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Decision 96-11-015 November 6, 1996

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

The City of Vernon, Complainant, vs. The Atchison, Topeka and Santa Fe Railroad Defendant.	Case 96-01-019 (Filed January 19, 1996)

INTERIM OPINION

Summary

The City of Vernon, California (Vernon) seeks to invoke the jurisdiction of the Commission to obtain an environmental review of proposed activities of the Atchison, Topeka and Santa Fe Railway (Santa Fe) in connection with an expansion of its facilities at its Hobart Yard. We will conclude that none of the proposed activities requires a permit or approval from the Commission, no environmental review under the California Environmental Quality Act (CEQA) is required, but we have independent authority under the Public Utilities (PU) Code to consider environmental factors in connection with certain reviews to which the facilities may be subject. We will grant Vernon leave to amend its complaint to state a cause of action against Santa Fe for relief pursuant to Sections 761 and 762 of the PU Code.

Procedural History

Vernon filed a complaint against Santa Fe on January 19, 1996. The complaint alleged the Santa Fe has failed to comply with applicable local land use regulations, applicable Commission policy requiring utilities to cooperate with local jurisdictions in planning, constructing, and operating expanded facilities, and violation of the policies of CEQA, which requires

environmental review. Santa Fe filed its answer on February 28, 1996 admitting some of the allegations contained in the complaint and denying others, particularly the allegations that Santa Fe violated any provision of law applicable to it. A pre-hearing conference (PHC) was held before the assigned administrative law judge (ALJ) in San Francisco on March 27, 1996. No other party entered an appearance or filed a petition to intervene. The ALJ entered an order directing the parties to engage in discovery or consultation to determine whether any disputed issues of material fact existed requiring an evidentiary hearing. The order provided that either party could notice its intent to litigate factual matters and a telephonic prehearing conference would be held. On May 1, 1996, pursuant to Vernon's notice and the ALJ's subsequent order, a telephonic PHC was held. The ALJ heard oral argument on why evidentiary hearings would be necessary to resolve disputed issues of material fact. Vernon advanced the argument that the Commission needs to be informed of the extent and effect of Santa Fe's planned activities, and their environmental effect, prior to deciding whether to exercising our authority under the PU Code. Vernon agreed that if, as a matter of law, the Commission lacks the authority to subject Santa Fe to a discretionary review in the manner urged, it would not be necessary to undertake any factual inquiry. The ALJ ordered a pleading cycle for the threshold jurisdictional questions, and this matter stands submitted on the written cross motions of the parties, and the respective replies as of May 31, 1996.

Discussion

Undisputed Facts

A recent decision of the Superior Court of the State of California for the County of Los Angeles provides a convenient summary of the undisputed facts shortly after the time of Vernon's filing of its complaint with the Commission (Judgement Case No. BC123510, February 20, 1996). Santa Fe had previously

brought an action against Vernon growing out of Vernon's assertion of jurisdiction over Santa Fe with respect to land use regulations. Santa Fe and Vernon jointly stipulated to the following facts in that litigation:

1. Santa Fe is a railroad corporation engaged in the business of operating an interstate railroad for compensation within the State of California. Vernon is a city in Los Angeles County, under a charter duly adopted in 1988.

2. Santa Fe operates Hobart Yard as a railroad facility which is located partly within Vernon and partly within the City of Commerce. During the time Santa Fe has owned and operated Hobart Yard, it has used those facilities as part of its rail transportation services.

3. In April 1989, the Vernon City Council adopted a new General Plan. On April 18, 1989, the Vernon City Council adopted a Comprehensive Zoning Ordinance (the Zoning Ordinance). Prior to the enactment of the Zoning Ordinance, a conditional use permit was not required for transportation related uses in the M-2 zone. Hobart Yard is located in the M-2 zone.

4. Santa Fe has developed a plan to acquire approximately 20.5 acres of property in Vernon adjacent to Hobart Yard. The additional properties involve 3 parcels, one consisting of approximately 11.1 acres (the ANR property), another consisting of approximately 6.9 acres (the Ferro property), and one consisting of approximately 2.5 acres (the Laidlaw property). The ANR property, the Ferro property, and the Laidlaw property will be used in Santa Fe's railroad operations, and the acquisition of these properties will expand Santa Fe's use of Hobart Yard. Santa Fe anticipates using the ANR property, the

Ferro property and the Laidlaw property as auxiliary storage facilities for intermodal chassis and trailers.[2]

5. On or about August 5, 1994, Santa Fe submitted an application to Vernon for a conditional use permit for the ANR property under the Zoning Ordinance. On or about September 26, 1994, Santa Fe caused an application for a conditional use permit to be submitted for the Laidlaw property.

6. Santa Fe occupied the ANR property prior to September 29, 1994, and on that date Vernon issued an order to comply which alleged that Santa Fe was in violation of the Vernon City Code and that Santa Fe would be required to vacate the ANR property until a Conditional Use Permit was issued.

7. On or about November 8, 1994, Santa Fe received a letter from Kevin Wilson, the acting director of Community Services and Water for Vernon which indicated that the applications for Conditional User Permit previously submitted by Santa Fe would be returned and an application for Conditional User permit was required for the entire Hobart Yard. Santa Fe has not filed any further Conditional Use Permit applications.

8. Vernon contends that its Zoning Ordinance is applicable to all of Santa Fe's property located within Vernon. Vernon contends that Santa Fe's acquisition and use of the three parcels located near Hobart Yard constitutes an expansion of a non-conforming use in connection with Hobart Yard and therefore a Conditional Use Permit is required for Hobart Yard pursuant to the Zoning Ordinance.

