

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Neighbors for Smart Rail for Rehearing
of Resolution SX-100 and for Oral Argument

Application 11-12-010
(Filed December 14, 2011)

**ORDER GRANTING LIMITED REHEARING OF RESOLUTION SX-100
ON ISSUES INVOLVING CEQA AND DUE PROCESS, AND
DENYING REHEARING IN ALL OTHER RESPECTS**

I. INTRODUCTION

In this Order, we grant limited rehearing of Resolution SX-100 for the reasons discussed below. We order the matters addressed in the rehearing application filed by Neighbors for Smart Rail (“NFSR”), as well as any other related matters, assigned to an Administrative Law Judge (“ALJ”) for coordinated consideration and review.

II. BACKGROUND

We issued Resolution SX-100 on November 14, 2011, and granted Exposition Metro Line Construction Authority (“Expo”) authorization pursuant to Commission General Order 164-D (“GO 164-D”) to construct 16 new at-grade and 11 grade-separated highway-light rail crossings as part of Phase 2 of the Exposition Corridor Light Rail Transit Project. Expo, on behalf of the Los Angeles County Metropolitan Transportation Authority (“LACMTA”), is charged with planning and constructing the Exposition Corridor Light Rail Transit Project. The project is a light rail transit extension that, when complete, will provide public transit service between downtown Los Angeles and the City of Santa Monica. Phase 1 of the project, an 8.5 mile segment from downtown Los Angeles to Culver City, has received Commission approval and is under construction. Phase 2 of the project will extend approximately 6.7 miles

from the terminus of Phase 1, at the Venice/Robertson/Washington aerial station in Culver City, to the downtown area of Santa Monica.

The Commission's Railroad Crossings Engineering Section ("RCES") has worked with Expo since 2007 to review the locations of the proposed crossings for Phase 2 and to address safety concerns related to proposed at-grade crossing designs. On January 27, 2009, Expo circulated its Draft Environmental Impact Report ("EIR") for Phase 2 for public comment. On March 27, 2009, RCES staff submitted comments to Expo's Draft EIR, noting specific safety concerns related to the proposed at-grade crossings. On November 16, 2009, Expo provided written response to RCES staff comments on the Expo Phase 2 Draft EIR. In December 2009, Expo prepared its Final Environmental Impact Report ("FEIR"), identifying environmental impacts and associated mitigation measures related to the Phase 2 project. On February 5, 2010, Expo adopted a Notice of Determination ("NOD") in certifying its FEIR, including a Statement of Overriding Considerations. On June 9, 2010, Expo submitted its Draft Rail Crossing Hazard Analysis Report ("RCHAR") to RCES for review and preparation of field diagnostic meetings. Two pre-diagnostic field meetings were held on July 27 and 29, 2010, and two field diagnostic meetings were held in Los Angeles on August 2 and 4, 2010. The field diagnostic meetings included a field evaluation of each proposed crossing. On November 12, 2010, RCES staff provided Preliminary Recommendations to Expo's RCHAR. RCES staff requested that three proposed at-grade crossings be evaluated for either closure or grade-separation. On March 11, 2011, Expo submitted its Final Draft RCHAR, which incorporated changes to the three at-grade crossings identified by RCES staff that satisfactorily addressed RCES staff's safety concerns. On April 1, 2011, Expo submitted revisions to its Final Draft RCHAR that included grade-separation for the Sepulveda Blvd. crossing.

On September 26, 2011, Draft Resolution SX-100 was published on the Commission's Daily Calendar and was also mailed in accordance with Section 311 of the Public Utilities Code and Rule 14.5 of the Commission's Rules of Practice and Procedure. Twenty-eight individual comments were received in support of Resolution

SX-100, including a petition of support containing 312 signatures. Two individual comments were submitted in opposition to Resolution SX-100 from NFSR and from United Community Associations.

We issued Resolution SX-100 on November 14, 2011. On December 14, 2011, NFSR filed its application for rehearing of Resolution SX-100. NFSR's service of the rehearing application was defective, and was not properly accomplished until December 23, 2011. As such, the time for filing responses to NFSR's rehearing application was extended by ruling until January 25, 2011.

