



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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Application of Wild Goose Storage, LLC to Amend  
its Certificate of Public Convenience and Necessity  
to Expand and Construct Facilities for Gas Storage  
Operations

A. 09-04-021  
(Filed April 24, 2009)

**REPLY OF WILD GOOSE STORAGE, LLC  
TO THE PROTEST OF WILD GOOSE CLUB, INC.**

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August 2, 2010

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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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**REPLY OF WILD GOOSE STORAGE, LLC  
TO THE PROTEST OF WILD GOOSE CLUB, INC.**

Pursuant to Rule 2.6(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission) and the June 22, 2010 Ruling of Presiding Administrative Law Judge Jean Vieth,<sup>1</sup> Wild Goose Storage, LLC (Wild Goose) replies to the Protest of Wild Goose Club, Inc. (WGC) to the above captioned application.

**I. INTRODUCTION AND PROCEDURAL HISTORY**

Over fifteen months ago, on April 24, 2009, Wild Goose filed an application seeking to amend its certificate of public convenience and necessity (CPCN) so as to further expand its existing natural gas storage facilities in Butte County, California and to increase the size of the interconnect between Wild Goose's facilities and Pacific Gas and Electric Company's (PG&E) Delevan Meter Station and the Line 400/401 backbone natural gas pipeline system. As explained in the Application, the expansion of the Wild Goose storage facilities will result in up to a 21 Bcf increase in inventory (from 29 to 50 Bcf) and in an increase in peak injection capacity to 650 MMcf/d from 450 MMcf/d and peak withdrawal capacity to 1,200 MMcf/d from 700 MMcf/d.

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<sup>1</sup> Administrative Law Judge's Ruling Granting in Part Motion of Wild Goose Club, Inc. to File a Response and Limited Protest Out of Time, A. 09-04-021 (June 22, 2010) (June 22 Ruling).

Ten months subsequent to the filing of the Application and five months subsequent to the issuance of the Scoping Memo, on February 5, 2010, WGC filed a Motion for Party Status.<sup>2</sup> In that Motion, WGC made certain assertions regarding Wild Goose’s legal obligations vis-à-vis the lease of its Well Pad Site and an associated “Surface Rights Addendum,” and WGC’s rights as a purported beneficiary under such addendum. WGC’s Motion was granted by the Presiding ALJ on February 10, 2010, prior to parties being afforded an opportunity to respond.

Approximately three months subsequent to being accorded party status, WGC sought “an extension” of time to “file a response and limited protest” to the Wild Goose Application. This request was granted by the June 22 Ruling.

Through its Protest filed on July 2, 2010,<sup>3</sup> WGC seeks to introduce a single new issue – *i.e.*, for the Commission to take judicial notice of a lawsuit WGC has filed against Wild Goose in Butte County superior court (Case No. 149934, filed April 2, 2010) and frame the Commission’s final decision in this case with reference to a future Superior Court order in that proceeding.<sup>4</sup> While WGC does not assert that the subject of the lawsuit falls within the jurisdiction of the Commission (it involves a contract dispute that concerns land use rights and noise), it asks the Commission to order, as an express condition of any amendment of Wild Goose’s CPCN, that Wild Goose operate its gas storage facilities in compliance with any final judgment in the Butte County lawsuit.

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<sup>2</sup> See Motion of Wild Goose Club, a California Corporation, to become a Party, A.09-04-021 (February 5, 2010)

<sup>3</sup> See Protest of Wild Goose Club, A. 09-04-021 (July 2, 2010) (WGC Protest).

<sup>4</sup> On May 6, 2010 Wild Goose filed a demurrer to WGC's Verified Complaint. On June 18, 2010 the Court entered its order sustaining Wild Goose's demurrer but afforded WGC the opportunity to amend its complaint to include an indispensable party, Wild Goose Energy Company, LLC, as a defendant. The Court did not address several substantive grounds for Wild Goose's demurrer in its June 18 ruling. On July 26, 2010, WGC filed its amended complaint.

There is no basis in law for the Commission to condition Wild Goose's CPCN amendment as requested by the WGC.

**II. THE FACTUAL DISPUTE UNDERLYING THE WGC LAW SUIT IS NOT BEFORE THE COMMISSION FOR RESOLUTION**

The Commission is not tasked with resolving the disputed issues underlying the lawsuit brought by WGC in Superior Court. This fact is acknowledged by WGC in its Protest.<sup>5</sup> Despite this acknowledgement, WGC spends four pages of its seven-page pleading setting forth the alleged facts underlying its lawsuit against Wild Goose. Wild Goose disagrees with WGC's recitation of the facts. However, as the issues underlying the lawsuit are not before the Commission for resolution, and indeed the Commission lacks jurisdiction to adjudicate the private contract dispute, Wild Goose believes it unnecessary and inappropriate to present its counter position and arguments to the Commission. Wild Goose will preserve those arguments for the appropriate forum – the Butte County Superior Court. Moreover, the Commission should not take into account WGC's rendition of the "facts" in its determination of whether or not to grant WGC the relief requested.

**III. WGC'S PROTEST SEEKS TO UNLAWFULLY BIND THE COMMISSION TO COMPLY WITH A SPECULATIVE FUTURE SUPERIOR COURT JUDGMENT**

As stated above, the purpose of the WGC Protest is to seek one particular form of relief – that the Commission order Wild Goose, as an express condition of any amendment to its CPCN, to conduct its gas storage operations in accordance with the final judgment, if any, rendered in the lawsuit filed by WGC against WGS in the County of Butte Superior Court. WGC argues that such compliance should be made an express condition of any amendment to Wild Goose's

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<sup>5</sup> WGC Protest at p. 2.

