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Decision No. 88005 OCT 18 1977

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Participation of Southern California Edison Company and San Diego Gas & Electric Company in the Proposed Kaiparowits Electric Generating Plant.	Application No. 56050 (Filed November 5, 1975; amended August 9, 1976)

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Janice E. Kerr, Attorney at Law, and Page E. Golsan, for the Commission staff.

O P I N I O N

This proceeding began originally as a petition by the Sierra Club (Sierra) requesting this Commission to require Southern California Edison Company (Edison) and San Diego Gas & Electric Company (San Diego) to obtain a certificate of public convenience and necessity (cpc&n) pursuant to Public Utilities

Code Section 1001[1/], with respect to their participation in the then proposed Kaiparowits electric generating plant (project) in southern Utah. Arizona Public Service Company (APS) was also a participant in the project. The California jurisdictional utilities owned 63.4 percent of the power expected to be generated by the proposed 3,000 megawatt (mw) coal-fired plant. The cost of the project was estimated at $2 billion. All of Edison's and San Diego's entitlement was to be transmitted for use in California.

Several prehearing conferences were held before Examiner Phillip E. Blecher. At the prehearing conference on April 14, 1976 Edison, San Diego, and APS announced the removal of the project from their respective resource planning schedules, while maintaining their interest in the coal and other rights relating to the project.

On May 18, 1976, a Notice of Further Prehearing Conference for July 6, 1976 was served on the parties. Because of the potential impact of the instant issue on all the major California utilities subject to Section 1001, this notice was also served on: General Telephone Company of California (General), The Pacific Telephone and Telegraph Company, Continental Telephone Service Corp., California-Pacific Utilities Company, Pacific Power and Light Company (PP&L), Sierra Pacific Power Company, Southern California Gas Company (SoCal), Southwest Gas Corporation, Pacific Gas and Electric Company, U.S. Department of Interior, Bureau of Land Management-Utah State Office, California Energy Commission, Arizona Public Service Company, and the Attorney General of the State of California.

1/ All further code and section references are to the Public Utilities Code, unless otherwise specified.

On July 6, 1976 Edison moved that Sierra's original petition be dismissed as (1) the issue was rendered moot by the utilities' withdrawal from the project, and (2) the Commission does not render declaratory judgments. San Diego and SoCal supported Edison's motion to dismiss. The staff did not believe the Commission should go forward under the then existing circumstances. General took no position. PP&L stated that because about 5 percent of its customers are located in California, about 4 percent of its sales are in California, about 2 percent of its hydroelectric (and no thermal) generating capacity is in California, and because it provides electric service in six states, each of which require either certification of siting or public convenience and necessity, action by the CPUC forbidding construction of out-of-state plant to serve 95 percent of its ratepayers, (which plant was certified in its locus) would be, among other things, an unconstitutional burden on and interference with interstate commerce. PP&L asserts that the Commission should issue an order declaring Section 1001 inapplicable to it.

On July 15, 1976 the utilities withdrew their previously approved applications for water rights in Utah for the project, and filed new applications for smaller amounts of water to be used for one of three alternate projects:

1. A coal gasification and/or liquefaction plant;
2. A coal slurry pipeline or other transport system, or
3. A power generating plant utilizing advanced air quality control technology.

On August 9, 1976 Sierra filed its First Amended Petition for an order compelling Edison and San Diego to obtain a cpc&n

prior to proceeding with any activity in furtherance of the proposed Kaiparowits development. This request is also based on Section 1001, the pertinent provisions of which are as follows:

> "1001. 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."
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> "The commission, as a basis for granting any certificate pursuant to the provisions of this section shall give consideration for the following factors:
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> (a) Community values
> (b) Recreational and park areas
> (c) Historical and aesthetic values
> (d) Influence on environment
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> "With respect to any thermal powerplant or electrical transmission line for which a certificate is required pursuant to the provisions of Division 15 (commencing with Section 25000) of the Public Resources Code, no certificate shall be granted pursuant to this section without such other certificate having been obtained first, and the decision granting such other certificate shall be conclusive as to all matters determined thereby and shall take the place of the requirement. for consideration by the commission of factors (a), (b), (c), and (d) specified in this section."

