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MAIL DATE
11/10/98

Decision 98-11-008

November 5, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND
ELECTRIC COMPANY, a California
corporation, for a Permit to Construct the
Vasona Substation Pursuant to General Order
131-D.

(U 39 E)

Application 97-04-043
(Filed April 18, 1997)

ORIGINAL

ORDER DENYING REHEARING
OF DECISION 98-10-010

I. SUMMARY

In Decision (D.)98-10-010 (the Decision), Pacific Gas & Electric Company (PG&E) was granted a Permit to Construct an electric substation, the Vasona Substation, to be located in the town of Los Gatos. Vasona Properties/Boccardo Corporation (Applicant) claims in its application for rehearing that we, in D.98-10-010, violated our own Rules of Practice and Procedure (i.e., Rules 51 et seq.) and Applicant's due process rights in partially approving a joint stipulation entered into between PG&E and Applicant. That partial approval resulted in the rejection of the provision in the stipulation which would require PG&E to address separately in a second phase of this litigation, the legality and propriety of requiring PG&E to underground a portion of the existing Metcalf-Monta Vista 230 kV transmission line during the construction of its Vasona electric substation. Applicant argues that we were required by our Rules to either approve all of the Joint Stipulation, or reject it in its entirety.

Applicant has not demonstrated that we abused our discretion or violated our own rules. Contrary to Applicant's claims, the Rules do not require

complete rejection or approval of a joint stipulation. This is particularly true in the present case since the issue involving the undergrounding of the transmission line was outside the scope of the proceeding. The undergrounding issue was not relevant to the approval of PG&E's application for a permit to construct the substation. We found in our Decision that the undergrounding of the transmission line should be undertaken as part of PG&E's ongoing undergrounding program.

Applicant has also not shown that it was deprived of an adequate remedy. We attempted to accommodate Applicant's transmission line undergrounding concerns by keeping the proceeding open for 60 days from the effective date of the Decision to allow the parties to notify the assigned administrative law judge within those 60 days if they believe evidentiary hearings for the undergrounding issue are needed. The substation is necessary and further delay in construction would be contrary to the public interest.

Applicant has also failed to show that it is threatened with immediate and irreparable injury because of our Decision. Applicant's contention that it will experience irreparable harm when construction begins is speculative. Allegations of what is likely to occur, without factual support, are of no value in support of a claim of irreparable harm.

Accordingly, we will deny rehearing because no legal error has been shown. Applicant also requests in its application that the Decision be stayed and that Applicant be granted the opportunity for oral argument in this matter. However, since no legal error has been shown, and Applicant has not presented additional and sufficient grounds to justify granting a stay and oral argument, those requests are denied.

II. BACKGROUND

On April 18, 1997, pursuant to our Rules of Practice and Procedure (Rules) and Section IX.B of our General Order (GO) 131-D, PG&E filed its

application for a permit to construct an electric substation, to be known as the Vasona Substation, in the vicinity of Winchester Boulevard and Lark Avenue in the Town of Los Gatos. Applicant owns the property immediately adjacent to the proposed substation. Applicant was the only party other than PG&E that participated in this proceeding.

In compliance with our Rule 17.1, PG&E included in its permit application an environmental assessment which is referred to as Proponent's Environmental Assessment (PEA). The PEA was used to focus on any environmental impacts of the project which might be of concern and to prepare an initial study to determine whether the project would need a Negative Declaration or an Environmental Impact Report (EIR).

On September 8, 1997, our staff issued a Draft Mitigated Negative Declaration for public review, in compliance with the California Environmental Quality Act (CEQA). Extensive comment letters were received in response to the publication of that set of documents. Based upon staff's environmental review and the comments received, staff concluded that PG&E's proposed substation will not have significant effects on the environment. Staff's conclusion was based on the assumption that PG&E will carry out the specific mitigation measures outlined in the Mitigated Negative Declaration.

On December 9, 1997, PG&E issued its Vasona Substation Feasibility Study that examined 16 alternative sites other than its proposed Winchester/Lark site. The consensus of the parties, including Applicant, was that there was no alternative site available that was superior to the Winchester/Lark site.

