

Decision 98-02-013 February 4, 1998

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Sierra Pacific Power Company for a Certificate of Public Convenience and Necessity to Construct and Operate the Alturas Transmission Line Project.

Application 93-11-018
(Filed November 9, 1993)

O P I N I O N

ORIGINAL

Summary

We will adjust the construction cost cap (from \$103,405,937 to \$119,730,000) for a 345 kilovolt (kV) transmission line project from a point near Alturas, California to a point near the California-Nevada border near Reno, Nevada (Project) of Sierra Pacific Power Company (Sierra) as approved by the Commission in decisions (D.) 96-01-012 and D.96-04-068, to reflect the showing by Sierra of the cost of Project telecommunication system and the adequacy of the cost control system that Sierra proposes. We will deny, without prejudice, Sierra's request for a further increase in the construction cost cap to reflect events arising after the issuance of the certificate of public convenience and necessity in D.96-01-012.

Procedural Background

In D.96-01-012, we granted a certificate of public necessity and convenience to Sierra to construct the Project. We granted permission to Sierra to make a further showing regarding its construction cost cap to address deficiencies in its justification for certain telecommunications features and the effectiveness of project management controls not only to prevent budgetary overruns but to complete the project under its budget. In D.96-04-068, we modified our order to permit Sierra to construct the Project along an alternative alignment because the U.S. Bureau of Land Management (BLM) refused to grant a permit for the alignment that we approved originally. The subsequent procedural history of this matter may appear more complex than it actually is, but is summarized below for completeness.

On July 8, 1996, Sierra filed a motion to adjust the construction cost cap. On August 8, 1996, the assigned administrative law judge (ALJ), issued an order noting that the Commission had been informed by the United States Forest Service (Forest Service) that it intended to delay issuance of rights-of-way in California and Nevada required for the Project until 1997. The ALJ ordered Sierra to supplement its construction cost cap filing on or before July 1, 1997, and established a special service list for considering construction cost cap issues. On July 1, 1997, Sierra filed a notice regarding the construction cost cap, stating that the Forest Service rights-of-way had not yet been acted upon. On July 10, 1997, Sierra filed a petition for modification of D.96-01-012 and D.96-01-013 to request an alignment for the Project that would avoid the necessity for rights-of-way in California from the Forest Service. On August 8, 1997, Sierra filed a supplement to its motion to adjust the construction cost cap to make its request for one cap if the Project alignment were changed, and another if it were not.

The Friends of Peavine (Peavine), Lassen Municipal Utility District (Lassen) and Green Gulch Ranch (Green Gulch) filed responses to Sierra's petition to modify. Peavine criticized Sierra's analysis of the environmental effects of changing the alignment of the project. Lassen supported Sierra's petition to modify. Green Gulch asked the Commission to reconsider other alternative alignments for the Project. Correspondence was also received from other persons regarding Sierra's proposal to realign the Project, but they did not seek to become formal parties. Sierra was granted leave by the assigned ALJ to reply to the responses, and did so on August 26, 1997.

On October 7, 1997, the Forest Service issued a decision to grant the required right-of-way in California for the Project as approved by the Commission in D.96-01-012 and D.96-04-68. On November 24, 1997, Sierra moved to withdraw its petition for modification, on the grounds that it had received the required rights-of-way in California from the Forest Service, and the proposed changes in the alignment of the Project were no longer necessary. On November 24, 1997, Sierra also amended its supplement to motion to adjust construction cost cap, to revise its construction cost cap request to be consistent with its motion to withdraw the petition for modification.

On December 2, 1997, Green Gulch filed a response in opposition to the motion to withdraw Sierra's petition for modification, and reiterated its request that the Commission reconsider alternative alignments to the Project as they affect Green Gulch's interests. On December 15, 1997, with the permission of the assigned ALJ, Sierra filed its reply to Green Gulch's response, and characterized that response as an untimely request for rehearing of issues that had already been addressed by the Commission.

On January 15, 1998, Sierra filed a revised exhibit to its amendment to supplement for the limited purpose of providing additional documentation concerning mitigation measures, requested by the California Department of Fish and Game. The assigned ALJ ordered that responses, if any, be filed and served by January 26, 1998. None were received.

Threshold Procedural Issues

Withdrawal of Petition for Modification

Applicants do not have the unilateral right to withdraw an application under all circumstances. (See *In re Southern California Gas Company* (1992) 43 CPUC2d 639, 640.) The same general rule should apply to petitions for modification, particularly when proceedings have progressed to the point at which the matter is ready for a Commission decision, substantial effort has been devoted by the parties or the Commission, and when important policy issues are to be decided. At some point, the applicant ceases to be the sole arbiter of the case, and leave of the Commission should be required.