[1] Santa Fe states in its pleadings that Hobart Yard contains approximately 225 acres, the majority of which are located outside Vernon. We make no finding on this point, mentioning it merely to place the disputed facility in perspective.

[2] Commonly referred to as "piggy back trailers/containers," these standardized units allow freight to be transferred from truck, to rail, and to ship as a unit.

9. On March 16, 1995, Santa Fe filed a complaint in eminent domain to acquire title to the ANR property.

10. On March 24, 1995, the court in that eminent domain action entered its order for possession directing that Santa Fe be given possession of the ANR property on May 8, 1995.

11. On April 6 and 13, 1995, Vernon issued further Orders to Comply to Santa Fe.

12. On March 10, 1995, Santa Fe filed its complaint with the Superior Court against Vernon and, on May 18, 1995, the court granted a preliminary injunction in favor of Santa Fe, enjoying and restraining Vernon, during the pendency of the action, from commencing, continuing or maintaining any criminal enforcement proceedings against Santa Fe (for violation of Vernon's Zoning Ordinance).

The Superior Court ruled on cross motions for summary judgment in favor of Santa Fe and against Vernon. The court found that "the subject matter of this controversy lies outside Vernon's jurisdiction by reason of the California Constitution, Article XII, Section 8, and the California Public Utilities Code" and that "[a]ny attempted regulation of Santa Fe by Vernon [with respect to its General Plan, Zoning Ordinance or land use regulations] is wholly preempted by state law." The court permanently enjoined Vernon from seeking to assert its jurisdiction over Santa Fe's railroad facilities under its Zoning Ordinance or land use regulations.

Santa Fe's Motion to Dismiss

Whether Vernon is Requesting an Investigation

Santa Fe asserts that this complaint, brought pursuant to PU Code Section 1702, requires that Vernon allege and prove a violation of law, or any rule, order, or general order of the Commission or any tariff. Vernon does not disagree, and it

disclaims any request that its filing be deemed a request for the Commission to initiate an investigation of Santa Fe's Local Land Use Ordinance's Applicability.

Vernon asks that the Commission order Santa Fe not to expand its use of Hobart Yard in the absence of compliance with its Zoning Ordinance. Santa Fe observes that it is no violation of law for it to fail to comply with the Zoning Ordinance because the "Legislature has granted to this Commission, not individual towns, the power to regulate the location of public utility facilities." Vernon responds that the Commission has not specifically preempted Vernon's local authority under the California Constitution to "make or enforce within [their] limits all local, police, sanitary, and other ordinances and regulations which do not conflict with general laws." (Cal. Const. Art. XI, § 7.)

Vernon then goes on to argue that the judgment of the Superior Court against it on this question is not binding on the Commission. This argument deserves a short answer: The judgment is binding on Vernon, which should[3] seek review of the decision in the California Court of Appeal. The judgment of the Superior Court may not limit our own jurisdiction, but if a violation of applicable law is to be made out in this complaint, it must be a violation of some other stricture than the Zoning Ordinance.[4]

CEQA's Applicability

Santa Fe argues that CEQA is inapplicable to its Hobart Yard expansion and it is not in violation of Public Resources Code Section 21000 or 21001 as Vernon alleges. The applicability of CEQA may prove a vexing question when we take it up below in

[3] Or should have; we do not know if Vernon exercised its right to appeal in the time provided by law.

[4] This is not to say the Zoning Ordinance, in a proper case, might not provide the Commission with a useful standard to determine whether some action otherwise before us was or was not in the public interest.

response to Vernon's motion in support of its argument that the Commission has a statutory duty to recognize and implement the policies underlying CEQA "even if [its] provisions do not technically apply to the matter before the Commission for its consideration" in the words of Vernon's motion. However, it is clear that CEQA does not technically apply.

CEQA imposes a duty, among others, on the Commission to undertake an environmental review of any activity that may result in a physical change to the environment that also "involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (Public Res. Code § 21065(c).) "Private action is not subject to CEQA unless the action involves governmental participation, financing, or approval." (Cal. Code Reg. Tit. 14 § 15002(c) (CEQA Guidelines).) Vernon concedes that Santa Fe's planned activities at Hobart Yard do not require a specific Commission approval or permit such as a certificate of public convenience and necessity.

However, Vernon attempts to bootstrap its position by claiming "in the absence of Commission preemption, Santa Fe's planned activities at Hobart Yard require prior issuance by Vernon of some kind of discretionary permit or approval." (emphasis added) and, therefore, those activities constitute a "project" for CEQA purposes.

Vernon is under the injunction of the Superior Court that bars it from enforcing its Zoning Ordinance and land use regulations against Santa Fe. Whatever we decide about the scope of our own jurisdiction over Santa Fe, we have no jurisdiction to set aside the order of the Superior Court that binds Vernon. Therefore, even if we were to determine that the exercise of Vernon's municipal authority did not conflict with our peremptory authority, Santa Fe would not, thereby, become subject to

Vernon's permitting authority unless and until the injunction of the Superior Court were to be dissolved.

Accordingly, there appears to be no public agency whose discretionary permit or approval requires an environmental review of Santa Fe's expansion of Hobart Yard. Santa Fe has not violated any law by expanding Hobart Yard without a discretionary permit or approval. Even if it had, that would not be a violation of CEQA but rather of a requirement that such permit or approval be obtained.[5]

Violation of any Commission Order or Rule

Santa Fe next asserts that it has not violated any order or rule of the Commission that is denominated as a "policy." The specific policy that Vernon suggests applies is the policy we established in General Order (G.O.) 131-D.