We held public participation hearings in Los Gatos to receive comments from the residents on the proposed substation. A facilitator was appointed to assist the residents with their concerns regarding the project. After eight public meetings held over the 60-day time limit set for the facilitation process, the facilitator issued his report on July 20, 1998.

Applicant and PG&E agreed, during the prehearing conference of August 13, 1998, that, since further litigation could jeopardize the availability of adequate electric power to the town to meet its 1999 summer load, we should grant PG&E a permit to immediately commence construction at the Winchester/Lark site, subject to certain additional mitigation measures which PG&E agreed to undertake. Those parties also agreed during that conference that the legality and propriety of requiring PG&E to underground the existing Metcalf-Monta Vista 230 kV transmission line in the area surrounding the proposed Vasona Substation should be reserved for a separate phase of the proceeding. The parties filed a Joint Stipulation memorializing the agreement reached at the August 13 prehearing conference on August 28, 1998, at which time this phase of the proceeding was submitted for decision.

On September 18, 1998, the proposed decision of the presiding administrative law judge was circulated for comment.

On October 8, 1998, we issued D.98-10-010 in which we adopted staff's Mitigated Negative Declaration, having found no substantial evidence in light of the record as a whole that the proposed substation, as revised by the mitigation measures contained in the Mitigated Negative Declaration, may have a significant impact on the environment. We granted PG&E its permit to construct the Vasona Substation subject to PG&E undertaking certain mitigation measures as set forth in the decision, and subject to PG&E working with the town of Los Gatos to resolve any issues related to landscaping and visual effects of the substation.

In our Decision, we adopted the administrative law judge's proposed decision, including its exclusion of one portion of the joint stipulation between Petitioner and PG&E. We concluded that the issue of undergrounding the existing Metcalf-Monta Vista 230 kV transmission line in the vicinity of the proposed substation, as requested in the joint stipulation, is outside the scope of the

application for a permit to construct the substation project, and should be undertaken as part of PG&E's ongoing undergrounding program.

In its application for rehearing, filed on October 13, 1998, Applicant challenged our exclusion of the undergrounding issue from our final Order. It also requested in its application that the Decision be stayed and that Applicant be granted the opportunity for oral argument in this matter. Applicant argues that it should be granted oral argument due to our alleged departure from existing precedent, both in terms of violating our own rules, as well as in terms of rejecting undergrounding." (Application, at p.3)

On October 28, 1998, PG&E filed its "Response to Application For Rehearing of D.98-10-010 of Vasona Properties/Boccardo Corporation and Motion For Stay And Request For Oral Argument."

III. DISCUSSION

A. APPLICANT HAS FAILED TO SHOW ABUSE OF DISCRETION SINCE THE COMMISSION DID NOT VIOLATE ITS RULES IN ARRIVING AT ITS DECISION

Applicant broadly alleges that we violated our own rules in partially approving the Joint Stipulation. However, Applicant fails to support this contention or point to any specific violation of our Rules. An examination of the relevant Rules reveals that no violation occurred.

Parties to a Commission proceeding may stipulate to the resolution of any issue of law or fact material to the proceeding pursuant to Rule 51.1(a) of our Rules of Practice and Procedure (Article 13.5, Rule 51 et seq.). Resolution of issues is limited to the issues in that proceeding and are not to extend to issues which may come before us in other or future proceedings (Rule 51.1(a)). We will not approve a stipulation unless it is reasonable in the light of the whole record, consistent with the law, and in the public interest (Rules 51.1(e) and 51.7).

In the present case, we held that the Joint Stipulation was reasonable in light of the record and in the public interest, except for one part. We found that it was necessary to reject the portion of the parties' Joint Stipulation relating to the undergrounding of the Metcalf-Monta Vista transmission line because it was outside the scope of the permit proceeding and because it is not in the public interest because of the significant costs associated with undergrounding.

