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Decision 97-04-089

April 23, 1997

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Morris & Gloria Sobhani,)
 Sherine Sobhani, Paree Sobhani,)
 Stephani Sobhani, Stephen Sobhani,)
)
 Complainants)
)
 vs.)
)
 Pacific Gas and Electric Company,)
)
 Defendant)
 _____)

Case 93-11-012
(Filed November 3, 1993)

ORDER DENYING REHEARING

In this order we deny the application for rehearing of D.96-09-012 ("Decision") filed by the above captioned members of the Sobhani family ("complainants"). The application asserts that we did not give proper weight to the evidence complainants submitted in this case. After careful review of each allegation contained in the application, we conclude we properly found that PG&E acted responsibly in selecting the site of its proposed substation, and that no further review is required. This conclusion is amply supported by the record submitted by the parties, and the allegations made in the application for rehearing do not demonstrate error. We do agree that the Decision should be more explicit in one area and will modify the Decision accordingly.

Background

The complainants own the Sobhani Industrial Park which is located at the eastern edge of the City of Lompoc in Santa Barbara County. In May, 1991 Pacific Gas and Electric Company ("PG&E") acquired a three-acre parcel in the Sobhani Industrial Park

though eminent domain. The site sits at the intersection of three transmission lines. PG&E proposes to construct a new 115 kv substation ("Cabrillo Substation") on the parcel, which is zoned to allow substations. (Decision, pp. 2-3.)

Complainants argued that the Cabrillo Substation should not be built in the Sobhani Industrial Park and that an EIR or similar document should be prepared to study the Cabrillo Substation. Complainants alleged that PG&E had improperly avoided environmental review of the facility. Following hearings, we issued D.96-09-012, which denied the complaint. The Decision held that since the Commission, "in this instance, is not required to exercise its 'judgment or deliberation' pursuant to California Environmental Quality Act (CEQA) Guidelines § 15357, the Cabrillo substation is not a 'project' requiring an EIR." (Decision, p. 2.; see, Pub. Util. Code, §1001, General Order 131-C.) In addition, the Decision held that PG&E "acted responsibly" in selecting the site for the proposed substation, and no further review was required. The Decision noted that PG&E had examined alternatives, prepared an environmental disclosure document ("PEA") and consulted with Lompoc. (Decision, p.15.)

The application for rehearing contains seven numbered allegations of error. The application requests that the entire case be reheard by a different administrative law judge ("ALJ") to cure the alleged errors. (Application, p. 3.) The application's first five claims assert the Decision is in error for not according enough weight to complainants' evidence, or for improperly according too much weight to PG&E's evidence. The sixth and seventh claims criticize the decisionmaking process, alleging that the Decision did not give enough weight to complainants' evidence because the assigned ALJ was biased, and allowed the passage of time to obscure complainants' position.

PG&E filed a response to the application for rehearing contesting each of the complainants' claims. In addition, the application requested a stay of D.96-09-012, and complainant filed an Motion for Emergency Stay of Construction on November 15, 1996. In response to the Motion for Emergency Stay, PG&E voluntarily agreed to suspend construction until the application for rehearing was decided. This voluntary stay was memorialized in an Administrative Law Judge's Ruling of December 9, 1996.

Discussion

The application's first five claims draw attention to certain evidence submitted by complainants in this case. The application asserts this evidence was not properly evaluated in the Decision. The application also criticizes evidence submitted by PG&E, claiming that the Decision gave this evidence too much weight. All of the specific issues raised in the application were contested by the parties, with evidence introduced both by complainants and by PG&E.

In deciding a complaint, our role is to evaluate the competing claims made by the parties, and to decide the case based on our evaluation of the record submitted. In this case, we decided in favor of PG&E and against complainants. We found that PG&E acted responsibly in selecting the site for the proposed substation and no further review was required. The record amply supports this conclusion. The ALJ and the Commission evaluated the record, including complainants' arguments and evidence, in rendering the Decision. (See, e.g., Decision, pp. 3-4.) The application's suggestion that we should have given more weight to its evidence and less weight to PG&E's in order to reach a different conclusion does not demonstrate error in the Decision. (Cf. Pub. Util. Code, § 1757.)