The subject matter of G.O. 131-D is electric generation, transmission/power/distribution line facilities and substations. It focuses on streamlining the handling of complaints involving proposed projects for lines designed to operate between 50 and 200 kilovolts (kV). We determined that such power lines would not require a certificate of public convenience and necessity (although transmission lines of greater capacity would continue to require them). Rather, we decided

[5] Santa Fe suggests that the power of a railroad corporation to condemn property and to use it for the construction and maintenance of "such railroad, and for all stations, depots, and other purposes necessary to successfully work and conduct the business of the railroad" is the basis for its freedom from needing to obtain Commission review and approval. (See PU Code § 7526(c).) Furthermore, PU Code Section 7527(b) grants every railroad corporation the power to erect and maintain all necessary and convenient buildings, stations, depots, fixtures, and machinery for the accommodation and use of its passengers, freight, and business. However, the Legislature would not have granted us the authority to regulate aspects of railroads such as grade crossings (see PU Code § 1201) if it had intended Santa Fe and other similar utilities to be entirely free from regulation by virtue of the cited sections.

that power lines would require a permit to construct, unless an exemption applied.

Among the requirements for a permit to construct a power line was notice to the planning commission and legislative body of each affected county or city in which the proposed facility would be located. However, we also "clarifie[d] that local jurisdictions acting pursuant to local authority are preempted from regulating electric power lines projects constructed by public utilities subject to the Commission's jurisdiction. We imposed a duty on the public utilities locating power line projects to consult with local agencies regarding land use matters. When the utility and public agency are unable to resolve differences, we provided that a hearing would be promptly held on land use matters.

Two major differences make G.O. 131-D inapplicable here. By its terms, G.O. 131-D applies only to certain projects of electric utilities; it does not apply to all projects of all utilities. Second, power lines are unlike the projected activities of Santa Fe, which are not otherwise subject to a Commission review. Such power lines would require an approval under PU Code Section 1001 ("no electrical corporation shall begin the construction of a line without having first obtained from the commission a certificate ..."). In G.O. 131-D, we merely adjusted the procedure by which we subjected power lines to examination.

For distribution lines, we decided we would not require a permit. We did require, however, that, to ensure safety and compliance with local building standards, the utility must first communicate with, and obtain the input of, local authorities regarding land use matters and obtain any non-discretionary local permits required for the construction and operation of the project (emphasis added). Because local authorities are

preempted from regulating power line projects, and because no application before us would exist for local authorities to protest if the utility failed to perform its duties to consult on land use matters and to obtain the required ministerial permits, we permitted the filing of complaints for violation of G.O. 131-D.

Vernon might well rejoin that the policy underlying G.O. 131-D of taking into account local land use concerns is a policy that we ought to apply to all utilities. But we have not done so in any rulemaking. Certainly when we have jurisdiction that pre-empts local authority, we may cede that jurisdiction in a manner that is not inconsistent with the statutory scheme of regulation that the Legislature has established. We do this in circumstances when matters of purely local concern may be accommodated without interfering with matters of regional or statewide import, as we did in G.O. 131-D. But we do so only on an industry-by-industry basis and not on a utility-by-utility basis. Moreover, to develop an adjusted procedure by which we subject railroad facilities expansion to a different permitting procedure to take into account local concerns, we must have some basis for requiring a permit in the first place. Vernon has not shown that we have any such basis for requiring a permit here.

Violation of any Duty of the Commission

Santa Fe maintains that CEQA does not impose a duty upon the Commission to implement the policies underlying CEQA in the absence of a specific approval that is required. Vernon argues that in order adequately to address environmental concerns, the Commission has a duty to assert all of our authority under PU Code Section 701 and other provisions that allow us to make orders governing the services, equipment, physical property, and safety devices used by public utilities. We will take up this spirit, if not the letter, argument in

dealing with Vernon's motion, which is where it belongs. Even if, however, we were to realize that we were derelict in our duty, that realization would not establish that Santa Fe had violated any provision of law applicable to it. For us to entertain a complain pursuant to PU Code 1702 against Santa Fe consistent with due process, Vernon must allege some violation of law by the defendant.

Whether Significant Effects Exist or are Alleged

Santa Fe next makes a curious argument that its proposed expansion does not, indeed cannot, create any "unreasonable environmental impact ... because, in Vernon, Santa Fe is the environment." (emphasis added). It has been a long time in this country since private enterprise has been bold enough to proclaim "What's good for General Motors is good for the USA."

Leaving aside the anachronism, however, whether a particular activity will have environmental effects, and whether such environmental effects are adverse, is a conclusion, not the start, of the CEQA analysis. (See Semi Valley Recreation and Park Dist. v. Local Agency Formation Commission (2d Dist. 1975) 51 Cal.App.3d 648, 663.)

Santa Fe states that it is using Hobart Yard for the receipt of intermodal trailer/container shipments by rail, that the shipments are off-loaded and trucked to their destinations, the empties are returned to Hobart Yard and then dispatched for loading at the point of origin for new shipments, when they are finally returned to Hobart Yard for carriage by rail to another terminal. As Vernon notes, an expansion of Hobart Yard to meet increases in intermodal shipping thus entails increased traffic on the roadways serving Hobart Yard. Such increased traffic at least poses the possibility that resulting concentrations of air pollutants at critical intersections may exceed applicable air quality standards or that existing violations of such standards may be exacerbated.

We cannot, accordingly, determine as a matter of law that Santa Fe's plans have no possibility of creating one or more adverse environmental effects on the environment. Even if we assume, however, that expansion of Hobart Yard will necessarily have one or more significant adverse environmental effects, in the absence of a permit or approval requirement, no environmental review under CEQA is triggered.

Whether Relief is Authorized

Santa Fe argues that we lack authority to deal with its Hobart Yard improvements because, first, the Legislature has specifically authorized Santa Fe to act in this manner, and, second, because the federal Surface Transportation Board has expressly pre-empted state regulatory authority since January 1, 1996.

