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Decision 97-09-058 September 3, 1997

MAIL DATE
9/8/97

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Women's Energy Inc.
for an Order Declaring Women's
Energy, Inc. not subject to the
Commission's jurisdiction.

ORIGINAL
Application 94-08-016
Filed August 11, 1994

Application of Women's Energy, Inc.
for a Certificate of Public Convenience
and Necessity to own and operate
electric distribution facilities in the
Golden Gate National Recreation Area,
Presidio Unit.

Application 94-08-042
Filed August 23, 1994

ORDER DISPOSING OF APPLICATION FOR REHEARING OF D.95-01-045

This application stems from Women's Energy Inc.'s (WEI's) attempt to become the electricity provider for the Presidio of San Francisco (Presidio). In Decision (D.) 95-01-045 (the Decision) the Commission concluded that WEI was required to apply for a certificate of public convenience and necessity (CPCN) if it wished to serve the Presidio.

On October 1, 1994, the United States Department of Defense transferred the Presidio to the Department of the Interior, and the Presidio became a park. The Presidio is now administered by the National Park Service (NPS) as part of the Golden Gate National Recreation Area. When the NPS took over the Presidio, it asked utilities to bid on running Presidio's electricity distribution system. As part of the bidding requirements, the NPS stated it would only award a contract to a utility that could demonstrate either (i) that it had obtained a CPCN from the Commission or (ii) that it was exempt from the CPCN requirement. (Decision, p. 2 (mimeo).)

WEI, Pacific Gas and Electric Company (PG&E), the City and County of San Francisco (The City) and one other company filed bids with the NPS. PG&E holds a CPCN. The City is demonstrably exempt from the CPCN requirement because it is a municipal utility. (Cal. Const., art XII, § 3.) WEI claimed it did not need a CPCN to enter into a contract with the NPS because a CPCN was not required for any utility serving the Presidio.

In order to demonstrate that it did not need a CPCN, WEI filed Application (A.) 94-08-016 seeking an order "declaring that WEI is not subject to the jurisdiction of the Commission." (Application of Women's Energy, Inc. (August 8, 1994), p. 1.) WEI also filed a "pro forma" request for a CPCN, A.94-08-042.

In the Decision, the Commission treated WEI's first application as a jurisdictional motion to dismiss the second application for a CPCN, according to its usual procedure.¹ The Decision concluded that the federal enclave doctrine did not prevent the Commission from requiring WEI to obtain a CPCN if it wished to provide service in the Presidio. Therefore, the Decision directed WEI to complete its application for a CPCN if it intended "to continue to seek to provide electrical service to the Presidio." (Decision, p. 19 (mimeo).) WEI filed an application for rehearing of the Decision, which PG&E opposed.

One month after WEI filed its application, the NPS concluded that PG&E was the successful bidder. All the other bidders challenged this determination before the United States General Accounting Office (GAO). The GAO denied or dismissed these protests. Subsequently, the NPS awarded the contract to PG&E. Once the contract was

¹ To obtain an order confirming that no CPCN is required a utility concurrently files an application and a motion to dismiss for lack of jurisdiction. The Commission may then confirm the lack of jurisdiction in a formal order or assert jurisdiction over the utility and require further proceedings. (See, e.g., Marin Telemanagement v. Pacific Bell (1995) [D.95-01-044] 58 Cal.P.U.C.2d 554, 556, Re Western Travel Plaza, Inc. (1982) [D.82-09-087] 9 Cal.P.U.C.2d 681.)

awarded to PG&E, WEI did not continue to challenge the bidding process. It also did not augment its application for a CPCN, and in D.96-06-042 that application was dismissed without prejudice as to later refiling.

The City continued to challenge the award of the contract to PG&E. It sued the United States in federal district court and filed a related case in state court. (See, City and County of S.F. v. United States (N.D.Cal. 1996) 930 F.Supp 1348.) The City's federal case is now before the United States Court of Appeals for the Ninth Circuit. (See City and County of S.F. v. United States, U.S. Court of Appeals for the Ninth Circuit No. 96-17251.) Briefs have been filed, but oral argument has not yet been scheduled.²

The issue presented by WEI's application for rehearing is whether WEI must obtain a CPCN in order to provide electric service in the Presidio.³ However, it is now unlikely that WEI will have an opportunity to enter into a contract with the NPS to provide electricity in the Presidio. The NPS has awarded the Presidio contract to PG&E. WEI unsuccessfully protested that award and did not pursue its challenge through litigation. In D.96-06-042 we dismissed the underlying application for a CPCN.

Since WEI no longer appears to require an order from this Commission determining the necessity of a CPCN, we will dismiss its application for rehearing. The application raises technical issues of statutory interpretation and federal constitutional law and we have some concerns about the Decision. However, we have a longstanding policy against issuing advisory opinions. In order to conserve scarce decisionmaking resources, the Commission generally, "does not issue advisory opinions in the absence of a case or controversy." (Re California-American Water Company (1995) [D.95-01-014] 58

² The description of the bidding process in the preceding paragraph is taken from the city's brief.

³ WEI has brought only that issue before us, and we are not deciding the general jurisdictional issue of whether WEI must obtain a CPCN for any other activities it might undertake.

Cal.P.U.C.2d 470, 476, 479 (Conclusion of Law No. 6); see also, Re Transmission Constraints on Cogeneration and Small Power Production Development (1993) D.93-10-026, pp. 4-5 (mimeo), abstracted at 51 Cal.P.U.C.2d 527, Re San Diego Gas and Electric Company (1994) [D.94-12-038] 58 Cal.P.U.C.2d 104, 105, Re San Diego Gas and Electric Company (1991) [D.91-11-045] abstracted at 42 Cal.P.U.C.2d 9.) The Commission adheres to this "rule" unless it is presented with "extraordinary circumstances." (Re Southern California Gas Company (1993) [D.93-08-030], 50 Cal.P.U.C.2d 518, 521.) If we granted the application, reconsidered this matter, and issued a subsequent opinion, effectively that opinion would be advisory.⁴ We do not believe it is an effective use of our decisionmaking resources to further pursue, at this point, the arguments WEI raises in its application. Therefore, we will dismiss the application for rehearing, as discussed below.

While the pendency of The City's litigation prevents us from finding that this matter is completely settled, that litigation will not be resolved soon. It is also unlikely that The City's suit would provide WEI with an opportunity to become the electricity utility for the Presidio. The City claims that it should be awarded the contract if PG&E is disqualified. The Commission would need to decide the jurisdictional issue only if The City prevailed and a new solicitation was ordered and WEI re-bid. In D.96-06-042 we provided that WEI could refile its application for a CPCN, if necessary. Similarly, we will here provide that WEI may reopen this proceeding if, as a result of a subsequent solicitation or resolicitation of bids, WEI again needs a determination of the question of our jurisdiction over it with respect to the provision of electric utility service in the Presidio.

⁴ Without addressing the issue of jurisdiction, D.95-12-055 held that the equipment at the Presidio was to be excluded from rate base but that all proceeds from the Presidio would flow directly to shareholders. (D.95-12-055, pp. 59-60 (mimeo).)

THEREFORE, IT IS ORDERED that:

1. The application for rehearing is dismissed.
2. Applicant may file a petition for modification of this order should it need a jurisdictional determination in the future.

This order is effective today

Dated September 3, 1997, at San Francisco, California.

P. GREGORY CONLON

President

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

RICHARD A. BILAS

Commissioners