With respect to its First Amended Petition, Sierra maintains that Edison and San Diego are both electrical corporations and because the three new alternatives described above fall within the scope of Section 1001, a cpc&n is required from the PUC before proceeding further.

Edison and San Diego maintain that the primary alternative being presently considered is coal gasification; that there

are no firm plans for any alternative; that they are only "concepts", not projects within the meaning of Section 1001, that there is and can be no justiciable issue at this time, that Sierra is seeking an advisory opinion, and the Commission should not entertain Sierra's First Amended Petition.

The Commission staff believes that Sierra's request is premature because the specific facility and conditions cannot now be determined. However, the staff recommends that the matter should not be dismissed, but should be removed from the calendar, with the utilities to file a report with the Commission every six months detailing the progress regarding any new Kaiparowits facility or project. Then, when it can be determined whether the planned facility is within the Commission's jurisdiction or not, the staff or other interested parties would be able to render advice so that the matter may be timely resolved. This position is supported by the Attorney General of the State of California.

The determination of whether any facility, including this project and the newly-named alternatives, is within our jurisdiction is not to be made on a case by case basis. If the project (or any alternative) becomes viable and requires a cpc&n under Section 1001, jurisdiction is not discretionary, (assuming the requirements of Section 1001 are met). The question is whether a cpc&n is required for out-of-state projects, as well as local projects, prior to construction. The answer to the last query will determine whether jurisdiction attaches as a matter of law. Because of the urgency of this question and its relation to the future of energy resources for California, we shall determine this question in this proceeding, and deny Edison's motion to dismiss. The probability of such future projects

and the desirability of assisting our jurisdictional utilities in their planning and decision-making processes lead us to conclude that this is an appropriate matter for a decision at this time.

To thoroughly review and analyze the issue here, we must consider the various briefs, pro and con, filed with respect to the original petition and incorporated in the arguments relating to the First Amended Petition. The other applicable provisions of the Code, as far as pertinent, are as follows:

> "202. Neither this part nor any provision thereof, except when specifically so stated, shall apply to commerce with foreign nations or to interstate commerce, except insofar as such application is permitted under the Constitution and laws of the United States..."
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> "451. All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
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> "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.
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> "All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable."
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> * * *

"701. The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Our General Order No. 131 (G.O. 131), as far as pertinent, is as follows:

"Section 1. Pursuant to the provisions of Sections 451, 584, 701, 702, 761, 762, 768, 770, and 1001 of the Public Utilities Code:

"IT IS HEREBY ORDERED that no electrical public utility, now subject,...to the jurisdiction of this Commission, shall begin construction within this state (emphasis added) of an electric generating plant...or of overhead line facilities...in excess of 200 kv...without this Commission's having first found, after consideration of the impact of such facilities upon the air, water, land, and other aesthetic, environmental and ecological requirements of the public and of its energy needs, 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."

The sections of the Public Resources Code (PRC) referred to in Section 1001 create the State Energy Commission, which has the right to approve and issue certificates for power plant and transmission line siting. It is admitted by the parties that this exclusive power is limited to California.

The United States Supreme Court has held, in the case of Chemehuevi Tribe of Indians v Federal Power Commission (1975) 420 US 395, 95 Sup Ct 1066, 43 L Ed 2d 279, that the Federal Power Act

does not give the Federal Power Commission (FPC) licensing jurisdiction over the Kaiparowits project and other thermal-electric power plants. The court concluded that while it is well established that the interstate transmission of electric energy is fully subject to the commerce power of Congress and that the subject project affects commerce between the States and is within the purview of the federal commerce power, Congress has not exercised its power to require FPC licensing for thermal-electric power plants. (FPC v Union Electric Co. (1965) 381 US 90, 14 L ed 2d 239, 85 Sup Ct 1253.)