Like other utilities, Santa Fe has been entrusted with the power of eminent domain. (See PU Code § 611.) If the Legislature had really intended that utilities could exempt themselves from further regulation simply by exercising that power, little of the remainder of the PU Code would be necessary. So the power of a railroad corporation to condemn property necessary for the construction and maintenance of its railroad cannot serve as the basis to exempt Santa Fe's activities from our oversight.

Likewise, the enumeration of the powers of railroad corporations in PU Code Sections 7526-7527 is not intended to exempt railroad corporations from other portions of the PU Code. Those statutes serve a different purpose altogether, which has become of purely historical interest. That purpose was to remedy an old defect in corporate law that limited a corporation to only those powers set out in its charter. (See, e.g., Boca & Loyalton R.R. Co. v. Sierra Valleys R.R. Co. (1905) 2 Cal.App. 546, 556-57 (holding that the powers enumerated in a railroad's charter at

the time it brought its action to condemn property did not include connection of a specific branch line and therefore the railroad was not entitled to condemn property for that purpose.)

Santa Fe notes that the Interstate Commerce Commission Termination Act of 1995 (the Act) subjects transportation by rail carrier to the jurisdiction of a federal Surface Transportation Board (Board). (49 U.S.C. § 10501(a)(1).) The term "transportation" is defined broadly, to include "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment or any kind related to the movement of passengers or property or both, by rail, regardless of ownership or an agreement concerning use." (49 U.S.C. § 10102(9)(A).) Santa Fe then mistates the law by claiming that the jurisdiction of the Board over transportation by rail carriers is exclusive. The statute provides:

> The jurisdiction of the Board over--(1) the transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State, is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

(49 U.S.C. § 10501(b).)

To determine what the statute has preempted, it is necessary to divide the language of the quoted section into three parts, and to consider each.

The Board has exclusive jurisdiction over (1) "transportation by rail carriers" and the remedies provided with respect to rates, classifications, rules (including car service,

interchange, and other operating rules), practices, routes, services, and facilities of such carriers." (Id.) Santa Fe's argument that because the definition of "transportation" contains "facilities" this portion of the statute preempts our authority fails to take into account the whole of the definition of "transportation." After enumerating the various types of transport that are "related to the movement of passengers or property," the definition adds "services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property." (49 U.S.C. § 10102(9)(B).) "Transportation," therefore, means movement of passengers or property and related services, and it is this movement by rail carriers that is the subject of the Board's exclusive jurisdiction, not the means by which the movement is effected. More particularly, the statute sets out the Board's exclusive jurisdiction to administer the Act's remedies with respect to "rates, classifications, rules, practices, routes, services, and facilities of such carriers." We believe that "facilities" in this context may be fairly understood to mean something which makes movement of passengers or property easier rather than something which is built, installed, or established to serve a particular purpose. Accordingly, we do not construe this part of the Act as preempting our authority.

The Board also enjoys exclusive jurisdiction over "the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State." (49 U.S.C. § 10501(b)(2).) Unlike the broad definition of "transportation" and an equally broad definition of "railroad" (which includes "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground) used or necessary for transportation"),

"tracks" are not defined. We give the term its ordinary meaning, therefore, and it is clear that parking facilities for intermodal units are not tracks that fall under the exclusive jurisdiction of the Board.

Nowhere in the Act does Congress subject facilities such as the expansion of Hobart Yard to a regulatory requirement for a certificate of public convenience and necessity by the Board, for permission by the Board to abandon such facilities, or any similar requirement. The Board is concerned with such facilities only insofar as they relate to the reasonableness of rates in circumstances in which the Board is authorized to maintain reasonable rates where there is an absence of effective competition. This is consistent with the stated purposes of the Act. (See 49 U.S.C. § 10101.) Therefore, the Act's preemption of the remedies provided under Federal or State law applies only to such remedies as are related to the subject matter of the Board's regulation, and not to other remedies. Santa Fe emphasizes that the Act pre-empts *economic* regulation by the states, but that does not establish preemption of *all* regulation.

Nor does In re Application of Burlington Northern Railroad Company 545 N.W.2d 749 (1996) (1996 Neb. LEXIS 74) compel a different conclusion. Although the Nebraska Supreme Court held that it lacked subject matter jurisdiction due to the Act, the application on appeal from our sister commission related solely to economic regulation--whether a utility would be permitted to discontinue an agency and transfer its services to another agency. "The rail service agency in question is a service of Burlington to its shipping customers, as well as a facility of that railroad." (Id.) As such, the subject matter of that case fell within the exclusive jurisdiction of the Board.

Santa Fe has signally failed to establish that our authority is preempted by the Act when we are dealing with physical facilities and not economic regulation.

Vernon's Motion for Summary Adjudication Applicability of PU Code Section 701, 761, 762, 768 & 1759

Vernon attempts to show that several sections of the PU Code grant us authority to review and regulate Santa Fe's activities and operations. While we agree with Vernon that Santa Fe is a public utility subject to our authority, we do not believe that our authority is plenary.

Section 701 of the PU Code provides that we "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." Section 701 is an important tool that the Legislature has entrusted to us to minimize the possibility for jurisdictional gaps between matters we are clearly authorized to regulate and activities of public utilities that, if left unregulated, would defeat the purposes of the regulatory scheme the Legislature has enacted. Section 701 is not, however, so elastic as Vernon suggests.

