

Decision 99-02-091 February 18, 1999

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of CITY OF EL PASO DE
ROBLES for rehearing of resolution E-
3573 ordering Dismissal of Protests to
Advice Letter 1791-E.

A.98-12-009
(Filed December 14, 1998)

**ORDER GRANTING REHEARING AND VACATING
RESOLUTION E-3573**

The City of El Paso de Robles ("City") filed an application for rehearing of Resolution (Res.) E-3573 on December 14, 1998. Res. E-3573 dismisses protests to Pacific, Gas & Electric's (PG&E's) Advice Letter (AL) 1791-E, which asserted that its proposed reconstruction of portions of its Coalinga - San Luis Obispo 70 kilovolt (kV) line is exempt from the General Order (GO) 131-D requirement of applying for a Permit to Construct (PTC). We have considered all the allegations of error in the application and we agree that good cause to grant rehearing exists. We will therefore grant rehearing for the purpose of vacating the resolution and rejecting AL 1791-E.

As a preliminary matter, PG&E argues that the City lacks standing to apply for rehearing because its protest to the advice letter was filed late. We disagree. There is no dispute that the City's protest to AL 1791-E was filed after the due date. However, we note that the 20 day limitation for filing protest is not contained in a statute, but instead is contained in our own General Orders. The Commission has the discretion to grant exceptions from its advice letter procedures for good cause. (GO 96-A § XV; see also Rule 87.) In this case there

does not appear to be any deliberate delay, but rather it took time to present the issue to the City and for the City to take official action. Furthermore, most of the City's concerns had been raised by other protestants, and therefore there was no real prejudice to PG&E from the late filing. Finally, the City identifies a legitimate legal error in its application for rehearing. Therefore, it is in the public interest to allow the City's late-filed protest, granting it standing to file for rehearing.

The City alleges that the reconstruction project does not fit within the exemption to GO 131-D claimed by PG&E. PG&E maintains that the project fits within the GO 131-D exemption for "power line facilities or substations to be located in an existing franchise, road widening setback easement, or public utility easement." (GO 131-D, § II.B.1.g.) Specifically, PG&E asserts that the entire project is within a public utility easement.

The City's argument, which had been raised by certain protestants, is based on the fact that for certain portions of the project there is no recorded easement. PG&E contends that a prescriptive easement exists for those segments. The City and some protestants have questioned whether a prescriptive easement does in fact exist.

Res. E-3573 declines to resolve the question of whether PG&E has a prescriptive easement on the properties in question. (Res. E-3573, at p. 5.) We reaffirm the resolution's conclusion in this regard. Although the Commission has jurisdiction to construe property rights for the purpose of applying our General Orders, it is neither feasible nor desirable to do so in this case.

PG&E correctly notes that in the case of a long-existing power line the existence of a prescriptive easement may be presumed. (Pacific Gas & Electric Co. v. Crockett Land & Cattle Co. (1924) 70 Cal.App. 283, 291.) However, this presumption is not conclusive, and may be rebutted if certain defenses are shown.

(Guerra v. Packard (1965) 236 Cal.App.2d 272, 288.) The existence of such an easement is essentially a factual question. (Ibid.)

The staff process to review 131-D exemptions is a ministerial process. There is no provision for adjudication, or any other process to resolve complex factual disputes. In addition, the Commission has little interest in entering into the area of property rights, which are ancillary to our areas of primary jurisdiction. Moreover, we note that the PTC application process was intended to be a streamlined process which would not be excessively burdensome for the utilities. We are unwilling to undertake an adjudication solely to determine whether a utility can be exempt from this streamlined application. If there is a legitimate factual dispute regarding the application of a GO 131-D exemption, that exemption should not be applied.

Although Res. E-3573 correctly declines to resolve the contested issue of whether the prescriptive easements exist, we acknowledge that the resolution errs in then applying the easement exemption anyway. Since the entire basis for PG&E's reliance on that exemption is the existence of easements for the entire project, the exemption cannot be applied when the existence of those easements is in dispute.

Therefore, we will vacate Res. E-3573, and reject PG&E's AL 1791-E asserting that the reconstruction project is exempt from GO 131-D based on GO 131-D § III.B.1.g. In order to construct its reconstruction project, PG&E must either file for a PTC, or refile an advice letter showing a court order, or other definitive resolution of the prescriptive easement issue.

Because we are vacating the resolution on other grounds it is not necessary to address the City's arguments regarding compliance with the California Environmental Quality Act (CEQA). However, to avoid future misunderstanding we will take this opportunity to clarify that projects that are

exempt from GO 131-D are not CEQA projects, and therefore there are no issues concerning CEQA compliance for those projects. As PG&E notes, CEQA only applies to projects which require discretionary agency approval. (Pub. Resources Code § 21080 (a).) Projects which are exempt from GO 131-D require no approval from the Commission, and therefore CEQA requirements are not triggered.

Therefore, **IT IS ORDERED** that:

1. Rehearing of Res. E-3573 is granted for the purpose of vacating the resolution.
2. Res. E-3573 is vacated.
3. PG&E's AL 1791-E is rejected.
4. The City of El Paso de Robles' request for oral argument is denied.
5. This proceeding is closed.

This order is effective today.

Dated February 18, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners