

Decision No. 90510 JUL 3 1979

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the matter of the adoption of regulations governing the safety and construction of a liquefied natural gas terminal in the State of California.

OII No. 1
(Filed October 18, 1977)

In the Matter of the Application of Western LNG Terminal Associates, a general partnership, and of a Joint Application of Western LNG Terminal Associates, Pacific Gas and Electric Company and Pacific Lighting Service Company, California corporations, for a permit authorizing the construction and operation of an LNG terminal pursuant to Section 5550 et seq. of the Public Utilities Code.

Application No. 57626
(Filed October 14, 1977)

In the Matter of the Application of PACIFIC GAS and ELECTRIC COMPANY, and PACIFIC LIGHTING SERVICE COMPANY, for a Certificate that Public Convenience and Necessity require the construction, operation, and maintenance of a 34" Pipeline from the Point Conception area, Santa Barbara County, California to Gosford, Kern County, California, and related facilities.

Application No. 57792
(Filed January 9, 1978)

Investigation on the Commission's own motion into the impact of the decline in natural gas available to California from traditional sources and the need for and timing of deliveries from supplemental supply projects.

Case No. 10342
(Filed June 1, 1977;
amended August 23, 1977)

OPINION AND ORDER

On July 31, 1978, the Commission issued Decision No. 89177 granting Western LNG Terminal Associates (Western Terminal) a permit and authorizing Western Terminal to construct and operate a liquefied natural gas terminal at Point Conception, subject to certain terms and conditions. Condition 36 of that order directed Western Terminal to undertake further geological and geotechnical investigations at Little Cojo, the site which Decision No. 89177 approved for construction and operation of an LNG terminal.

On May 24, 1979, the Indian Center of Santa Barbara, Inc. (Indian Center) filed with this Commission, along with several ancillary motions, a Petition for Stay and Request for Modification of Condition 36 of Decision No. 89177, alleging that such condition is unlawful and in violation of the requirements of the American Indian Religious Freedom Act (42 U.S.C. §1996) and the Natural Gas Act of 1938 (15 U.S.C. §717 et seq.) in that said Condition 36 requires geological and geotechnical investigations which will result in the abridgement of religious freedom for traditional American Indians and further in that implementation of Condition 36 directly conflicts with the Natural Gas Act of 1938.

On June 7, 1979, Western Terminal filed a Petition for Modification of Decision No. 89177 requesting that the Commission issue a final permit, free of any conditions precedent, for the construction and operation of an LNG terminal at Point Conception as well as delete Ordering Paragraph 18 of that decision.

The two petitions were the subject of oral argument held before Administrative Law Judge Haley on June 25, 1979. Since the issue of alleged conflict between Condition 36 and the

Natural Gas Act of 1938 has been raised, argued, and briefed in this forum on numerous occasions, the scope of said oral argument was properly limited to the following issues:

(1) Whether Condition 36 of Decision No. 89177 should be redesignated as a condition subsequent;

(2) Whether Ordering Paragraph 1-A of Decision No. 89177 should be modified to grant a final permit, free of any conditions precedent;

(3) Whether the additional trenching and excavation required by Condition 36 of Decision No. 89177 is unlawful and in violation of the requirements of the American Indian Religious Freedom Act and should be stayed pending action by the Federal Energy Regulatory Commission on Western Terminal's application to construct and operate a liquefied natural gas facility.

In addition to petitioners Western Terminal and the Indian Center, Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Hollister Ranch Owners' Association (Hollister) and the Fred H. Bixby Ranch Company (Bixby) appeared and presented their views on the above-referenced issues.

We have carefully considered the subject petitions, written responses thereto, and the ^{relevant} oral arguments presented by petitioners and interested parties. After full evaluation of all the arguments, it is our opinion that modification of Decision No. 89177 is neither appropriate nor necessary. Accordingly, the petitions for modification of Decision No. 89177 filed by Western Terminal and the Indian Center will be denied. The reasons for denial are herein contained.

