

Decision 83 04 090

APR 20 1983

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

H. B. RANCHES, INC.,
Complainant,

vs.

SOUTHERN CALIFORNIA EDISON
COMPANY,

Defendant.

Case 82-08-09
(Filed August 25, 1982)

INTERIM OPINION

I. Summary

We deny a complaint alleging that a utility's construction of a 115 kV transmission line within its service area is unlawful. The complaint alleged that environmental review of the project is required before construction may begin. The Public Utilities (PU) Code does not require prior Commission approval of a utility facility that is being constructed to extend service within a utility's authorized service area. We find that the provisions of the California Environmental Quality Act (CEQA) do not apply to such a utility facility which may be built without prior Commission approval. Environmental review as specified in CEQA is not required for this 115 kV transmission line.

Further, we find that the complainant cannot challenge the 200 kV standard for review of transmission lines set forth in General Order (GO) 131-B since the time for appeal of that order has expired.

The complaint is denied in its present form but leave to amend is granted to complainant.

II. Background

The Southern California Edison Company (Edison) is constructing a 115 kV transmission line in Riverside County known as the Auld-Cajalco Project (ACP). This project is an 8.7 mile long wooden pole transmission line that is intended to meet load growth in the Cajalco area of Riverside County. Edison has the franchise right to serve Riverside County.

H. B. Ranches, Inc. (H.B.) filed the instant complaint after Edison had begun construction of the line whose route follows a road bisecting H.B.'s property. In its complaint, H.B. asserts that construction of the ACP is unlawful since Edison has not secured a certificate of public convenience and necessity (cpcn) for the project and no environmental impact reports have been prepared for the project. H.B. asked the Commission to issue an order restraining Edison from further construction until the complaint is ruled upon. After the complaint was filed, construction on the ACP in the vicinity of H.B.'s property was suspended at the request of the assigned Administrative Law Judge.

Edison filed an answer admitting that it was constructing the ACP but otherwise denied each and every allegation in H.B.'s complaint.

Points and authorities on the legal issues raised in the complaint were filed by H.B., Edison, and the Commission staff (staff) on or before December 31, 1982. H.B. and Edison filed reply memorandums on or before January 21, 1983.

III. Issues

This complaint raises the following legal issues which we decide based on the pleadings:

1. Whether the Commission is required by PU Code § 1001 and CEQA to review the potential environmental impact of the ACP?
2. Whether the GO 131-B standard for review only of transmission line facilities whose operating voltage exceeds 200 kV may be challenged?
3. Whether complainant may obtain review of a utility construction project, which otherwise would not be subject to Commission review, by filing a complaint under PU Code § 705?

IV. Statutes and Regulations

The construction of electric generation and transmission facilities by utilities under the Commission's jurisdiction is governed by PU Code § 1001 and GO 131-B.

PU Code § 1001 provides in part that:

"No...electrical corporation...shall begin the construction...of a line, plant, or system, or of any extension thereof, without having first obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction.

"This article shall not be construed to require any such corporation to secure such certificate for an extension within any city or city and county within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city or city and county contiguous to its...line, plant, or system, and not

theretofore served by public utility of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business...".

General Order 131-B provides in part that:

"...no electric public utility, now subject, or which hereafter may become subject, to the jurisdiction of the Commission, shall begin construction in this state...of major electric transmission line facilities which are designed for immediate or eventual operation at any voltage in excess of 200 kilovolts (kV)...without this Commission's having first found that said facilities are necessary to promote the safety, health, comfort, and convenience of the public, and that they are required by the public convenience and necessity...".

V. Positions of the Parties

A. H.B.

H.B. argues that the Commission has unlawfully abdicated its authority under PU Code § 1001 and CEQA over transmission line projects which have the potential to damage the environment. H.B. claims that CEQA does not exempt transmission lines like the ACP from environmental review. H.B. further claims that "unless Public Utilities Code § 1001 is dramatically amended, there can be no question that 115 kV transmission lines are within the regulatory ambit of the PUC." H.B. then concludes that the provisions of CEQA and PU Code § 1001 together mandate Commission review of the environmental impacts of the ACP.

H.B. declares that under the Commission's present scheme of "nonregulation," the public and government agencies do not receive notice of projects which they would receive if CEQA was applied. Because of the Commission's failure to assert jurisdiction, H.B. claims that agencies with environmental knowledge and expertise are not aware of these unreviewed projects until well after construction is under way.

Anticipating an agency plea of administrative inconvenience, H.B. also states that the Commission cannot evade its CEQA duties for reasons of economy or insufficient personnel.

In summary, H.B. asserts that the Commission has unlawfully failed to conduct an environmental review of the ACP. H.B. asks that any further construction on the project remain suspended until the Commission makes its environmental review in compliance with CEQA.

B. Edison

Edison submits that in order for CEQA to apply, the law must require prior approval by the Commission before the construction of a utility facility begins. Edison claims that prior approval of 115 kV transmission lines is not required by statute or regulation. Accordingly, Edison concludes that CEQA does not apply to the ACP.