The various pertinent positions in regard to the project (and any similar facility) may be summarized as follows:

Sierra

Section 1001 of the Code explicitly requires an electrical corporation to obtain a cpc&n prior to commencing construction of a generating plant. Since Edison and San Diego are electrical corporations and the project is such a plant within the meaning of this section, they are required to obtain a Section 1001 certificate. The Commission should assert its jurisdiction at this time, prior to construction, so that the critical question of whether there is a need in California for the large amount of additional electrical capacity of the project may be determined prior to the beginning of construction. The costs of construction, borrowing, maintenance, and operation of the project will ultimately be paid by California ratepayers. The 1,900 mws of power proposed to be imported into California constitutes approximately 12 percent of the present combined generating capacity of Edison and San Diego. If this Commission

does not assert jurisdiction to determine this issue, no public agency anywhere will make a timely and independent review to determine whether California ratepayers and consumers need this additional capacity and whether it is worth the cost. Since Section 1001 does not limit the Commission's jurisdiction to plants within this State and since Section 701 allows this Commission to act whenever necessary and convenient, whether specifically designated or not, this Commission has both the power and duty to undertake a certificate proceeding here, particularly since the utilities admittedly do not plan on seeking a certificate for the project because they maintain Section 1001 applies only to plants located within the boundaries of California.

Section 1001 is clearly distinguishable from Section 25000 et seq. of the PRC, which specifically limits the Energy Commission to the certification of sites and related facilities within the State.

In order to make any meaningful determination of public convenience and necessity here, it must be done prior to construction because if a determination was made that the additional generating capacity of the project was unnecessary after these huge investments by the utilities, the Commission would then be placed in the untenable position of disallowing the inclusion of the project costs in rate base. This would severely damage the financial condition of the utilities, and place the Commission and the ratepayers in a difficult, if not impossible, position.

Sierra relies heavily on the reasoning of a New Mexico Public Service Commission (NMPSC) decision[2/] which held that it

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2/ In re the Matter of Public Service Company of New Mexico (Case No. 1216).

had jurisdiction to determine whether two New Mexico public utilities should participate in a nuclear power plant proposed to be constructed in Arizona. That commission reasoned that it has authority to control the expenditures of monies by New Mexico ratepayers outside the geographical borders of the State because the construction of such plant would have an important effect on the New Mexico ratepayers and the future of the energy supplies of the State. The investments needed to pay for the construction and the distribution of the electricity to the people of New Mexico affects the plant with a public interest which it must determine since any Arizona regulatory agency could not and would not protect the interest of the New Mexico ratepayers.

Edison

This Commission does not have extraterritorial certificate jurisdiction because:

(1) Section 202 of the Code limits the Code's application where, as here, the interstate aspects are essentially national in character and state regulation is impermissible under the law;

(2) The territorial limitations have long been adhered to under Section 1001 by long-standing Commission interpretation;

(3) Section 701 of the Code does not provide a basis for expanding the Commission's jurisdiction under Section 1001 beyond the boundaries of California;

(4) G.O. 131 (which limits Section 1001 cpc&n jurisdiction to within the State) has been confirmed by the California legislature by reenactment of Section 1001 three times since the promulgation of G.O. 131 without changing the provisions of Section 1001 in this respect;

(5) The adoption of the State Energy Act (PRC 25000, et seq.) confirms that the Commission does not have extraterritorial cpc&n jurisdiction;

(6) The NMPSC decision relied on by Sierra is not final and has no precedential value in construing the California statute;

(7) The extraterritorial application of Section 1001 would (a) produce absurd and unjust results and (b) unreasonably burden interstate commerce in violation of the commerce clause of the U.S. Constitution; and

(8) Continued application of Section 1001 in its historical construction does not deprive the Commission of adequate power to protect California consumers because it has the power to issue a cpc&n for the transmission lines to be located within the boundaries of California and to adjust the rates of the utilities in ratemaking proceedings to allow or not for monies expended for the project.