CPCN in the interests of comity and consistency and to avoid confusion regarding the parties' and the public's respective rights and duties.<sup>6</sup> The very nature of this request highlights that WGC is raising an assertion that has not been adjudicated in any court and requires the Commission to engage in unwarranted speculation. Moreover, WGC's position overlooks numerous cases construing the extent to which a Superior Court action may interfere with Commission jurisdiction. The Commission *cannot and should not* prospectively subordinate its jurisdiction to an indeterminate future judgment of the Superior Court.

As California courts have stated, "the Legislature has granted the PUC comprehensive jurisdiction to regulate the operation and safety of public utilities . . . and [to] do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction."<sup>7</sup> In addition, California Public Utilities Code section 1759 explicitly provides that:

No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.

Accordingly, the Supreme Court of California has stated that, "[t]he PUC has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue."<sup>8</sup> In addition, the courts have stated that in order to harmonize sections 1759 and 2106<sup>9</sup> of the Public Utilities Code, the ability of Superior Courts to provide

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<sup>6</sup> WGC Protest at p. 6.

<sup>7</sup> *Hartwell Corp. v. The Superior Court of Ventura County*, 27 Cal. 4<sup>th</sup> 256, 265 (2002) (internal citations and quotations omitted).

<sup>8</sup> *Hartwell*, 27 Cal. 4<sup>th</sup> at 275 (quoting *San Diego Gas and Elec. Co. v. The Superior Court of Orange County*, 13 Cal. 4<sup>th</sup> 893 (1996) (*Covalt*)).

<sup>9</sup> Public Utilities Code section 2106 also provides, in relevant part, that:

(footnote continued)

relief to parties who seek redress from a public utility must be “limited to those situations in which an award of damages would not hinder or frustrate the commission’s declared supervisory and regulatory policies.”<sup>10</sup>

The extent to which a civil action may be preempted under section 1759 requires a fact-based inquiry which takes into consideration: (1) whether the Commission has authority to adopt a regulatory policy on the matter in question; (2) whether the Commission has exercised that authority; and (3) whether the Superior Court’s judgment would hinder or interfere with the Commission’s exercise of regulatory authority.<sup>11</sup> As illustrated by this three-part test, the inquiry into whether a civil action may be preempted under section 1759 would be entirely dependent on the circumstances of the case *and* the precise form of the Superior Court’s judgment. No such judgment related to the WGC contract claim exists at this time, and whether or not it would conflict with the prohibition of *Waters v. Pac. Tel. Co.* cannot be known. In the absence of any certainty regarding what this future Superior Court order may contain, it is both impossible and unreasonable to ask the Commission to prospectively subordinate its own broad authority and jurisdiction to an unspecified future judgment of a Superior Court.<sup>12</sup>

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Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom.

<sup>10</sup> *Waters v. Pac. Tel. Co.*, 12 Cal. 3d 1, 4 (1974).

<sup>11</sup> *Hartwell*, 27 Cal. 4<sup>th</sup> at 266 (citing *Covalt*).

<sup>12</sup> The in-depth analysis undertaken by the courts in the *Hartwell* and *Covalt* cases are illustrative of the many facts that must be taken into consideration in making a determination under the three-part test. For instance, in *Hartwell*, the court considered, among other things, the history of the Commission’s regulation of water companies, the background of California law regarding drinking water standards, the interaction between those standards and the Commission’s exercise of authority, and the interaction between the Superior Court actions for damages and the powers vested in the Commission to ensure the health and safety of the public’s drinking water. Similarly, the court in *Covalt* analyzed, among other things, the science of electromagnetic fields,

(footnote continued)

The sole issue which WGC seeks to raise by its protest -- that the Commission make compliance with an unknown final judgment in the Superior Court lawsuit an express condition of its order granting an amendment to Wild Goose's CPCN -- is inconsistent with the Public Utilities Code and applicable precedent and, therefore, cannot be granted by the Commission

#### IV. CONCLUSION

For the above stated reasons, the Commission should deny the relief requested by WGC in its Protest, should clarify that the scope of the issues in this proceeding shall *not* be expanded to include the WGC lawsuit or the outcome of any potential Superior Court decision, and require that WGC, like all interested parties, participate in the proceeding within the scope of the case set forth in the original Scoping Memo.

Respectfully submitted this 2nd day of August, 2010 in San Francisco, California.

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By

*/s/ Jeanne B. Armstrong*

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the background of the Commission's regulation of power lines, the Commission's history of regulating electromagnetic fields and the relationship between the causes of action raised in the Superior Court and the Commission's authority to adopt a policy with regard to electromagnetic fields.

**CERTIFICATE OF SERVICE**

I, Melinda LaJaunie, certify that I have on this 2<sup>nd</sup> day of August 2010 caused a copy of the foregoing

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to be served on all known parties to A.09-04-021 listed on the most recently updated service list available on the California Public Utilities Commission website, via email to those listed with email and via U.S. mail to those without email service. I also caused courtesy copies to be hand-delivered as follows:

Commissioner Michael R. Peevey	ALJ Jean Vieth
California Public Utilities Commission	California Public Utilities Commission
505 Van Ness Avenue, Room 5218	505 Van Ness Avenue, Room 5010
San Francisco, CA 94102	San Francisco, CA 94102

I declare on penalty of perjury under California law that the foregoing is true.  
Executed this 2<sup>nd</sup> day of August 2010 at San Francisco, California.

/s/ Melinda LaJaunie  
Melinda LaJaunie

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