On the other hand, when proceedings have been limited to an exchange of pleadings and the reason an applicant seeks to withdraw a petition for modification are a change in external conditions beyond its control, as is the case here, no good reason appears to refuse leave to withdraw the petition.

Green Gulch's Petition for Modification

Rule 47 of the Rules of Practice and Procedure set forth the requirements for requests that the Commission make changes to the text of an issued decision. The

request must concisely state the justification for the requested relief and must propose specific wording to carry out all requested modifications to the decision. (Rule 47(b).) Any factual allegations must be supported with specific citations to the record. (*Id.*) Allegations of new or changed facts must be supported by an appropriate declaration of affidavit. (*Id.*) It must be filed and served within one year of the effective date of the decision proposed to be modified or the petition must explain why it could not have been filed within that time. (Rule 47(c).)

Green Gulch's petition fails to conform to all of these requirements except for the concise statement of justification. Green Gulch states succinctly that if Sierra can afford to realign the Project in Nevada to obtain the required rights-of-way from the Forest Service there, it can also afford to realign the Project in California to avoid Green Gulch's property.¹ However, Green Gulch proposes no specific wording. Except with respect to the portion of the Project involved in Sierra's withdrawn petition to modify, Green Gulch cites no part of the record to support its factual allegations, and supports none of its allegations of new or changed facts with a declaration or affidavit. Green Gulch filed its request more than a year-and-a-half following the decisions it seeks to have modified without explaining why it could not have made its request within a year. Green Gulch, which is the owner of substantial property, was represented by a principal who is an attorney and by California counsel.

We can only take Green Gulch's failure to address the requirements of Rule 47 as an admission by Green Gulch that the only basis for its request is that it does not like the outcome of our earlier decisions. The Public Utilities (PU) Code provides an adequate remedy for parties that are aggrieved by our decisions. (PU Code § 1731(b).) That remedy contains an important limitation, which is an abbreviated statute of limitation to ensure that the status of Commission decisions is expeditiously

¹ Green Gulch ignores an important distinction. Through the proper exercise of the power of eminent domain, Sierra can obtain private property, such as that belonging to Green Gulch, upon payment of its fair market value. That option is not available to obtain the property of the sovereign at any price.

determined. The petition to modify fulfills a different office than providing potential redress to parties who are dissatisfied with the basic outcome of a matter, and it must not be used in substitution for an application for rehearing. For that reason, we summarily dismiss petitions to modify, such as Green Gulch's, that do not adequately justify their late submission.

Request for Construction Cost Cap Adjustment

No party commented directly on Sierra's request for an adjustment to its construction cost cap, as permitted by Ordering Paragraph 2 of D.96-01-012.

Sierra's original estimate of the cost of construction included \$5,132,858 for a fiber optic communications system. A principal component of that system is a bundle of 12 fiber optic cables contained in the Project's guard wire.² Sierra selected this technology as less expensive than an eight-fiber system, which it deemed as the minimum to meet its requirements to have four communications channels, each with a spare.

In addition, Sierra's shareholders will bear the additional incremental expense (\$352,000) of installing a 16-fiber optic cable system for the purpose of offering the extra capacity to third parties. Sierra represents that it will also offer the capacity of the four fibers that are excess to the Project's needs and credit any revenue to the Project's revenue requirements.

In light of the practically unlimited bandwidth afforded by fiber optic cable (at least compared to the scale of voice and data communications likely to be required for Project purposes), we are uncertain why Sierra is reserving eight strands to Project use. However, it is still clear that whether the Project uses one strand or eight, the selected technology represents the cost-effective selection.

We will require Sierra to allocate revenues received from third parties for capacity on the following basis: Sierra shall earmark eight fibers for Project use, and any

² The guard wire is the overhead wire installed above the conductors to protect against lightning strikes.

revenues derived from rented capacity on such fibers shall be allocated as a credit to the Project's revenue requirements. For the remaining fibers, half of the revenues derived from rented capacity shall be allocated as a credit to the Project's revenue requirements without regard to whether communications are carried on a "Project" fiber or a "shareholder" fiber.

We will permit the construction cost cap to be increased by \$5,132,858 plus \$227,212, representing a proportionate share of indirect or add-on costs, for a total of \$5,360,070.

Another concern that we expressed in D.96-01-012 was that Sierra's cost management system seemed designed solely to prevent the total cost of the Project from exceeding the budgeted amount. Inadequate attention appeared to be given to managing costs with the express objective of bringing the Project in *under* its budget. We withheld approval of \$10,963,993, pending Sierra's showing that it has controls in place that are intended not only to control against total maximum expenditures, but also to achieve minimum expenditures consistent with completing the Project as designed.

Sierra provided the declaration of the manager of its Project who described various cost control and incentive measures which we failed to find in the original record. Based on this showing, we are satisfied that Sierra's management approach is not one geared to assuring that the entire budget is necessarily expended. We will increase the construction cost cap by \$10,963,993, to \$119,730,000.