The application's first claim asserts that the Decision "omitted" mention of the El Puente School. (Application, p. 1 (emphasis omitted).) In fact, the Decision acknowledges the complainants' arguments with respect to the school and other land uses near the proposed substation on page 4. The record indicates that the school, which enrolls 26 middle- and high-school-aged children, has received a permit to locate in a building near the proposed Cabrillo Substation.

PG&E's was very responsive in submitting evidence on this issue. Following a reference by complainants to the potential of a school's locating in the Sobhani Industrial Park, PG&E investigated, introduced Exhibit 64 and requested that complainants introduce Exhibit 65. (Transcript, pp. 264-268, 285-286.) PG&E's witness De Silva also testified that the location of the school did not require changing the location of the proposed substation. (Transcript, p. 267.) PG&E notes that the proposed substation site is zoned for Commercial and Manufacturing uses, including substations. By way of contrast, PG&E points out that schools are not permitted in this area without special

authorization. (Response, p. 2.) Thus, there is ample support for the finding that PG&E behaved responsibly in selecting the site and no further review should be required.

We concur with one point raised by complainants, however. The Decision should be explicit in its disposition of this matter. We will modify the Decision in several minor respects to make it clear that PG&E addressed issues in this case as well as in its PEA and in public comments. The discussion section of the Decision indicates that PG&E's process included: consultation with Lompoc, public meetings, and incorporation of comments into their planning process. (Decision, p. 15.) We should include mention of this proceeding there. This should make it clear that the basis on which the complaint is denied is PG&E's overall disclosure and responsiveness. Further, our Conclusions of Law should accord with this discussion, and conclusion nine will be modified.

The application's second claim asserts PG&E's testimony should have had "no significance" and should have been disregarded because witnesses were PG&E employees who "had been coached and rehearsed." (Application, at p. 2.) Similarly, the application's third claim asserts the consultants who worked on PG&E's PEA cannot be characterized as "independent" alleging that the PEA was "biased" and "ignored the negative impacts of the substation." (Application, p. 2.; see, e.g., D.96-09-012 at p. 18 (Finding of Fact 5).)

Complainants have already contested PG&E's evidence and provided the Commission with the reasons why they believe PG&E's evidence should not be given much weight. For example, complainants' critique of the PEA was presented at the hearing and the letter attached to the application was submitted as an exhibit. (Transcript, pp. 46-47; Exhibit 1, Tab 2.) Moreover, while PG&E's witnesses may have presented PG&E's position, complainants' only witness, Morris Sobhani, was one of the complainants and similarly presented his own position. (See, Response of PG&E, p. 8.) Complainants cross-examined PG&E's witnesses and presented their version of the case. After evaluating these claims, the Decision found that PG&E's evidence was persuasive. This conclusion is supported by the record, and complainants contention that we could, or should, have found otherwise does not demonstrate error.

In addition, we note the Decision does not rely on the consultants' "independence" (in the sense of "disinterestedness") as a factor that increases the credibility of the PEA. The Decision acknowledges that the PEA, which stands for "proponent's environmental assessment," is produced by a project's sponsor, citing the Commission's Rule 17.1. (Decision, p. 9.) The reference to "independent" consultants indicates the PEA was not prepared by private, in-house staff.

The application's next claim, its fourth, disputes PG&E's evidence on cost savings. (See, PG&E's Concurrent Opening Brief, p. 25; Decision, p. 11.) PG&E claimed a cost saving of \$750,000; complainants claim "the cost would not have been more than \$200,000." (Application, p. 2.) The application asserts PG&E's figure cannot be relied upon because it is "exaggerated" and "self-serving." The claim that the amount of cost saving was disputed does not demonstrate that the Decision is in error.¹ It is not even clear that this issue is material to the resolution of the case.

