend to take action on the final EIR and the CPCN not later than the end of February 1991, subject to the requirements of the upcoming decision in I.88-12-027.

Finally, PG&E agrees that if its Request is granted the same time limit would apply even in the event the MOU is terminated. PG&E's agreement is not required because we do not believe that PG&E may rescind its agreement to the waiver. The extension of time under Section 65951 is based on a condition precedent, that is, the preparation of a joint EIR/EIS document. A condition subsequent, that is, the severing of the joint state/federal study, logically would have no effect on a waiver that has already taken place.

Findings of Fact

1. PG&E filed its application for a certificate of public convenience and necessity to construct and operate and expansion of its existing natural gas pipeline system on April 14, 1989.
2. PG&E filed its "Supplement to the Application of Pacific Gas and Electric Company" on October 2, 1989.
3. PG&E filed its Request for Waiver of Time to Prepare Combined Environmental Impact Report -- Environmental Impact Statement Under Cal. Govt. Code Sec. 65951 and Cal. Pub. Res. Code Sec. 21083.6 on November 13, 1989.

4. Pursuant to Govt. Code Section 65951, PG&E has requested that the one-year time limit imposed by Govt. Code Section 65950 and Pub. Res. Code Section 21100.2 be waived with respect to the date on which its application is deemed complete and accepted for filing "with respect to the original Application acceptance date and instead begin November 17, 1989."

5. The Commission and the FERC have agreed to prepare a joint environmental study as described in Pub. Res. Code Section 21083.6.

6. The Commission will require more than one year from the date the application is deemed complete and accepted for filing to complete the environmental review required by CEQA because of the pendency of I.88-12-027 and the administrative requirements of the environmental study undertaken jointly with FERC.

7. The completion of a joint EIR/EIS will require less time than the individual preparation of separate environmental studies by the Commission and the FERC.

8. The Application will be deemed complete and accepted for review as of November 17, 1989.

9. The Commission intends to complete its review and take action on the Application by the end of February 1991.

#### Conclusions of Law

1. The Commission should, pursuant to Pub. Res. Code Section 21083.6, waive the one-year time limit established pursuant to Section 21100.2 because it has found that additional time is required to prepare a combined EIR/EIS and that the time required to prepare this combined document would be shorter than that required to prepare each document separately.

2. The Commission should, pursuant to Govt. Code Section 65951, waive the one-year time limit for approval or disapproval of the PG&E portion of the PGT/PGT Expansion Project established by Govt. Code Section 65950 because a combined EIR/EIS

is being prepared pursuant to Section 21083.6 of the Public Resources Code.

3. There is no "one-year time limit" for Commission action on the Application due to waiver under Govt. Code Section 65951. Govt. Code Section 65957, which provides that an applicant may extend the one-year time limit of Section 65950 by 90 days, does not confer on PG&E any right to Commission action within one year.

4. PG&E has no right to extend or withhold an extension of time for the Commission to complete its review of the development project under Govt. Code Section 65957 once the Commission waives the time limit pursuant to Section 65951.

5. Since the time limits of Govt. Code Section 65950 and Pub. Res. Code Section 21100.2 have been waived, the Commission must use its discretion to complete its review of the development project within a timeframe consistent with the objectives of the joint EIR/EIS process. The Commission should not delay its action any more than necessary to ensure that the joint EIR/EIS statement is comprehensive, and is efficiently completed and certified.

O R D E R

IT IS ORDERED that the request of Pacific Gas and Electric Company (PG&E) for a waiver of the one-year time limit for completion and certification of the required EIR/EIS under Public Resources Code Section 21100.2 and the one-year time limit for

approval or disapproval of the PG&E application under Govt. Code Section 65950 is granted, consistent with the terms of the preceding discussion.

This order is effective today.

Dated DEC 18 1989, at San Francisco, California.

G. MITCHELL WILK  
President  
FREDERICK R. DUDA  
STANLEY W. HULETT  
JOHN B. OHANIAN  
PATRICIA M. ECKERT  
Commissioners

I CERTIFY THAT THIS DECISION  
WAS APPROVED BY THE ABOVE  
COMMISSIONERS TODAY.

*Wesley Franklin*

WESLEY FRANKLIN, Acting Executive Director

*DB*