Under Section 202 of the Code, the words "except when specifically so stated" must not be disregarded in applying Sierra's construction of Section 1001. Since Section 1001 does not specifically state that it should apply to interstate commerce, the Commission does not have jurisdiction of plants to be constructed outside the boundaries of California under Section 202 because such a plant would necessarily be in interstate commerce. This Commission has jurisdiction only within the State unless there is manifested an intention to apply extraterritoriality by express words, reasonable inference, or clear implication. Edison has previously participated in two coal-fired electric generating projects located out of state, one in New Mexico and one in Nevada. This Commission is and has been aware of Edison's participation but never attempted to assert certificate jurisdiction over those generating plants.

Section 701 only evidences the legislative intention to vest the Commission with jurisdiction to do those things necessary to exercise the powers with which it has elsewhere been vested.

The NMPSC'S decision cited by Sierra was the product of a stipulation filed between that Commission and the Public Service Company of New Mexico and is not final.

If Sierra's construction of Section 1001 were to be applied, the following generally absurd and unjust results would occur:

a. This jurisdiction would then extend at least to the electric generating plant in Utah and the transmission lines in Utah, Arizona, and Nevada as well as in California.

b. Since Section 1001 requires the Commission to give consideration to various specific values set forth under (a) through (d) therein, the Commission must review and consider these values in all four states involved.

c. The public whose interest, convenience, and necessity would be involved and must be considered would include the customers served by all participating utilities in all four states involved.

d. Because the contractual commitments and rights and obligations of the out-of-state participants in the project would be uncertain, ongoing commitments for financing would be difficult to obtain, if obtainable at all.

e. While the several states may exercise their respective police powers to protect the health, welfare, and property of its residents, such exercise of police power may not impose a substantial burden on interstate commerce.

Sierra is in error in saying that no public agency will make a timely and independent review of whether California ratepayers need this capacity or should bear the cost. Since the U.S. Department of Interior, pursuant to the provisions of the National Environmental Protection Act (NEPA), is making a review as to the need for the energy with respect to all the participants in the project, the national interest in the construction and operation of such an interstate electric power project militates against any Commission action to assert jurisdiction over the Utah plant[3/] and such action would constitute an unreasonable burden on interstate commerce and thus violate the commerce clause of the U.S. Constitution.

San Diego

The argument raised by Sierra as to Section 701 of the Code is peripheral and not related to the sole issue of whether a cpc&n under Section 1001 is a prerequisite to the legal commencement of construction of the project. Since the project is located in Utah there is no certificate proceeding required under Section 1001. A statute such as Section 1001 will not be granted extraterritorial effect by implication. Unless such intention is clearly expressed, it is limited to state boundaries. PP&L and Sierra Pacific Power Company are electric utilities in California which have considerable generating facilities located in other states. Thus, if Section 1001 were made applicable to this project, it would be equally applicable to the generation of

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3/ Sierra asserts that this review is for the purpose of preparing a Final Environmental Impact Statement required under NEPA, and is not an independent evaluation of the needs and cost of the project.

these multi-state electric utilities. This would create absurd consequences and would be the inescapable result of Sierra's position.

The need for this project is something with which this Commission should be concerned. The CPUC has examined this need and found that it exists by reason of the staff preparation of a report on ten-year forecasts of electric utilities loads and resources, which was used not only for internal Commission purposes, but also submitted to the State Energy Commission. In applications involving other projects of San Diego, staff witnesses testified to the various peak load estimates in 1981 and 1984 from this forecast, which refers to the instant project.

The cost of the project has also come under scrutiny in San Diego's pending rate case (A.56627). The examiner there has indicated that some cost aspects of the project will be considered further in subsequent hearings. Therefore, since both the need for and the cost of the project has been and continues to be examined by this Commission in relation to other exercises of its regulatory powers, there is no need to engage in duplicative efforts to protect California consumers by considering these issues in a Section 1001 proceeding.

If the Commission feels that it must look into the need for and cost of the project in a separate proceeding, a more appropriate vehicle (than a Section 1001 proceeding) would be an investigation into the necessity and the cost of the project.[4/]

4/ We have a problem in distinguishing how such an investigation, which presumably would be an OII, would in any manner shorten the time necessary to develop the information required to make an intelligent decision on the questions involved.