The Application's fifth claim argues that PG&E's testimony on the nature and extent of Lompoc's City Counsel and Planning Commission review was "misleading and without foundation." (Application, p.2.) The Application points to two letters from the Planning Commission it introduced at the hearing. (Exhibit 2, Tab 3.) The letters state that the Planning Commission's review of the proposed Cabrillo Substation was limited to architecture and landscaping. PG&E contested the claim that Lompoc's review was limited. The record contains evidence indicating a more extensive consultation process. The City Attorney told the Planning Commission that PG&E was seeking input on all matters, although Lompoc could not block the project. (Exhibit 41, p. 2.) The Planning Commission requested further information from PG&E, which PG&E supplied. (Decision, p. 15.) When the matter came before the City Counsel, PG&E offered in writing to address "any and all" of the city's remaining concerns as part of its

¹PG&E claims that the complainants' figure does not appear anywhere in the record. Complainants cost estimate is stated in their Reply Brief at p. 10. Complainants provide very little to substantiate their claim, made by an unknown company with respect to construction of transmission lines at a military base. A review of the record does not reveal another mention of the \$200,000 figure. Thus, PG&E may not have been afforded an opportunity to cross-examine complainants on this evidence.

collaborative review process. (Exhibits 51, 54.) After informing itself about the proposed Cabrillo Substation and the collaborative process PG&E undertook, a majority of the City Counsel voted not to send a letter to this Commission stating that more review was appropriate. (Exhibits 52, 55, 57.) This evidence is sufficient to support the finding that PG&E properly consulted with Lompoc.

The application's sixth and seventh claims assert that the assigned ALJ was biased, and that the facts of this case were not fresh in his mind when he wrote D.96-09-012. The Complainants allege that "available data" show ALJ Patrick favors utility companies as a result of a "basic philosophy." (Application, at p. 3.) The application also speculates that "time"—18 months between hearing and a Decision—allowed the ALJ to omit "pertinent" information from the Decision.

Although these arguments speak in terms of bias and improper process, it is difficult to see how they differ from complainants' first five claims. These claims do not contain specific allegations of improprieties that would allow us to determine if bias or forgetfulness interfered with decisionmaking in this case.² The application does not provide the "available data" it claims supports the assertion that the ALJ's rulings disproportionately favor the utilities, nor does it explain what "pertinent information" was overlooked because of "time." Rather, complainants seem to be explaining why the Decision found against them even though they introduced evidence supporting their claims. As stated above, the Decision is based on the record. The Decision is not so inexplicable that it indicates bias or inattention on the part of the decisionmaker, and the application provides no real indication that such problems were present.

Nevertheless, these are serious claims and should be analyzed in their own right. The Commission's Rules of Practice and Procedure now contain provisions for the disqualification of ALJ so that bias can be avoided.³ Those rules were recently adopted

² The Commission requires that applications for rehearing specifically explain how a decision is in error so the Commission can properly review applicants' claims. (See, Rules of Practice and Procedure, Rule 86.1, codified at Cal Code Regs., tit. 20, § 86.1.)

³ See Rules of Practice and Procedure, Rules 66.2, 66.3, codified at California Code of Regulations, Title 20, sections 63.2, 63.3. Statutory authority relating to the bias of

and thus complainants could not have made use of them in this proceeding. Before the new rules were adopted, the Commission applied the standard set out in the Supreme Court case Andrews v. Agricultural Labor Relations Board (1981) 28 Cal.3d 781. "Bias in the sense of a crystallized point of view about issues of the law or policy is almost universally deemed no grounds for disqualification." (Andrews, *supra*, 28 Cal.3d at p. 790, citing 2 Davis, Administrative Law Treatise (1st ed. 1958) at p. 131.) In Re Pacific Telesis Group (1994) [D.94-03-036] 53 Cal.P.U.C.2d 344, the Commission addressed a claim of bias stating, at 53 Cal.P.U.C.2d 347-348 :

[w]e take very seriously allegations of bias and pre-judgment. The right to an impartial decisionmaker is a basic element of due process. However, the right to an impartial decisionmaker does not mean that a decisionmaker must be indifferent to the general subject matter of a case.