The California Constitution subjects "(p)rivate corporations that own, operate, control, or manage a line, plant, or system for the transportation of people or property ... to control by the Legislature as public utilities." (Cal. Const. Art. XII § 3.) The California Constitution entrusts us with the authority to "fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges." (Cal. Const. Art XII § 4.) The Legislature has "plenary power ... to confer additional authority and jurisdiction upon the

[C]ommission with respect to public utilities. (Cal. Const. Art. XII § 5.) Leaving aside rate discrimination and reparation issues, which are not germane here, therefore, the California Constitution gives the regulation of public utilities generally to the Legislature, and permits the Legislature to delegate that authority to us.

We suppose that if it had wished, the Legislature could have relied solely upon Section 701 for that purpose and ceded the whole of public utilities regulation to our discretion, subject only to the California Constitution. It did not do so, however, but enacted many other statutes directing how public utilities should be regulated. It is in the interstices of those statutes that we must find the gap-filling authority of Section 701. (See Assembly of the State of California v. Public Utilities Commission (1995) 12 Cal.4th 87, 103 (noting that § 701 does not confer upon us powers contrary to other legislative directives or to express restrictions on our authority in the PU Code).)

For example, our authority under Section 761 of the PU Code applies equally to all public utilities. If we find after a hearing "that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, we shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, server, or methods to be observed, furnished, constructed, enforced, or employed." (PU Code § 761.) However, our authority under Section 1001 applies only to certain utilities, specifically not including railroad corporations, such as Santa Fe, whose railroads are not operated primarily by electric energy. We do not think that we can rely upon Section 701 of the PU Code to expand our authority under Section 1001 to

a class of railroad corporation that the Legislature excludes from its scope. So, while Section 701 may apply to the situation before us, Vernon has not shown us the specific gap that Section 701 may properly fill. We do not rely upon it as an independent basis of authority.

Section 761 of the PU Code, which we have quoted above, seems to embrace "facilities" in the same sense as the federal Act discussed earlier, especially in light of the more direct treatment of the subject matter in Section 762 of the PU Code: "Whenever the [C]ommission, after a 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 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 [C]ommission shall make and serve an order directing that such additions, extensions, repairs, improvements, or changes be made." We believe that Section 762, rather than Section 761, encompasses Santa Fe's expansion plans.[6]

Although Section 762 permits us to subject Santa Fe's expansion plans to an examination, it does not require us to do so. Whether CEQA commands us to exercise our authority under Section 762 we will take up separately.

Vernon cites PU Code Section 1759 in an attempt to replay its losing hand in the litigation with Santa Fe before the Superior Court. As we concluded above, the proper forum for Vernon to seek relief from the order of the Superior Court is not this Commission but the Court of Appeal. In any event, Section

[6] We also believe that Section 768 of the PU Code does not apply to Santa Fe except in the context of our examination of railroad yards and terminals generally. That statute contemplates rules of general applicability through the establishment of "uniform or other standards of construction."

1759, which restricts review of our actions to the Supreme Court, does not apply to the outcome of the litigation by which Vernon finds itself bound. No order or decision of the Commission was involved in that case.

Whether Hobart Yard Expansion is a CEQA Project

Vernon begins its argument on this point by stating: "There is no dispute that Santa Fe's planned activities at Hobart Yard require no specific Commission approval or permit." Rather, Vernon attempts to convince us, the expansion is a CEQA project because we have encouraged electric utilities to consult with local authorities on land use matters and to obtain ministerial permits in connection with certain power line projects. Vernon concludes that we have established a rule of never preempting a local jurisdiction without having reviewed the project and the local jurisdiction's concerns and, since we have not reviewed the project, we therefore have a duty under CEQA to require Santa Fe to obtain Vernon's approval.

However, Santa Fe is not an electric utility, and it is not constructing a power line over which we would otherwise have authority to require a permit under Section 1001 of the PU Code.

Past Commission Practice

Vernon next argues that we have a history of subjecting projects not otherwise subject to environmental review to CEQA, citing G.O. 131-D and a 1979 decision in which we included a finding that a regulatory system would have a beneficial effect on the environment. Neither precedent is persuasive. In G.O. 131-D we were dealing with the means of implementing broader statutory authority to require a certificate or permit; here, we lack such authority. The fact that we once determined it prudent to make an environmental finding on our own actions is no authority for us to require a CEQA review for private action not otherwise subject to our approval.

Necessity to Ensure an Environmental Review

Vernon's last argument is at once both its weakest and its strongest: If we do not require an environmental review, none will occur, and the possible adverse environmental consequences that could have been avoided will occur. This is an argument that requires us to revisit the last major occasion on which we found ourselves confronted with the question of our authority to require an environmental review under CEQA.

In the last century, a railroad was constructed to carry passengers from San Francisco to the mineral baths in Calistoga, at the northern end of the Napa Valley. (Napa Valley Wine Train, Inc. v. Public Utilities Commission (1990) 50 Cal.3d 370, 374 (Wine Train).) After a long decline in passenger and freight traffic, an applicant (NVWT) acquired a portion of the line to operate as a tourist attraction. This proved highly unpopular with residents of several affected cities and towns who asked us, by way of a complaint against NVWT, to institute an investigation and to order NVWT to suspend operations until an environmental review under CEQA was completed. We asserted jurisdiction, denied NVWT's petition for rehearing, and the Supreme Court issued a writ of review.

The majority opinion of the Supreme Court found that CEQA did not apply to the institution of passenger service on rail rights-of-way already in use under an exemption in the Public Resources Code. The Legislature responded by amending the Public Resources Code to specifically subject NVWT's proposal to CEQA, notwithstanding the Supreme Court's decision that the exemption did apply.[7]

The question naturally arises why the Legislature chose to call out the NVWT proposal for individual treatment under

[7] In fact, Public Resources Code § 21080.04(b) states the Legislature's specific intent to override Wine Train.