Jurisdiction is not the question here, since this Commission has the jurisdiction and the power to review the cost of and need for the project. The only question is whether Section 1001 requires the utilities here to obtain a cpc&n before construction in Utah is started.

Sierra's Reply

Sierra asserts that it is the locus of both the rate base and the service area within this State which determines this Commission's jurisdiction. The site of the plant itself is not determinative. Any other conclusion would mean that this Commission would have no authority to determine whether any out-of-state plant is necessary to provide electricity to California ratepayers even though they will ultimately pay for its cost. G.O. 131 and PRC are intended to regulate the siting of power plants in the best environmental location within the State since (a) G.O. 131 did not interpret Section 1001, but resulted from an investigation into requirements for siting of electrical plants and facilities in the State and (b) the PRC does not usurp the jurisdiction of this Commission in certification proceedings since the utilities must still obtain a cpc&n from this Commission, and this Commission, under PRC, is required to furnish to the State Energy Commission "comments and recommendations regarding the design, operation, and location of the facilities designed in the notice in relation to the economic, financial, rate, system reliability, and service implications of the proposed facility." Since this Commission always has the duty to determine the financial stability of a California utility and the economic implications of its power plant developments, the Commission must still consider these factors in a cpc&n proceeding.

Sierra also maintains that Section 1001 requires this Commission to exert its jurisdiction only over California public utilities for the protection of California consumers. Sierra is not seeking extraterritorial effect for Section 1001.

Sierra asserts that it is a misunderstanding of the purpose of the Code and Section 1001 to argue that the extension of the police power of California into other states violates the commerce clause. Section 1001 is intended to protect the ratepayers of California and not the ratepayers of any other state. In any event, if a burden is placed on interstate commerce by the assertion of Commission jurisdiction in this matter, it is not an unreasonable burden such as is prohibited by the U.S. Constitution.

Commission Staff

The Commission staff has essentially taken two positions. The Legal Division essentially supports the proposition of Sierra that Section 1001 requires a prior cpc&n for the project. Rather than giving Section 1001 an extraterritorial construction, the Legal Division argues that the Commission, operating under its statutory mandate to regulate California public utilities with their principal places of business in California, their service areas in California, and their participation in the project for the sole purpose of serving their California customers, should require a certificate under Section 1001 as it has the right and duty to regulate all the activities of the California utilities in serving California ratepayers. This position is supported by the language of Section 701. G.O. 131 dictates rules for the siting of plants in California but otherwise is irrelevant to the instant issues since it does not direct itself to the Commission's jurisdiction over California utilities generating power in out-of-state plants. Unless the Commission exercises jurisdiction over

the project here, it will passively allow California utilities to make a $2 billion investment in a power plant which has received no prior review with regard to its public convenience and necessity. Since assertion of Section 1001 jurisdiction is primarily local in character, it has no extraterritorial purpose or goal, it would produce no direct effect on interstate commerce, and there can be no unreasonable burden on interstate commerce in violation of the commerce clause of the U.S. Constitution.

The Utilities Division of the staff urges the Commission to refuse to assert jurisdiction on the following grounds:

a. The State Energy Commission was created by the Legislature on January 7, 1975 with the clear mandate of exclusive jurisdiction over certification of new plants in order to coordinate electric energy management and plant construction.

b. If the Commission were to exercise jurisdiction, it would be required to issue an Environmental Impact Report (EIR) and make a finding requiring need which would cause serious manpower problems to the Commission staff and result in probable delay in final determination of this matter.5/

Attorney General of the State of California

The Attorney General filed a brief supporting the positions of Sierra and the Legal Division of the Commission, essentially to prevent a regulatory vacuum.

Discussion

Technically, the issue of prior certification of out-of-state plant presented in the original petition is now moot.

5/ The Legal Division states that the consideration of the necessity of this plant by this Commission is one of the principal reasons for Commission jurisdiction.