First, we have concluded that to grant Western Terminal's application would add nothing to our July 31, 1978, decision. The Commission at that time designated Point Conception as California's LNG site. That is a final decision. Pursuant to the terms of the LNG Siting Act, no other site remains under active consideration. While the July 31 decision contained a number of conditions, those were simply common sense requirements which are being expeditiously resolved. Other than Condition 36, none of the conditions could lead to disqualification of the Little Cojo site.

Condition 36, requiring additional trenching to resolve the issue of seismic safety, has received much attention. Western Terminal asked that the condition be designated a "condition subsequent". We think it meaningless to take this step. Description of Condition 36 as a "condition subsequent" would simply have no impact upon the reality which confronts Western Terminal.

Evidence available last July 31, coupled with our recent Decision No. 90374, issued June 5, 1979, which imposed stringent design requirements, make it very unlikely that our decision affirming Point Conception as our chosen site will have to be withdrawn on seismic safety grounds. But this Commission cannot responsibly abdicate its power to take such action if unexpected unreasonable risks are found. The Commission would, in any case, retain this power -- through its continuing jurisdiction and authority to reopen proceedings -- regardless of the name or description which it gives to the permit granted.

The major problem affecting this project is the absence of a federal decision on the Little Cojo site. The longer the delay, the greater the prospect that the Indonesian government will exercise its option to withdraw from their supply contract with Western Terminal. In the face of this prospect, Western

Terminal has filed this petition to obtain a further positive signal to take to Indonesia as a sign that the project will ultimately be approved. As previously discussed, we have issued our decision. Little Cojo is the ~~preferred~~ California site. Changing Condition 36 from a condition precedent to a condition subsequent would not affect the substance of our earlier order and would not in our opinion provide the type of signal Western Terminal seeks. *es*

In short, the Commission remains firmly convinced of the need for construction of an LNG terminal in California to assure the availability of an adequate supply of clean-burning fuels in the 1980's, but we decline here to intervene or change the form of our July 31, 1978, decision. The federal evidentiary record on the Point Conception site was closed last January. In the interest of adequate energy supplies, conservation of ratepayers' monies, and resolution of major social problems in Santa Barbara County, we trust that the federal agencies will render their decisions very soon.

Our refusal to delete Ordering Paragraph 18 of Decision No. 89177 is also linked to our view that LNG is needed in California and that without federal approval of the Point Conception site the Indonesian project will fail. This Commission's commitment to acquisition of vitally needed, clean-burning natural gas supplies, including LNG, is manifestly clear. In the event that the federal government terminates the current Indonesian project by its failure to approve the Point Conception site, Ordering Paragraph 18 serves to insure that

Western Terminal, along with respondents, will as soon as practicable make application to this Commission for approval of a new project to import LNG into California at an alternate site.

We now address ourselves specifically to the petition filed by the Indian Center. Although we consider it advisable, out of respect for the Indians' religious claims, that trenching be deferred until a federal decision is reached, we are not compelled to require such deferral by the American Indian Religious Freedom Act (42 U.S.C. §1996, hereinafter Religious Freedom Act). The Indian Center's argument that Decision No. 89177 is preempted by the Religious Freedom Act, insofar as that decision allows Western Terminal to perform trenching activities at the Little Cojo site prior to federal approval of that site, is without merit, for the following reasons.

First, we find the substance of the Indian Center's argument to be without merit, as applied both to Decision No. 89177 and to Resolution No. L-209. The Religious Freedom Act creates no new rights. Rather, it is a statement of national policy concerning the protection of religious freedom of American Indians. It is directed at federal, not state, agencies. In practical terms, federal agencies must evaluate their practices and policies in order to determine appropriate changes necessary to protect American Indians' religious rights, and must recommend appropriate legislative changes to Congress within 12 months. However, the Religious Freedom Act creates no right of action, nor does it contain any enforcement provisions. Moreover, it is highly questionable that the Act applies at all to privately owned lands. Certainly no compelling argument has been made that it preempts any actions of this Commission taken pursuant to state law, concerning privately owned land to which no Indian group has demonstrated property rights.