CEQA. (Public Res. Code § 21080.04 states CEQA "applies to a project for the institution of passenger rail service on a line paralleling State Highway 29 and running from Rocktram to Krug in the Napa Valley.") Arguably, it could have accomplished the same result by excluding the NVWT proposal from the exception in CEQA (*i.e.*, by amending Public Res. Code § 21080(a)(10) by adding the language in italics: "A project for the institution or increase of passenger or commuter services on rail or highway right-of-way already in use *(not including the institution of passenger rail service on a line paralleling State Highway 29 and running from Rocktram to Krug in the Napa Valley)*, including modernization of existing stations and parking facilities.") Can we conclude that the Legislature rejected that approach because it was uncertain that we had sufficient authority to subject the project to an approval under the PU Code?

We think not for the simple reason that if the Legislature had been uneasy on that point, it could have granted us that authority easily pursuant to its plenary power over public utilities. (Cal. Const. Art. XII § 5.) We think, rather, it would have been awkward to the Legislature to have accomplished its purposes (which included designating us as lead agency for the CEQA review, specifically disapproving the decision of the Supreme Court, and expressing its intent that it did not intend to confer jurisdiction upon us with respect to any other project involving rail service) by excluding the NVWT proposal from the exception in Public Resources Code Section 21080(a)(10). (See Public Res. Code § 21080.04.) As the Supreme Court noted, "CEQA remains a legislative act subject to legislative limitation and legislative amendment." (Wine Train at 376.) Accordingly, if the Legislature wished to subject the Wine Train project to CEQA, it was free to do so in the most direct way possible, acting under its plenary power over public utilities, and it did so.

The resolution of that issue, however, does not dispose of the present controversy. The Legislature has not commanded that expansions of Hobart Yard be expressly subject to, or exempt from, CEQA. This brings us to Justice Kaufman's dissent in Wine Train in which Justice Mosk joined.

Justice Kaufman would have concluded that we had regularly pursued our authority in ordering the NVWT plan subjected to CEQA. (Wine Train at 385.) Leaving aside the dispute with the majority over the exemption that the Legislature subsequently mooted, Justice Kaufman would have found that the plans to construct depots, repair facilities, passenger stations, and crossings and guardrails and to run round-trip trains was a project for CEQA purposes.

Although Justice Kaufman put great emphasis on the policies underlying CEQA and on the likelihood that the plans would have "a significant effect on the environment, in areas ranging from air and noise pollution, to traffic volume and delays on one of the most sensitive and cherished environmental resources in the state" (Wine Train at 392), he rested his conclusion on a portion of the definition of "project." NVWT was applying for public funding to install crossing controls, which brought its activities within the purview of CEQA pursuant to Public Resources Code Section 21065(b). (Id. at 394.) Although our Rule of Practice and Procedure 17.1 contains a categorical exemption for the installation of such signals or signs, Justice Kaufman was of the opinion that the CEQA Guidelines Section 15300.2(c) prohibited us from applying it because the magnitude of the possible impacts was so great. (Id.)

So far as the record now stands, Santa Fe is seeking no financial assistance from the State of California in connection with the expansion of its Hobart Yard. So, there is still no CEQA "project."

Justice Kaufman then turned to our authority over various safety features of NVWT's proposal. He would have found that PU Code Section 1202, which empowers us to determine and prescribe railroad crossings, was one such source of authority.[6] In PU Code Section 768, he found another.[7] From such authority over safety measures, he found that we could exercise discretionary authority in a way that would have a bearing on the environmental impact of the project as a whole. (Id. at 397.) Justice Kaufman quoted with approval a 1987 Court of Appeal decision that "'the touchstone is whether the approval process involved allows the government to shape the project in any way which could respond to any of the concerns which might be identified in an environmental impact report.'" (Id.)

This may truly be a touchstone if an agency is not required to wait for an application before finding a CEQA project exists, but may exercise its independent judgment to seek out situations calling for oversight and thereby bring a project into jurisdictional existence. So let us turn to the case Justice Kaufman cited, *Friends of Westwood, Inc. v. City of Los Angeles* ((1987) 191 Cal.App.3d 259, 267 (Westwood).)

A developer proposed to construct a 26-story office tower at the corner of Wilshire Boulevard and Glendon Avenue in Westwood neighborhood of Los Angeles, California. (Id. at 262.) In connection with the building plans, the developer applied to city's planning commission to vacate an alley that bisected the site. The city council approved the request over the planning commission's objection, subject to conditions, and determined

[6] The dissent also looked to PU Code § 7604 (frequency and location of bells and whistles at crossings and § 7604 (nature and placement of locomotive headlights). Like § 1202, none of these safety provisions are implicated, so far as the record shows, by Hobart Yard expansion plans.

[7] We believe that Justice Kaufman is mistaken here, because he reads the statute as though it read "require *any* public utility" rather than "require *every* utility."

that the vacation was categorically exempt from CEQA. The developer subsequently obtained a building permit, following a detailed review of construction plans subject to further conditions, but without an environmental review under CEQA. (Id. at 263.)

A community group sought a preliminary injunction against construction, and appealed its loss in Superior Court to the Court of Appeal. (Id. at 264.) The appellate court quickly focused on whether the project should be classified as "discretionary" or "ministerial." (Id.) If it were the former, an environmental impact report or negative declaration would be required; otherwise, construction could proceed without further CEQA review. In analyzing the distinction for CEQA purposes, the Court of Appeals said: "Thus the touchstone is whether the approval process involved allows the government to shape the project in any way which would respond to the concerns which might be identified in an environmental impact report. And when is government foreclosed from influencing the shape of the project? Only when a private party can *legally compel* approval without any changes in the design of its project which might alleviate adverse environmental consequences." (Id. at 267, emphasis in original.)