However, the staff's suggestion for interim reporting and later determination of our jurisdiction merely delays the day of reckoning until the time of crisis, when a specific project is already in the works. We think it more appropriate to deliberate and reflect on the problem presented here without waiting for the impetus of a sorely needed and speedy decision. The question of our right to require certification of an otherwise not-to-be certificated out-of-state plant generating electric power for sale to California consumers is so vitally connected with the public interest in this era of relentless energy price escalation, the necessity for conservation of dwindling natural resources, the search for alternative energy sources, the intermingling of the various energy sources, and the rapidly changing roles of the utilities and the consumers in our increasingly complex society, that we believe it is in the best interests of all Californians to examine and decide the delicate problem raised, particularly where the potential for constructing other out-of-state facilities by utilities under our jurisdiction may exist. Further, we believe it in the interests of both the utilities and the ratepayers to set the future policy for like projects, based on the probability that this problem will soon recur.

Because many of the ancillary issues to be determined are overlapping, we shall discuss them, as far as possible, by subject.

Interstate Commerce

The U.S. Supreme Court said in the Chemehuevi Tribe case, supra, that Congress has the power to regulate interstate transmission of electric energy under its commerce power but it has chosen not to so do. Thus, under our dual system, until Congress

acts, there remains to the States a wide range of permissible exercise of power appropriate to their territorial jurisdiction, although interstate commerce may be affected. Such State power has long been recognized, Breard v City of Alexandria, La. (1951) 341 US 622, 95 L ed 1233, rehearing denied 342 US 843, 96 L ed 637; Edwards v California (1941) 314 US 160, 86 L ed 119; California v Thompson (1946) 313 US 109, 85 L ed 1219. This is particularly true where Congress reserved to the states those matters previously subject to state regulation, as it expressly does in the Federal Power Act. (U.S. v Public Utilities Commission of California (1953) 345 US 295, 97 L ed 1020.) This applies whether the state regulation affects interstate commerce, or to some extent, regulates it. (Southern Pacific Co. v State of Arizona ex rel. Sullivan (1945)325 US 761, 89 L ed 1915.) Thus even if a burden upon interstate commerce is imposed by the requested relief, it is clearly within the limits of permissible state regulation in this area, as any burden is only indirect and no regulation of interstate commerce is sought. However, we maintain there is no burden imposed on interstate commerce as we are not determining resale rates, nor any other aspect of the interstate relationship, but would be complying only with our statutory duty to determine the impact of the proposed facility upon California exclusively, and would not be evaluating the project from the viewpoint, law, public interest, or necessity of any other state or its commerce.

The question boils down to this: Does the fact that a California jurisdictional utility desires to build an uncertificated plant outside California to serve its California service area deprive this Commission of jurisdiction to determine the public convenience and necessity of such construction? We have rephrased the issue in this manner because we believe the extraterritoriality of Section 1001 is not the true issue. The location of the plant does not determine Section 1001 jurisdiction. The wording

of Section 1001 clearly relates to the type of utility and activity and not the location of the line, plant, or system. A decision under Section 1001 would only bind California and its residents because the public convenience and necessity referred to in Section 1001 necessarily means the convenience and necessity of the California public, not the public of any other state. Thus, any extraterritorial effect would only incidentally involve other states within constitutional limits. (Breard v City of Alexandria, supra.) This is consistent with the holding of the California Supreme Court in California Adjustment Co. v Atchison T. & S.F.R. Co. (1918) 179 C 140, 146. The court there held that California could not regulate transportation outside the state. We agree and hold that requiring a California utility to obtain a cpc&n for out-of-state plant does not violate that rule. We are only regulating a California jurisdictional utility in relation to the convenience and necessity of the California public, which exclusively pays the rates which will be sought to pay for the plant, wherever the plant is located. It is reasonable to infer that he who pays the bills should have the right to determine whether he needs to buy before he has to pay. At a minimum, someone should determine whether the billpayer needs the goods before the time comes to pay.