Edison points out that CEQA requires environmental review only of "projects" defined by PU Code §§ 21065 and 21080. Edison maintains that the ACP does not fall within the CEQA definitions of "projects"; consequently, the environmental review sought by H.B. is not required.

Edison also argues that H.B. is foreclosed from challenging GO 131-B because the time for appeal has passed. Edison points out that H.B. did not file an application for rehearing of the Commission

decision adopting GO 131-B and that H.B. did not apply to the California Supreme Court for a writ of certiorari. Edison submits that H.B. has waived its appeal rights and cannot object to any portion of GO 131-B at this time.

Edison also contends that a complaint against a public utility must allege a violation of the law or of a Commission order or rule. (See PU Code § 1702.) Edison maintains that it has not violated any state law or Commission regulation. Edison concludes that H.B.'s complaint must be denied since the ACP complies with all applicable laws and regulations.

C. Staff

Staff concurs in most of Edison's arguments. Staff also states that CEQA does not apply since a open under PU Code § 1001 or other discretionary approval by the Commission is not required for the ACP. Staff also concludes that H.B. cannot challenge GO 131-B since the time for administrative appeal and judicial review of that order has expired. Staff submits that H.B. complaint in its present form should be denied.

Staff notes that the Commission may wish to reconsider the 200 kV jurisdictional limit set forth in GO 131-B for transmission line review. Staff states that:

"Public agencies are strongly encouraged to not merely conform with the strict letter of the law in relating CEQA to their other regulatory responsibilities but should do so actively, making protection of the environment a major consideration in their activities."
(Response of Commission Staff, pages 7 and 8.)

Staff points out that 115 kV transmission lines may have an impact on the environment. Also, staff suggests that an absence of public agency review may encourage Edison and other utilities to build several transmission lines less than 200 kV when a transmission line exceeding 200 kV might be preferable. Staff believes that a reexamination of GO 131-B limitations is appropriate. However, at this time staff has no recommendation as to whether the Commission should undertake formal review of transmission lines less than 200 kV.

Despite the foregoing, staff states that a cause of action still is available to H.B. In staff's opinion, utility facilities, not otherwise subject to Commission review, may become subject to Commission review and even CEQA requirements if an appropriate complaint is filed.

Staff observes that several provisions of the PU Code give the Commission authority to direct utilities under its jurisdiction to add, extend, repair, improve, construct or maintain any plant or facilities when it is necessary for the benefit of their customers or the safety of their customers, their employees or the public generally. Staff relies specifically upon PU Code §§ 762 and 762.5 which provide that:

"762. Whenever the commission, after hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and

serve an order directing that such additions, extensions, repairs, improvements, or changes be made or such structures be erected in the manner and within the time specified in the order.
. . ."

"762.5. The commission, as a basis for making any order pursuant to the provisions of Section 762 relating to location of structures, shall give consideration to, and include in its order findings upon, the following factors:

- (a) Community values.
- (b) Recreational and park areas.
- (c) Historical and aesthetic values.
- (d) Influence on environment..."

Staff states that the 762.5 requirement for findings on the "influence on environment" is essentially equivalent to CEQA review.

Staff notes that under PU Code § 705, the above provisions of the PU Code can be implemented on the Commission's own motion or by complaint. Staff then concludes that despite the present 200 kV jurisdictional limitation of GO 131-B, a complainant may initiate review of a 115 kV transmission line facility, where a review might not otherwise be taken. Such a review then could include consideration of the "influence on the environment."

In the present case, staff asserts that H.B.'s complaint does not invoke the above procedure since it does not focus upon the appropriateness of the ACP but instead is directed at Commission procedures and regulations. However, staff maintains that if the

complaint is amended to allege deficiencies in the ACP itself rather than just errors in established Commission procedures and regulations, the environmental review sought by H.B. may occur.

VI. Discussion

A. Requirements for the ACP

CEQA requires environmental review of "discretionary projects proposed to be carried out or approved by public agencies." (Public Resources Code § 21080(a).) Project is defined in Public Resources Code § 21065 to include:

- "(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."

CEQA applies to the ACP only if Edison is required to obtain some governmental approval of the project in the form of a lease, permit, license, certificate, or other entitlement for use. The ACP is not being undertaken by any public agency nor is it supported by assistance from a public agency.

The only regulatory approval referred to by H.B. is the PU Code § 1001 requirement of a cpen.

However, the section does not require a utility to obtain a cpcn if the facilities to be constructed are an extension of the utility's existing lines in an area already served by the utility.

Edison has asserted that it has received a franchise from the County of Riverside and is authorized to serve the county in which the ACP is to be built. E.B. does not dispute Edison's franchise claim, and we have no reason to believe Edison has misrepresented the extent of its service territory. Accordingly, we find that Edison is not required to obtain a cpcn for the ACP because it is building the line to extend service in an area it already has the franchise right to serve.

Since Edison does not need to obtain Commission approval by obtaining a cpcn, the requirements of CEQA do not apply. Edison's construction of the ACP does not require environmental review under CEQA since it may construct the facility without prior Commission approval.