It was undisputed in Westwood that at least one approval was required--it was a building permit. The Court of Appeal concluded that those opposing its issuance could probably show its issuance required the exercise of discretion. For Santa Fe, however, there is no approval of any kind required and, in its absence, no distinction between discretionary and ministerial approvals. The fact that we may exercise discretionary rather than ministerial authority under PU Code Section 762 does not turn our action into an approval for purposes of CEQA.

More particularly, our inaction does not invoke CEQA. Our exercise of discretion as to whether to exercise authority under a statute cannot be made the predicate for an environmental review. First, the plain language of CEQA does not require it. Second, the universe of actions that we are permitted to take is so vast that if we had first to study the consequences of declining to act, we would do nothing else. We would have reached the state of cosmic perfection contemplated by the Zen masters of two flawless mirrors reflecting nothing but each other.

Additional Environmental Review Duties

Apart from CEQA, the Legislature charges us to take into account the effect on the environment in at least two situations. In connection with granting a certificate of public convenience and necessity pursuant to PU Code Section 1001, we must give consideration to community values, recreational and park areas, historical and aesthetic values, and influence on the environment. (PU Code § 1002(a).) Santa Fe requires no such certificate. Also, however, in connection with making any order pursuant to PU Code Section 762 regarding the location of structures, we are to consider the same factors. (PU Code § 762.5.)

Section 762 of the PU Code provides in relevant part:

> Whenever the [C]ommission, after a 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 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 [C]ommission 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. If the [C]ommission

orders the erection of a new structure, it may also fix the site thereof.

We have previously noted that our authority under PU Code Section 762 is subject to the provisions of PU Code Section 705, which permits a hearing either upon complaint or the motion of the Commission. (H.B. Ranches, Inc. v. Southern California Edison Company (1983) 11 CPUC2d 400, 407.) Thus, an aggrieved party "may complain about utility conduct which may comply with all existing laws and regulations but nonetheless be unreasonable." (Id. at 406.) However, we also "emphasized that such complainants, as the moving parties, bear the burden of demonstrating the unreasonableness of a utility's conduct." (Id.)

The tenor of Vernon's complaint is that Santa Fe's expansion of Hobart Yard is unreasonable because it has not been subjected to the Zoning Ordinance (a contention that was settled in Superior Court adversely to Vernon shortly after it filed its complaint with the Commission) or to any environmental review. Vernon should be granted leave to amend its complaint, if it can, to allege, with particularity facts to show why, in light of the economically feasible alternatives, if any, available to accomplish the same objectives, the means by which Santa Fe has chosen to implement its plan of expansion unnecessarily create avoidable adverse environmental effects of sufficient magnitude so as to make the expansion unreasonable. (See Rule 87 (policy of liberally construing procedural rules to secure just, speedy, and inexpensive determination of the issues presented).)

In assessing the adequacy of any amended complaint, we shall be guided by CEQA Section 21082.2. Vernon may propound discovery upon Santa Fe for the purpose of determining the scope of Santa Fe's plans at a level of detail consistent with that required in connection with a Proponent's Environmental Assessment pursuant to Rule 17.1(d). Vernon, however, shall be

solely responsible for conducting all environmental studies and analyses of such plans in connection with its complaint and may not lay off such studies and analyses on Santa Fe in the guise of discovery except to the extent that Santa Fe has already conducted any such studies or analyses and reduced them to written form. We include this stricture to emphasize the difference from environmental review under CEQA, in which the burden of demonstrating the reasonableness of a proposed action lies with the proponent of a project.

Findings of Fact

1. Santa Fe is a railroad corporation engaged in the business of operating an interstate railroad for compensation within the State of California. Vernon is a city in Los Angeles County, under a charter duly adopted in 1988.

2. Santa Fe operates Hobart Yard as a railroad facility which is located partly within Vernon and partly within the City of Commerce. During the time Santa Fe has owned and operated Hobart Yard, it has used those facilities as part of its rail transportation services.

3. In April 1989, the Vernon City Council adopted a new General Plan. On April 18, 1989, the Vernon City Council adopted the Zoning Ordinance. Prior to the enactment of the Zoning Ordinance, a conditional use permit was not required for transportation related uses in the M-2 zone. Hobart Yard is located in the M-2 zone.

4. Santa Fe has developed a plan to acquire approximately 20.5 acres of property in Vernon adjacent to Hobart Yard. The additional properties involve 3 parcels, one consisting of approximately 11.1 acres, another consisting of approximately 6.9 acres, and one consisting of approximately 2.5 acres. The ANR property, the Ferro property, and the Laidlaw property will be used in Santa Fe's railroad operations, and the acquisition of

these properties will expand Santa Fe's use of Hobart Yard. Santa Fe anticipates using the ANR property, the Ferro property and the Laidlaw property as auxiliary storage facilities for intermodal chassis and trailers.

5. On or about August 5, 1994, Santa Fe submitted an application to Vernon for a conditional use permit for the ANR property under the Zoning Ordinance. On or about September 26, 1994, Santa Fe caused an application for a conditional use permit to be submitted for the Laidlaw property.

Findings of Fact

6. Santa Fe occupied the ANR property prior to September 29, 1994, and on that date Vernon issued an order to comply which alleged that Santa Fe was in violation of the Vernon City Code and that Santa Fe would be required to vacate the ANR Property until a Conditional Use Permit was issued.

7. On or about November 8, 1994, Santa Fe received a letter from Kevin Wilson, the acting director of Community Services and Water for Vernon which indicated that the applications for Conditional User Permit previously submitted by Santa Fe would be returned and an application for Conditional User permit was required for the entire Hobart yard. Santa Fe has not filed any further Conditional Use Permit applications.