We note in our Decision that it is well settled that mitigation measures prescribed as part of a Mitigated Negative Declaration must address only environmental impacts caused by the project in question. PG&E did not propose any modifications to the transmission line as part of this project. Therefore, the Decision appropriately concludes that undergrounding of the transmission line is outside the scope of any CEQA mitigation measures prescribed by the Mitigated Negative Declaration for the Vasona Substation project. Accordingly, since any public benefit of such undergrounding is unrelated to the impact of the project itself, we decided not to require PG&E, and the general body of ratepayers, to provide at their expense such a public benefit, however worthwhile. Consequently, we placed the parties to the Joint Stipulation on notice that such undergrounding may not be undertaken at ratepayer expense, except possibly as part of PG&E's ongoing undergrounding program, which is implemented pursuant to PG&E's Tariff Rule 20 - Replacement of Overhead With Underground Electric Facilities.

Applicant disagrees with our holding regarding the undergrounding provision. It maintains that this rejected provision was the essential consideration for the stipulation and that without the inclusion of that provision, Applicant does not agree "that evidentiary hearing is not necessary on the issue of location." It argues that it would not have stipulated to the admission of any exhibits, including the draft and final negative declarations, or to the waiver of hearings and further cross-examination had it known that this provision would be excluded. Applicant

contends that it is being denied due process because of our unwillingness to permit it to introduce further evidence and testimony regarding the undergrounding issue.

Applicant is incorrect when it claims that we were limited by our Rules to either approve or reject the Joint Stipulation in its entirety. Contrary to Applicant's claim, we acted completely in accordance with our Rules. We adopted the Joint Stipulation to the extent that we were able to do so, i.e., to the extent that the issues at hand were relevant to the purpose of the proceeding and in the public interest. There was no need to hold hearings on the line undergrounding issue prior to granting PG&E its permit to construct because the undergrounding issue is outside the scope of the proceeding.

Applicant also mistakenly asserts that our Rule 51.7 requires us to undertake certain steps in order to reject the terms of the stipulation. Rule 51.7 in fact states that we may take certain steps, such as holding further hearings on a rejected stipulation, but it does not require us to do so.

Even assuming arguendo that we did not follow our Rules, no harm was done since the undergrounding issue was not essential to the approval of PG&E's application for a permit to construct the substation. That approval was based on independent grounds which included an extensive environmental review and public participation process. Moreover, our Rules also provide that all requirements, including the Rules, should be liberally construed, and that deviations are permissible for just cause (Commission Rule 87).¹

Applicant claims that our Decision is arbitrary in that we previously ordered PG&E to underground transmission lines in conjunction with substation siting. It asserts that our failure to address these precedents constitutes a failure of reasoned decision making. Applicant does not provide cites to these precedents in

¹ Rule 87 (Construction and Amendment) specifically states: "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviation from the rules. Rules may be amended at any time by the Commission."

its application before the Commission. However, it did include such cites in its Writ of Mandamus filed before the California Supreme Court on October 15, 1998.² It also asserted there that the U.S. Supreme Court's decision in Nollan v. California Coastal Commission (1987) 483 U.S. 825, somehow justifies a condition requiring PG&E to underground the existing power line that bisects the substation site. In fact, however, Nollan prohibits a requirement to underground the power line in this case.

Under Nollan, a permit condition will pass judicial scrutiny only if there is a direct causal relationship or "nexus" between the condition and a public need or burden created by the proposed project. (Nollan, 483 U.S. at 837.) The proposed condition must be "related both in nature and extent to the impact of the proposed development." (Dolan v. City of Tigard (1994) 512 U.S. 374, 391.) The Nollan court provided an example: If a project creates a negative impact on the public's view of the ocean, a reasonable condition to directly address this concern might be providing a public viewing place. (Nollan, 483 U.S. at 836.) If there is no such nexus, however, the permit condition is simply an attempt by the government agency to obtain a public benefit without paying for it, an unconstitutional "taking" of private property.

Here, PG&E applied for a permit for an electrical substation on a site identified and approved for that purpose by the Town of Los Gatos in 1975. Because the existing transmission line bisects the site, no new transmission lines are proposed. The site, which is adjacent to the business corridor in Los Gatos creating the need for the substation, is currently surrounded on three sides by a wall and landscaping required by the Town during earlier approvals concerning the substation.

² The Commission precedents Applicant cites in its Writ Of Mandamus are: A.55019, D.87928; A.56302, D.89779; and A.86-10-006, D.88-01-062.