During the two-year period following issuance of D.96-01-012, Sierra had planned to complete the construction of the Project, which it has not yet started, and which Sierra estimates will take approximately 10½ months to complete. This results in a substantially greater allowance for funds used during construction, \$10,816,226, from \$5,907,316 to \$16,723,542. In addition, Sierra has agreed to specific environmental mitigation measures that it believes go beyond the minimums that we required in D.96-01-012 and D.96-01-013, and now estimates that the costs of environmental compliance will increase by \$645,000. In total, moreover, Sierra requests that we increase the construction cost cap by \$26,552,059, from \$119,730,000 to \$146,282,059. That increase is

\$15,090,833 more than can be accounted for by the sum of the greater allowance for funds used during construction and increased costs of environmental compliance.

While we are prepared to adjust the construction cost cap to take into account this later information regarding the two issues we identified in D.96-01-012, we are not prepared to adjust it for after-arising events, except in the context of PU Code Section 1005.5(b). As Green Gulch points out, we may authorize an increase in the specified maximum cost only if we find and determine that the cost has in fact increased³ and that the present or future public convenience and necessary require construction of the Project at the increased cost. But that inquiry comes close to beginning all over again. For purposes of the California Environmental Quality Act (CEQA), the Project would be subject to an independent analysis from D.96-01-013, and we should examine all relevant factors, including revised estimates of cost based on increases, to determine whether again to find that the Project should be approved.

As that process would be inconsistent with Sierra's stated plan to commence construction immediately, we will deny this portion of Sierra's request, without prejudice to its right to bring an application under PU Code Section 1005.5.

Findings of Fact

1. D.96-01-012 granted a certificate of public convenience and necessity to Sierra to construct the Project.
2. D.96-04-068 permitted Sierra to change the alignment of the Project.
3. D.96-01-012 permitted Sierra to move for an increase to its construction cost cap to show why the telecommunications system should be included in the construction cost cap and why the construction cost cap should include an allowance for project management.
4. Sierra filed a petition to modify D.96-01-012 to permit another change in the alignment of the Project.

³ This is distinct from the adjustments that we are making in this order to the original estimate, based upon the further showing of Sierra as permitted by D.96-01-012.

5. Sierra subsequently obtained a right-of-way that made another change in the alignment of the Project unnecessary.

6. Sierra presented declarations to show why the telecommunications system should be included in the construction cost cap and why the construction cost cap should include an allowance for project management.

7. No party disputes Sierra's showing that the telecommunications system should be included in the construction cost cap and that the construction cost cap should include an allowance for project management.

8. Sierra also requests an increase in the construction cost cap to account for costs that have increased since the certificate of public convenience and necessity was granted in D.96-11-012.

9. Sierra plans to install a fiber optic communications system with 16 fibers, of which eight will be reserved for Project use, four will be paid for by shareholder funds, and eight will be available for hire.

Conclusions of Law

1. Sierra's motion to withdraw its petition to modify should be granted.

2. Green Gulch's petition to modify should be summarily dismissed.

3. The telecommunications system should be included in the construction cost cap and that the construction cost cap should include an allowance for project management.

4. Revenues from third-party payments for use of the telecommunications system should be allocated as a credit against revenue requirements for the Project for any portion derived from the eight fibers dedicated to Project use, and all other revenues should be allocated 50% as a credit against revenue requirements for the Project and 50% to shareholders, if Sierra installs a 16-fiber system; otherwise all revenues shall be allocated as a credit against revenue requirements.

5. The construction cost cap should be increased from \$103,405,937 to \$119,730,000.

6. Sierra's request to increase the construction cost cap to account for costs that have increased since the certificate of public convenience and necessity was granted in D.96-11-012 should be denied without prejudice.

O R D E R

THEREFORE, IT IS ORDERED that:

1. The construction cost cap for the 345 kilovolt transmission line project from a point near Alturas, California to a point near the California-Nevada border near Reno, Nevada of Sierra Pacific Power Company (Sierra) as approved by the Commission in decisions (D.) 96-01-012 and D.96-04-068, is increased from \$103,405,937 to \$119,730,000 to reflect the showing by Sierra of the cost of Project telecommunication system and the adequacy of the cost control system that Sierra proposes.

2. Sierra shall allocate revenues from third-party use of the proposed telecommunications system in accordance with the discussion herein.

3. Sierra's request for a further increase in the construction cost cap to reflect events arising after the issuance of the certificate of public convenience and necessity in D.96-01-012 is denied without prejudice.

4. Sierra's motion to withdraw its petition for modification is granted.

5. The petition for modification of Green Gulch Ranch is summarily dismissed.

6. Application 93-11-018 is closed.

This order is effective today.

Dated February 4, 1998, at San Francisco, California.

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