Secondly, the Indian Center's argument has not been timely raised. This statute by its terms became effective on August 8, 1978. Petitions for rehearing of Decision No. 89177 had to be filed by August 30, 1978. The Indian Center timely filed a petition for rehearing, but raised no issues involving the Religious Freedom Act in its petition. Similarly, the Indian Center did not raise this argument in its petition for writ of review with the California Supreme Court. By this failure, the Indian Center waived its right to challenge our Decision on this ground. On June 13, 1979, the California Supreme Court denied all of the petitions for writ of review of Decision No. 89177, including that of the Indian Center (S.F. Nos. 23958, 23959, 23960). This Decision is now final and is clearly not subject to new challenges which had not properly been included in either a petition for rehearing or a petition for writ of review.

Lastly, even if we had found the Indian Center's legal arguments to be persuasive, we would be precluded from granting the Indian Center relief on the grounds it asserts. Article XIII, Section 3.5 of the California Constitution precludes us from declaring that any actions we have taken pursuant to the LNG Terminal Act (Public Utilities Code §5550 et seq.) are unconstitutional or are preempted by any federal law. Such a determination must first have been made by an appellate court.

The Indian Center seeks an order from us delaying trenching until there is a federal decision. Western Terminal indicated in its petition that it would defer further trenching pending a federal decision if a final state permit with a condition subsequent were granted. Neither Western Terminal nor the Indian Center wish to provoke a confrontation over trenching at the Little Cojo site prior to issuance of a federal decision.

In the event federal authorities disapprove Little Cojo, the trenching required by Condition 36 will be rendered useless. Although we believe federal rejection is unlikely, it is nevertheless possible, and because of this possibility we agree with both Western Terminal and the Indian Center that it would be prudent to defer trenching until some positive federal signal is given as to Little Cojo. Indeed, as this order affirms our conclusion that the state already has approved Point Conception, we would expect Western Terminal to continue to exercise its sound discretion to defer trenching until a federal decision is reached.

Findings of Fact

1. The Commission's Decision No. 89177, issued July 31, 1978, selected Point Conception over other proposed sites for Western Terminal's LNG facility.

2. Decision No. 89177 included as Condition 36 a requirement that Western Terminal undertake further trenching at the Point Conception site to investigate seismic safety.

3. The Indian Center did not raise issues involving the Religious Freedom Act in its petition for rehearing or petition for writ of review of Decision No. 89177.

4. On May 24 and June 7, 1979, the Indian Center and Western Terminal, respectively, filed petitions for modification of Decision No. 89177 and ancillary relief.

5. Oral argument was held on said petitions on June 25, 1979.

6. The Point Conception site is privately-owned land to which no Indian group has demonstrated property rights.

Conclusions of Law

1. To characterize Condition 36 as a condition subsequent would be without significant legal effect.

2. The Religious Freedom Act provides no legal basis for objection to Decision No. 89177 or Condition 36 thereof.

3. California Constitution Article XIII, Section 3.5 precludes our granting the relief sought by the Indian Center.

4. The petitions of Western Terminal and the Indian Center should be denied.

We have considered each and every allegation in the Petitions for Modification of Decision No. 89177 filed by Western Terminal and the Indian Center as well as the ancillary motions filed by the Indian Center and are of the opinion that no good cause for granting such modification or motions exists.

Therefore, IT IS HEREBY ORDERED that the Petitions for Modification of Decision No. 89177 filed by Western Terminal and the Indian Center, as well as the ancillary motions of the Indian Center, are denied.

The effective date of this order is the date hereof.

Dated JUL 3 1979, at San Francisco, California.

*I will file a
conceding opinion
Alain T. Dedrick*

<i>John E. Byron</i>	President
<i>George L. Stegeman</i>	
<i>Richard W. ...</i>	
<i>Alain T. Dedrick</i>	
<i>James ...</i>	Commissioners