B. GO 131-B Jurisdictional Limitations

GO 131-B provides that a cpcn is required only for transmission line facilities whose operating voltage exceeds 200 kV. This 200 kV jurisdictional limitation was first stated in Decision (D.) 77301 issued June 3, 1970 when the original GO 131 was adopted. The 200 kV limitation was reaffirmed on February 10, 1976 when D.85446 was issued approving GO 131-A. On August 28, 1979, the Commission issued D.90700 and promulgated GO 131-B. Thus, the Commission on three occasions has considered and approved the 200 kV jurisdictional limitation contained now in GO 131-B.

The time for appeal of any of the above decisions is past. In order to challenge the propriety of any of those decisions it was necessary to have filed a petition for rehearing within 30 days of

the decision. (PU Code § 1731.) The filing of a petition for rehearing is a prerequisite for seeking judicial review of the Commission's action. (PU Code § 1731.) Although complainant may request that a prior proceeding, such as that adopting GO 131-B, be reopened, a collateral attack on a final decision of the Commission is improper. (PU Code § 1709.) H.B. is foreclosed from challenging GO 131-B at this time.

C. Environmental Review Through A Complaint

We concur with staff's contention that environmental review of a utility construction project may be triggered by the filing of a complaint when such review otherwise would not occur.

Staff suggests that an amended complaint which alleges a deficiency in the ACP, such as environmental damage, would invoke the Commission's jurisdiction under PU Code §§ 762 and 762.5 and cause environmental review. Staff maintains that PU Code § 705 permits complainant to implement PU Code §§ 762 and 762.5 in this manner.

Section 705 does provide that whenever a hearing is required in certain other provisions of the PU Code, the hearing may be had on the Commission's own motion or by complaint. And § 762 requires a hearing before the Commission may direct a utility to extend or change existing plant or facilities. The question then arises as to whether a cause of action under § 762 may be pleaded by H.B.

H.B. is concerned about the environmental impact of the ACP. If given the opportunity, H.B. presumably could amend its complaint to allege that the ACP will have a significant adverse impact on the environment and that there are economic alternatives to the ACP or its planned route which would mitigate those adverse

impacts. If H.B. could make a sufficient evidentiary showing, the Commission then could find that changes to the ACP "ought reasonably to be made" and could direct Edison under § 762 to modify the ACP or even to undertake an entirely different project.

The above procedure allows aggrieved parties to complain about utility conduct which may comply with all existing laws and regulations but nonetheless may be unreasonable. It should be emphasized that such complainants, as the moving parties, bear the burden of demonstrating the unreasonableness of a utility's conduct.

H.B. has requested leave to amend its complaint to set forth its specific environmental concerns. We will deny H.B.'s complaint in its present form but will grant H.B. leave to amend.

We have also issued today an Order Instituting Investigation into the question of whether certification or some other form of Commission review should be required before construction of electric transmission lines of less than 200 kV. We invite H.B. to participate in that proceeding.

Findings of Fact

1. Edison is constructing an 8.7 mile long wooden pole 115 kV transmission line in Riverside County known as the ACP.
2. Edison has a franchise right for Riverside County which is within its service area.
3. The 200 kV jurisdictional limitation in GO 131-B was last approved in D.90700 issued August 28, 1979.
4. This order should take effect on the date of issuance since construction of the ACP has already begun.

Conclusions of Law

1. Edison is not required to obtain a cpen under PU Code § 1001 for the ACP.
2. CEQA does not apply to the ACP since a cpen or other Commission approval is not required.

3. H.B. is barred from challenging the jurisdictional limitations of GO 131-B since the time for appeal of that order has expired.

4. The provisions of PU Code §§ 762 and 762.5 may be implemented by the filing of a complaint under PU Code § 705.

INTERIM ORDER

IT IS ORDERED that the complaint as presently stated is denied but leave to amend is granted to complainant. The stay of construction requested by the assigned Administrative Law Judge shall expire 30 days from today unless an amended complaint is filed before then.

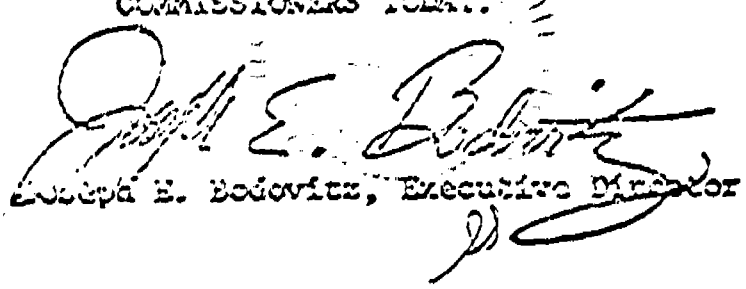
This order is effective today.

Dated APR 20 1983, at San Francisco, California.

LEONARD M. CRIMES, JR.
President
VICTOR CALVO
DONALD VIAL
Commissioners

Commissioner Priscilla C. Grew, being necessarily absent, did not participate in the disposition of this proceeding.

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


Joseph E. Bodovitz, Executive Director



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