8. Vernon contends that its Zoning Ordinance is applicable to all of Santa Fe's property located within Vernon. Vernon contends that Santa Fe's acquisition and use of the three parcels located near Hobart Yard constitutes an expansion of a non-conforming use in connection with Hobart Yard and therefore a Conditional Use Permit is required for Hobart Yard pursuant to the Zoning Ordinance.

9. On March 16, 1995, Santa Fe filed a complaint in eminent domain to acquire title to the ANR property,

10. On March 24, 1995, the court in that eminent domain action entered its order for possession directing that Santa Fe be given possession of the ANR property on May 8, 1995.

11. On April 6 and 13, 1995, Vernon issued further orders to Comply to Santa Fe.

12. On March 10, 1995, Santa Fe filed its complaint with the Superior Court against Vernon and, on May 18, 1995, the court granted a preliminary injunction in favor of Santa Fe, enjoying and restraining Vernon, during the pendency of the action, from commencing, continuing or maintaining any criminal enforcement proceedings against Santa Fe (for violation of Vernon's Zoning Ordinance).

13. The Superior Court ruled that Vernon lacked jurisdiction to enforce its Zoning Ordinance or land use regulations against Santa Fe.

Conclusions of Law

1. Santa Fe is a public utility subject to the jurisdiction of this Commission.

2. Vernon is bound by the judgment of the Superior Court pending the outcome of the regular appeals process.

3. None of the proposed activities of Santa Fe with respect to Hobart Yard requires a permit or approval from the Commission.

4. In the circumstances presented, CEQA does not apply to Santa Fe's proposed expansion of Hobart Yard insofar as the jurisdiction of the Commission is concerned.

5. G.O. 131-D applies only to electric generation, transmission/power/distribution line facilities and substations.

6. PU Code Sections 7526 and 7527 do not exempt railroad corporations from other portions of the PU Code.

7. The authority of the Board under the Act does not totally preempt our authority under the PU Code.

8. Vernon has not shown what jurisdictional gap in our authority PU Code Section 701 fills that subjects Santa Fe to the necessity of obtaining a permit or approval from this Commission.

9. Hobart Yard expansion is not a CEQA project.

10. PU Code Section 761 provides a basis for the Commission to review actions of public utilities not otherwise subject to permit authority by the Commission.

11. PU Code Section 762.5 requires consideration of environmental factors in making certain determinations pursuant to PU Code Section 761.

12. The Commission's authority under PU Code Section 762 is subject to PU Code Section 705, which permits a hearing either upon complaint or the motion of the Commission.

I N T E R I M O R D E R

IT IS ORDERED that:

1. The City of Vernon (Vernon) is granted leave to amend its complaint to attempt to state a cause of action in accordance with this decision; provided, that it do so within sixty (60) days of the date of this decision.

2. The matter is remanded to the assigned administrative law judge for further proceedings consistent herewith.

This order is effective today.

Dated November 6, 1996, at San Francisco, California.

P. GREGORY CONLON
President
DANIEL Wm. FESSLER
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

We will file a concurring opinion.

/s/ DANIEL Wm. FESSLER
Commissioner

/s/ JOSIAH L. NEEPER
Commissioner

FESSLER and NEEPER, Commissioners, concurring:

We write to briefly elaborate on one point in this decision to prevent any misunderstanding in the future. The proposed opinion of the Administrative Law Judge explores the dimension of our authority under Section 701 of the Public Utilities Code in the context of the operations of the Atchison, Topeka and Santa Fe Railroad and concludes that it is insufficient to assume the jurisdiction or grant the relief sought by the City of Vernon. We have joined our colleagues in voting to adopt that proposed decision. Within the Commission staff certain language in that opinion has excited controversy. The following statement occupies the center of the storm:

> We supposed that if it had wished, the Legislature could have relied solely upon Section 701 for that purpose and ceded the whole of public utilities regulation to our discretion, subject only to the California Constitution. It did not do so, however, but enacted many other statutes directing how public utilities should be regulated. It is in the interstices of these statutes that we must find the gap-filling authority of Section 701. (See *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal.4th 87, 103 ((noting that § 701 does not confer upon us powers contrary to other legislative directives or to express restrictions on our authority in the PU Code).)

We concur with the specific conclusion that Section 701 does not provide authority to require a preconstruction certificate of public convenience and necessity from an entity which is clearly excluded by the terms of Section 1001. We regard the use of the phrase "interstices of these statutes" as sound in this context but subject to possible misunderstanding. By its terms Section 701 embodies a grant of legislative authority to the Commission to ". . .do all things, whether specifically

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We concur with the specific conclusion that Section 701 does not provide authority to require a preconstruction certificate of public convenience and necessity from an entity which is clearly excluded by the terms of Section 1001. We regard the use of the phrase "interstices of these statutes" as sound in this context but subject to possible misunderstanding. By its terms Section 701 embodies a grant of legislative authority to the Commission to ". . .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." The use of the phrase "in addition thereto" suggests to me that the Commission may rely on Section 701 for more than merely "gap-filling" between statutory provisions. Yet such an authority is clearly limited and, in our view, the most useful authoritative construction of this grant is to be found in *Southern California Gas Co. v. Public Utilities Commission*, 24 Cal.3d 653, 657-60 (1979). There we are taught that the Commission may not rely on Section 701 to sustain an assertion of authority which would contravene a statute or act with respect to that statutory language in such a manner as to defeat its evident purpose.

Daniel Wm. Fessler
Commissioner

Josiah L. Neeper
Commissioner

San Francisco, California
November 6, 1996