[Quotation from Andrews omitted.] On the other hand, disqualification because of bias would be appropriate where the decisionmaker has prejudged the facts or has demonstrated bias against a particular party sufficient to impair the decisionmakers' impartiality.

Under the Commission's new rules on disqualification, complainants' allegations—even if true—would be insufficient to require disqualification of the ALJ. Rule 63.3(b) provides that an ALJ should not be disqualified even if he or she has "in any capacity expressed a view on a legal, factual or policy issue presented in the proceeding." The only exception is a case where the ALJ has served as a representative in the same proceeding or represented a party on the same issues in a different proceeding. (See Rule 63.2(a)(2).) Thus, even if ALJ Patrick were predisposed to favor utilities, such a policy position would not require his disqualification if he were capable of fairly adjudicating the facts presented and did not harbor bias against a particular party in the case.

judges (Code Civ. Proc., § 170.6) and to administrative law judges covered by the California Administrative Procedure Act (Gov. Code, § 1512 et seq.) does not apply to Commission proceedings.

This result is consistent with the general principles of administrative law outlined above. The Decision was rendered by the Commission, after hearings were conducted by ALJ Patrick who then wrote a proposed decision. (See Pub. Util. Code, § 311(d).) ALJ Patrick afforded complainants ample opportunity to state their case, and provided a certain amount of informality in the hearing so complainants could present their case in full. (E.g. Transcript, pp. 4, 12.) The Decision indicates the Commission understood and fully considered complainants' position. Although the Commission ruled against complainants, the Decision is based on the record and does not seem to unaccountably or illogically favor PG&E. Even if ALJ Patrick were of the opinion that utilities claims were generally correct, such a predisposition would not demonstrate a due process problem unless the decisionmaker here prejudged the facts of the case or harbored bias against a particular party. The application does not show the decisionmaker here prejudged the facts or harbored any bias against a particular party in this proceeding.

Similarly, the claims of forgetfulness do not indicate a due process problem. An extensive record was developed in this proceeding, consisting of 87 Exhibits and three volumes of Transcripts. The Decision reviews much of the matters discussed at the hearing and is rendered on the basis of the evidence collected. Other than the application's previous five claims there is no indication that the Decision overlooked pertinent facts. Again, we note that the Decision is based on the record developed in this proceeding and does not seem to unaccountably or illogically favor PG&E. Thus, the application's seventh claim does not demonstrate a basis for granting rehearing.

Conclusion

There is ample evidence to support the conclusion that PG&E acted responsibly in selecting the site for the proposed substation, and the application does not demonstrate that we have erred in reaching that conclusion. Moreover, the application's claims of bias and forgetfulness do not demonstrate that the Decision is the result of improper process. While we understand that complainants are disappointed that they did not win their case, the Decision is based on the record, and its denial of the complaint is not so inexplicable

that it must be accounted for by supposing the ALJ was biased or did not fully understand all the facts.

Therefore, **IT IS ORDERED** that:

1. D.96-09-012 is modified as follows:
 - a) On page 15, a new sentence is added at the end of the first full paragraph, which begins, "Our review of the record . . ." and ends, ". . . review of its plans for Cabrillo Substation." The new sentence reads: "Items not raised in public comments, such as the proposed school, were addressed in the hearings before the Commission."
 - b) Conclusion of Law 9, on page 19, is restated to read as follows: "9. PG&E sufficiently addressed environmental impacts created by the construction and operation of the Cabrillo Substation."
 - c) A new Conclusion of Law 10 is added on page 19, immediately following Conclusion of Law 9, and stating: "10. The Complaint should be denied."
2. The application for rehearing of D.96-09-012, as modified, is denied.

This order is effective today.

Dated April 23, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners