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Decision 00-02-024 Febebruary 3, 2000

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Gas Company for authority pursuant to Public Utilities Code Section 851 to sell its storage field in Montebello, California.	A.98-01-015 (Filed January16, 1998)

ORDER MODIFYING AND CLARIFYING DECISION 99-09-068 AND DENYING REHEARING

I. INTRODUCTION

On January 16, 1998, the Southern California Gas Company (SoCalGas) filed an application seeking Commission authority under Public Utilities Code section 851 to sell, through a competitive bidding process, its underground gas storage field in Montebello, California. SoCalGas requested ex parte approval of the application without hearings, and a determination that the proposed sale was not subject to the California Environmental Quality Act (CEQA, Public Resources Code §§21000-21178.1), or alternately, Commission issuance of a negative declaration pursuant to CEQA. Alternately to either of the above, SoCalGas sought a determination that no Commission approval was required for the sale. It is noted that while SoCalGas was proposing that Montebello be sold as a gas storage facility, the proposal contained no limitation on the potential use a buyer could make of the property once it was purchased.

Hearings were held on December 7 and 8, 1998. The Commission's Office of Ratepayer Advocates (ORA), the Southern California Edison Company (Edison), and the Southern California Generation Coalition were formal parties in the case.

ORA and Edison presented evidence; all three parties cross examined witnesses. The Utility Reform Network (TURN) was an appearance in the case but not a formal party. These hearings explored issues dealing with the mechanics of the proposed bidding process, the need for the facility, and ratemaking impacts of the proposed sale, and did not examine environmental issues except very tangentially.

After the hearings concluded, the matter was submitted and briefs were filed. The Commission's Energy Division staff began preliminary work on CEQA review.

Meanwhile, in response to an investigative report prepared by the Commission's Consumer Services Division (CSD) staff, the Commission opened Investigation (I.) 99-04-022 (OII) in April of 1999 to determine whether SoCalGas had engaged in a pattern of providing inaccurate information to the Commission and its staff regarding plans for Montebello and SoCalGas' operations and practices surrounding the acquisition of fee ownership interests of mineral rights in connection with this facility.[1] In addition to discussing at some length the factual background and allegations of CSD concerning the above issues, the OII also noted certain environmental concerns which had arisen:

> "It is also alleged [in CSD's investigative report] that there are many environmental cleanup problems with the Montebello facility, and that for a number of years SoCalGas had problems with pressurized storage gas migrating upwards and in some cases out of old ill-capped oil wells." I.99-04-022, p. 5.

[1] The OII states in part: "The questions raised in staff's report which require adjudication are whether SoCalGas provided inaccurate information, both by affirmative statements to the Commission or its staff made by employees or agents of the utility, or by material omissions in the course of the utility supplying information. If the Commission finds in the affirmative, the utility will be fined for violating Rule One of the Commission's Rules of Practice and Procedure. The Commission will also entertain recommendations on any other orders which it may need to enter to mitigate against recurrence. The alleged misconduct is fundamentally troubling and undermining to this agency's regulatory role over a utility which is expected to serve the public trust." I.99-04-022, pp. 2-3.

While the OII provided that the application proceeding would be held in abeyance until resolution of the OII, it also indicated that the two proceedings might be consolidated. However, although the scoping memo issued June 30, 1999 in the OII noted that there might be some overlap between the two proceedings, it did not consolidate them.

We issued Decision (D.) 99-09-068 (the Decision) on September 16, 1999. It dismisses SoCalGas' application without prejudice, due to the need to further consider the proposed sale, and to review information that might be brought forward in I.99-04-022. In terms of further consideration of the proposed sale, the Decision specifically states that "because of the uncertainties surrounding possible environmental contamination of Montebello, and because the application does not clearly define the potential future uses for the property, the Commission does not have a well-defined application for purposes of environmental review." D.99-09-068, p. 2. The Decision also orders that rates collected due to Montebello after the effective date of the Decision are subject to refund pending resolution of the issue of whether Montebello has not been used and useful for some future period following the date the Decision was issued.

On October 15, 1999, the CSD staff and SoCalGas jointly filed a Notice of Settlement Conference and attached proposed settlement agreement with the Commission in I.99-04-022. The final settlement agreement was filed November 12, 1999. To date, we have not acted on that settlement.

Three days after filing the Notice of Settlement Conference and proposed settlement, SoCalGas filed a timely application for rehearing of D.99-09-068, contending that neither the environmental review issue nor the issue involving the pending OII has any merit. SoCalGas also argues that the Commission has committed legal error in making rates related to Montebello subject to refund. TURN filed a response in opposition to the application for rehearing, addressing only the subject to refund issue.

We have reviewed each and every allegation of error raised in the application for rehearing, and are of the opinion that no legal error has been demonstrated. We will, therefore, deny the application for rehearing, for the reasons we state below. However, we will also modify D.99-09-068 to provide a more detailed discussion of the basis for denial without prejudice of SoCalGas' application to sell its Montebello facility.

II. DISCUSSION

A. Impact of I.99-04-022

SoCalGas first argues that the Decision's rationale that the application should be dismissed because the relief requested in the application may be affected by the outcome of the OII has become moot. According to SoCalGas, this is because "SoCalGas and the Consumer Services Division (CSD) have agreed to settle the OII, on terms that do not affect the relief requested in the Application." (App. Rhg., p. 2.) SoCalGas requests that we take official notice of the Notice of Settlement Conference and the attached proposed agreement which it and CSD staff filed three days before the application for rehearing in the application proceeding was filed.

SoCalGas' argument lacks merit. While this issue may become moot upon our acting on the proposed settlement agreement, that has not happened yet. At this point, there is no indication one way or another that the settlement agreement will be approved as is, or with some modifications that would not affect the relief SoCalGas seeks in its application. We note, for example, that both ORA and TURN have filed protests to the settlement agreement which we are bound to consider. It is simply too early to conclude that this rationale has become moot.

We address at this point what appears to be an overriding theme in SoCalGas' application for rehearing; namely, that our investigation and the application proceeding are completely separate from each other, and it is somehow inappropriate, if not downright unlawful, to consider them in any way interrelated.

We strongly disabuse SoCalGas of that view. Both the OII and D.99-09-068 cross reference each other, with good reason. While we do not make any decisions today in I.99-04-022, we also do not conclude that it is now unrelated to the application proceeding, or that it will or should have no impact on the application proceeding.

B. The CEQA Issue.

SoCalGas disputes the statement in the Decision that "because the application does not clearly define the potential future uses for the property, the Commission does not have a well-defined application for purposes of environmental review." D.99-09-068, p. 2. SoCalGas argues the obstacle to completing CEQA review is not the completeness of the application, which SoCalGas contends was accepted as complete by operation of law, but is inherent in the nature of the relief requested. SoCalGas is proposing a sale to the highest bidder pursuant to a sealed bid process. However, the proposal provides that the bids will not be accepted before the process is approved by the Commission; thus no one will know with certainty in advance the identity of the highest bidder or its intended use of the property. SoCalGas wants the Commission not to dismiss its application, but to 1) recognize that SoCalGas' Proponent's Environmental Assessment (PEA) is "complete," and 2) perform a CEQA review regarding known potential uses, with further CEQA review occurring, if necessary, once the winning bidder and its intended use are known.

SoCalGas points out that it filed not only its initial PEA in January of 1998, which assumed that the property would be sold as an ongoing gas storage operation and that if it was sold for another use, further CEQA review would be triggered, but also an amended PEA after Energy Division staff had requested that it provide more information in several areas. (App. Rhg., pp. 6-7.) Staff wanted more information on 1) environmental analysis of an abandonment and salvage of the facility; 2) environmental analysis of potential projects that would be allowed under the current permits, including mitigation measures to avoid or reduce any

identified environmental impacts to a level less than significant, and any permits that would be required by any affected agencies in order to carry out these projects; 3) analysis of secondary effects associated with the closure of the facility, including abandonment and salvage as well as any of the other projects identified in #2 above; and 4) identification of hazardous materials on-site and the appropriate treatment for handling and disposing of those materials, including any agencies that would have to be involved and any permits that would have to be obtained. (App. Rhg, pp. 6-7; June 2, 1998 letter to Joyce A. Padleschat from Moises Chavez, attached as Appendix 1 to SoCalGas' June 29, 1998 Amended PEA.) The amended PEA was filed on June 29, 1998.

SoCalGas argues the staff never asked the utility to address uses not allowed under current permits, nor did staff notify SoCalGas that its PEA was incomplete. Therefore, SoCalGas argues, under CEQA Guideline 15101, its application is deemed complete by operation of law. CEQA Guideline 15101 provides:

> A lead agency [the Commission in this case] or responsible agency shall determine whether an application for a permit or other entitlement for use is complete within 30 days from the receipt of the application except as provided in Section 15111 [not applicable here]. If no written determination of the completeness of the application is made within that period, the application will be deemed complete on the 30th day.

SoCalGas contends that a PEA is not required to contain all the information and analysis that would ultimately go into the Commission's Initial Study or Environmental Impact Report (EIR). It further contends that its PEA contains all of the information requested by Energy Division and is thus legally complete, and the fact that all possible future uses are not defined or analyzed should not form the basis for dismissing SoCalGas' application.

SoCalGas is correct that the staff never determined in writing that the application was either complete or incomplete within 30 days after SoCalGas filed its amended PEA. The company is also correct that a PEA is not required to contain all the information and analysis needed for an Initial Study or EIR. However, whatever the legal consequence on the completeness of SoCalGas' application, this does not mean the Commission is powerless to dismiss the application. Nothing in CEQA or the Guidelines requires that if an application is accepted as complete for purposes of beginning CEQA review, it cannot then be dismissed at some later point. In fact, Guideline 15270, which addresses disapproval of applications, appears to provide for just such an eventuality.[2]

Moreover, this is an application under Public Utilities Code section 851. The Commission has full authority to grant or deny the relief sought, regardless of any requirements placed upon evaluation of such application by CEQA. CEQA does not give the Commission further power than it already has, nor does it take away any power the Commission has. Without doubt, the Commission has the power to deny a section 851 application, which is in effect what dismissal is doing, although we stress that in this case, we do so without prejudice to SoCalGas' beginning again. What the Commission must do, however, is to provide adequate justification for its dismissal. We have done so here.

First, we have dismissed SoCalGas' application based on the pendency of the OII. That was completely appropriate at the time D.99-09-068 was issued, and as discussed above, continues to be appropriate. Second, the investigative report in the OII revealed potential environmental contamination beyond any specifically identified in either the PEA or (in passing) at the hearings.

[2] Guideline 15270 states that it is intended to allow an initial screening of projects on the merits for quick disapprovals prior to the initiation of the CEQA process where the agency can determine that the project cannot be approved. However, it also does not relieve an applicant from paying the costs for an EIR or Negative Declaration prepared for the project prior to the Lead Agency's disapproval of the project after normal evaluation and processing.

(See I.99-04-022, p. 5.) This in large part forms the basis for our statement in the Decision that "uncertainties surrounding possible environmental contamination of Montebello" could warrant stopping the process and starting over again. Finally, given that SoCalGas' proposal does not restrict the uses to which the property might be put by a given buyer, it is certainly within our discretion to find that the alternatives already identified do not sufficiently cover the field of possible uses. Taken together, we are of the view that these reasons amply support our conclusion to dismiss SoCalGas' application without prejudice.

SoCalGas points out that a two-step CEQA review, one step now and the second step, if necessary, once the winning bid was determined, would fully comply with CEQA. SoCalGas cites D.97-09-046 in Application 96-11-020, where it alleges we adopted a very similar approach. That case involved PG&E's request for Commission approval under section 851 to sell certain fossil fuel generation plants through an auction process. Staff had issued a Draft Mitigated Negative Declaration (Neg Dec). Before the comments were due to come in on the Neg Dec, the Commission issued an interim decision approving the auction process, but reserving authorization for PG&E to accept final bids until all environmental mitigation factors were known and approved by a Commission decision. (D.97-09-046, 1997 Cal. PUC Lexis 859, *26.)

We could have decided to follow a similar course here; however, for several reasons, we did not and do not believe it would be appropriate. First and foremost, as discussed throughout this order, the facts and circumstances of this case lend themselves to a broader initial environmental review than was the situation in the PG&E case. Moreover, this case is at a different procedural stage. It hardly seems appropriate to approve abbreviated initial environmental review at this time. Fundamentally, this is a matter of Commission discretion; nothing in CEQA required us to adopt a phased plan for environmental review in the PG&E situation, nor does CEQA require that here. We approved a phased plan in the PG&E case for sound policy reasons. For other equally sound policy reasons -

The alternative is to exceed the 18-month statutory limit imposed by SB 960 for completion of a proceeding like this by a huge margin (the 18 months expired in June of 1999.) In addition, because CEQA review has not progressed beyond the staff's review of SoCalGas' amended PEA, CEQA review will have similarly slipped far beyond CEQA's timelines. We do not believe the public interest is served by imposing these consequences.

C. Rates Subject to Refund.

SoCalGas argues the Commission has set up a Catch-22 situation. SoCalGas has argued to the Commission that Montebello is no longer used and useful, and requests authority to sell it, but the Commission has not yet granted that authority, thus making it necessary for SoCalGas to maintain the field. Despite the fact that SoCalGas has no choice, rates attributable to the Montebello facility have been made subject to refund. SoCalGas contends that denying rate recovery of the cost of ownership and maintenance of an asset for the very period of time the Commission has prevented the utility from selling or salvaging the asset is a taking without compensation which violates the state and federal constitutions. SoCalGas further argues we commit legal error by failing to state clearly any reason for making Montebello's rates subject to refund, citing Public Utilities Code section 1705 and two court cases which discuss required findings of fact.

TURN correctly responds that SoCalGas confuses setting rates subject to refund with actually ordering a refund itself.[3] TURN points out that SoCalGas made exactly the same argument when responding to comments TURN had submitted on this very issue in the OII. TURN claims that SoCalGas refuses to acknowledge that setting rates subject to refund is not irrelevant to the issue of

[3] Although TURN has filed an appearance but is not a formal party in this proceeding, it is a formal party in the OII. Because of the interrelationship between the two proceedings, TURN was allowed to file comments on the Proposed Decision in this proceeding. See ALJ Ruling of August 19, 1999. TURN also filed a response to SoCalGas' application for rehearing in this proceeding, which we have accepted and consider here.

imposing penalties on SoCalGas for failure to inform the Commission adequately about its plans to sell Montebello, which is one of the primary issues in the OII. Moreover, TURN argues that no taking can possibly have occurred now, because we have not done anything yet. We have simply provided for the opportunity to refund rates at some time in the future, should circumstances warrant doing so.

TURN's arguments are persuasive. There is no legal error in our having taken this initial step. We reiterate that the OII and this proceeding are interrelated. At least until the OII is resolved, it is appropriate to continue our directive that rates attributable to the Montebello facility be subject to refund until further order. We may re-evaluate it at that time, if presented with an adequate written request, and if circumstances warrant our doing so.

THEREFORE, IT IS ORDERED that:

1. Decision 99-09-068 is modified to include by reference the above discussion clarifying the Commission's decision to dismiss without prejudice the application of SoCalGas to sell its Montebello facility.

2. Rehearing of Decision 99-09-068 as modified and clarified herein is denied.

This order is effective today.

Dated February 3, 2000, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
CARL W. WOOD
LORETTA M. LYNCH
Commissioners

pendency of the OII, further environmental problems coming to light, and lack of clarity in the formulation of alternatives to the project – we do not at this time approve a similar plan in this case.

SoCalGas makes much of the delay factor, both in terms of repeating the review process, and in terms of harm to its ratepayers. It contends repeating the process will needlessly expend Commission resources. It further contends that in the context of its recommendation, shared by ORA, that any gain on sale relative to book value be split between ratepayers and shareholders, every day of delay denies ratepayers the time value of their share of the possible gain. Moreover, once the sale is complete, recorded rate base and operation and maintenance expenses will be reduced. SoCalGas states it presented testimony that benefits to ratepayers could approach $5 million annually, depending on SoCalGas' overall earnings relative to PBR earning sharing bands. It is argued that each day of delay means that these potential ratepayer benefits are lost as well.

We do not find these arguments persuasive. We have already pointed out in D.99-09-068 that Rule 72 of our Rules of Practice and Procedure can be used to incorporate any portion of the record in this case into a new proceeding. We further express our intent in this order that once a new application is filed, the new proceeding, and CEQA review, be expedited. Energy Division staff is fully prepared to comply with this. Finally, we recognize that whenever a proceeding is dismissed and the parties are told to begin again, some element of delay will result. However, given all of the circumstances presented by this case, on balance we have decided that some delay is justified in order that all of the complex issues presented may be resolved fairly. In fact, because so little environmental review has yet occurred, any substantial delay would more likely be due to SoCalGas' failure to refile in a timely manner, than it would to the actual mechanics of beginning the process over again. We strongly encourage SoCalGas to file its new application as soon as possible.