Compare Section 451. The first paragraph requires just and reasonable rates. The second paragraph requires public utilities to furnish and maintain adequate service and facilities necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public. The third paragraph requires utilities to have reasonable rules. Nowhere is any territorial limitation mentioned. Thus, under Edison and San Diego's theory, this section is limited to California. But would the companies question this Commission's right to disallow unreasonable costs incurred in interstate commerce? For instance, hypothetically Edison buys 20 desks from a North Carolina desk manufacturer at a cost of $2,000 each for use in its offices in the state. We disallow $1,500 per unit as being unreasonable when the company seeks to include this cost in its rate base. Certainly, the purchase of the desks was in interstate commerce. So is the purchase of oil, vehicles, and virtually everything else. Could the interstate commerce argument be used to void our action? Could a valid argument be made that we are giving Section 451 extraterritorial effect by disallowing a portion of an interstate transaction? We think not, as we cannot conceive of any transaction by a major utility that does not have at least an indirect bearing on interstate commerce. Essentially, the entire Public Utilities Act could be said to have extraterritorial effect. And in this sense it does, but neither is it unconstitutional thereby, nor would any of the companies so contend. We can discern no viable distinction between this example and the out-of-state plant under Section 1001 with respect to extraterritoriality.

This conclusion is buttressed by the U.S. Supreme Court in Osborn v Ozlin (1940) 310 US 53, 84 L ed 1074. At page 1078 the Court said, "The mere fact that state action may have

repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. . . ." (See also Watson v Employers Liability Assurance Corp. (1954) 348 US 66, 99 L ed 74.) Since we have already determined there is no constitutional infringement present here and the power to regulate here is reserved to the states, we have no justiciable issue of extraterritoriality.

Having concluded that Section 1001 is applicable, then the certificate should be acquired prior to construction, according to the uncontroverted wording of Section 1001. This makes good sense and reflects the legislature's advocacy of a certification process before the expenditure of huge sums of money in construction, which might create a major financial problem for the utilities, the ratepayers, and this Commission. (This is one of the problems created by the abandonment of the instant project; the companies are seeking to recover in rates their already expended funds.)

The fact that Edison has two out-of-state plants already operating does not offend our conclusions here. Those projects were planned during a time when growth and expansion of capacity were the rule and promotion, expansion, and competition between fuels were prevalent. No certificates were sought, no complaints or petitions requesting them were filed, and no certificates were granted. The Commission is not barred from exercising its jurisdiction now merely because it had not exercised it before. (Key System Transit Lines, etc. (1953) 52 CPUC 687.)

Section 701

Edison comments that Section 701's broad language limits the Commission to actions "necessary to exercise the powers with which it had elsewhere been vested." (Edison Answer in Response to Petition of Sierra, page 24.) Edison cites Pacific Telephone &

Telegraph Co. v PUC (1950) 34 C 2d 822 as authority for the above proposition. The court there said that this Commission cannot substitute its judgment for that of management regarding the terms of contracts with affiliated corporations in the absence of express statutory authority, but it may disallow certain payments thereunder for ratemaking purposes. This is entirely consistent with our reasoning here as we are not attempting (nor has anyone so alleged) to dictate contract terms or abort the utilities' right to construct plant outside the state. We are saying, however, that if the utility desires to obtain payment for reasonable plant expenditures in rates, then we have the prior right and duty to determine whether "present or future public convenience and necessity require or will require such construction". Reading Section 701 (page 7, supra) as a whole, the supervisory and regulatory power granted by the Legislature to this Commission is clearly set forth in the first phrase. The words "such power and jurisdiction" in the last phrase refer to that granted in the first phrase, to "supervise and regulate", not to that granted elsewhere in the Code. It is thus reasonable to infer that the general power to supervise and regulate every public utility in the state carries with it the power to do all things necessary and convenient to exercise those powers of supervision and regulation. We believe that the power to fix rates and grant certificates for new construction carries with it the power to determine whether the construction of plant, wherever located, which will impact the rates to be collected from California customers is or will be required by public convenience and necessity. And we have on many occasions exercised necessary and

convenient power that extends beyond the usual boundaries of utility regulation. See Angora Water Co., et al (1971) 72 CPUC 378, where under Section 701 we imposed a 60-year trust upon the utility for the benefit of the assessed land owners; Vallecito Water Co. (1967) 67 CPUC 213, where under Section 701 we inquired into the legality of corporate elections; and National Communications Systems (1971) 71 CPUC 682, where under Section 701 we asserted this Commission's jurisdiction over radiotelephone utilities though they were not specifically defined as utilities in the Code, and issued an order to show cause why one should not be restrained from pursuing action before the FCC.

Other Remedies

Both Edison and San Diego acknowledge that the Commission does have the jurisdiction and the power to review the cost and need for an out-of-state project. They maintain that this can be done in the context of a general rate case and/or in a Section 1001 proceeding for transmission lines within California. While this is true, it begs the question, for these matters would not ordinarily arise until long after the major investment in the out-of-state plant was spent or committed, thus confronting us with a fait accompli. The query is whether Section 1001 requires a certificate before construction. By its specific terms it does. This would allow a thorough examination of all the essentials: Supply, demand, size, location, costs, financing, etc. Would a prudent utility commence construction before determining its need, costs, and other data relevant to such a construction? Obviously not. Why should a prudent regulatory agency do otherwise? We see no valid reason. Thus, everyone could proceed after the pre-construction certificate determination with

substantially more certainty, confidence, and direction.

San Diego also suggests an OII proceeding could always be instituted prior to construction. Certainly this is permissible under Section 701 and elsewhere in the Code. But we fail to see how that would shorten the procedure or hearing process or in any way accomplish anything that could not be accomplished in an ordinary certificate proceeding. An OII might be an appropriate vehicle to review any prior certification proceedings regardless of the result reached therein. But these factors, as well as the Energy Commission mandate in the PRC, do not detract from the Commission's right to use the certificate proceedings prior to the planned construction to determine its convenience and necessity.

Findings

1. There is no distinction between a California utility's out-of-state plant serving California and in-state (local) plant in relation to its impact on California ratepayers.

2. Public convenience and necessity require inquiry into the need, convenience, and costs of a California utility's out-of-state plant serving California to the same extent as local plant.

3. There is no burden imposed on interstate commerce by this Commission's consideration, in a certification proceeding, of a California utility's out-of-state plant producing a product or commodity to be consumed by California ratepayers.

Conclusions

1. No utility subject to Section 1001 shall begin construction of any line, plant, or system, whether in California or otherwise, without first obtaining from this Commission a certificate that the present or future public convenience and necessity require or will require such construction. This Commission may exempt from this requirement, upon written application requesting such exemption, utilities whose primary service area is outside California.

2. Electric generating plants to be constructed outside California by Southern California Edison and San Diego Gas & Electric Company require prior certification by this Commission.

3. This Commission's certification of out-of-state plant of California utilities which will produce a service or commodity for California ratepayers does not violate the commerce clause of the U. S. Constitution.

4. Code Section 701 permits this Commission to perform any lawful act pursuant to the power to supervise and regulate public utilities granted to it by the California Constitution and the legislature.

5. This Commission's certification jurisdiction over California utilities is not determined by the location of such utilities' plants.

6. A certification proceeding prior to construction for plant of California utilities is the most appropriate and timely means of determining the public convenience and necessity of such construction.

7. The Commission may waive prior certification of out-of-state plant if the public convenience and necessity of California ratepayers has been considered to this Commission's satisfaction in proceedings before other regulatory bodies.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company and San Diego Gas & Electric Company shall not begin construction of any line, plant or system, whether in California or otherwise, without first obtaining from this Commission a certificate that the present or future public convenience and necessity require or will require such construction.

2. All other relief requested is denied.

The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 18th day of OCTOBER, 1977.

Robert Batinovich
President

Abstain
William Symons, Jr.
Commissioner

Leonard M. Grimes, Jr.
Richard D. Gravelle
Vern L. Holmes
Commissioners