In its rehearing application, NFSR challenges Resolution SX-100 on the following grounds: (1) at-grade crossings are not cheaper, and Expo cannot claim cost as a factor in eliminating analysis and adoption of grade separations if they did not seek funding for those options; (2) the Commission failed in its duties as a responsible agency under the California Environmental Quality Act ("CEQA"), and the Commission cannot claim it did not know the requirements of CEQA; (3) the Commission failed to comply with section 13.6 of the Commission's Rules of Practice and Procedure, which states that the substantial rights of the parties must be protected; (4) the Commission has lost objectivity in proceedings with LACMTA and therefore further fails to serve the public interest and need for transparency, due diligence and due process in transit planning in Los Angeles County; (5) the metro grade crossing policy circumvents safety and defers environmental review; (6) NFSR agrees with Commissioner Simon that the public was excluded in the crossing approvals, and the Commission erred in relying on Expo to conduct public outreach; and (7) the ratesetting categorization wrongly disallows intervenor compensation for parties who are members of the public. NFSR also requests oral argument on its rehearing application.

We have carefully considered the arguments raised in the application for rehearing, and are of the opinion that good cause has been established to grant limited rehearing on issues involving CEQA and due process as set forth in today's decision.

III. DISCUSSION

A. CEQA Compliance

NFSR alleges throughout its rehearing application that we failed in our duties as a responsible agency under CEQA, and that we cannot claim ignorance as to the requirements of CEQA. (Rehearing Application (“Reh. App.”), pp. 12-15). NFSR further alleges that the application of the Metro Grade Crossing Policy prematurely eliminates grade-separated alternatives which may be environmentally superior. (Reh. App., pp. 29-30.) We have determined that cause exists to grant rehearing of these issues, as discussed below.

As a “responsible agency” under the CEQA Guidelines, our obligations and responsibilities are more limited than those of Expo, which is the “lead agency” on the project. (See Cal. Code Regs., Tit. 14, Div. 6, Ch. 3 (“Guidelines”), §§ 15050, 15051, 15096.) However, the Guidelines do lay out in specific detail what is required of a responsible agency in terms of CEQA compliance. We are required to: (1) consider the EIR or Negative Declaration prepared by the lead agency and reach our own conclusions on whether and how to approve the project involved (Guidelines, § 15096(a)); (2) make findings for each significant effect of the project (Guidelines, §§ 15091, 15093, 15096(h)); and (3) ensure that the findings are supported by “substantial evidence in the record,” defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached” (Guidelines, §§ 15091(b), 15384(a)).

We have determined that cause exists to grant rehearing on the CEQA issues raised in NFSR’s rehearing application. The CEQA issues, along with other issues addressed below, will be assigned to an ALJ for coordinated consideration and review.

B. Due Process

NFSR next alleges that we failed to comply with Rule 13.6 of the Commission’s Rules of Practice and Procedure by approving grade crossings pursuant to GO 164-D. (Reh. App., pp. 21-28.) NFSR claims that there was insufficient public participation and

input prior to the issuance of Resolution SX-100. (Reh. App., pp. 31-32.) We have determined that cause exists to grant rehearing on the due process issues raised by NFSR.¹

GO 164-D is a relatively new Commission procedure that allows the Commission to approve at-grade rail crossings without conducting a formal application proceeding. The most recent version of GO 164-D was developed pursuant to Order Instituting Rulemaking (“OIR”) (R.) 06-10-004, adopted October 5, 2006. The OIR included a proposed GO 164-D, which allows rail transit agencies to request approval of at-grade crossing by way of Commission resolution, rather than through a formal application procedure. In order to utilize the GO 164-D procedure, a rail transit agency is required to consult with Staff in the initial phase of a new crossing project, and justify to Staff why each proposed at-grade crossing is not a good candidate for closure or grade-separation. (R.06-10-004, p. 24.) As a second phase, the rail transit agency must comply with a detailed process that includes requesting Commission authorization for every at-grade crossing either by filing an RCHAR and obtaining Commission approval by way of resolution, or by filing a formal application. (R.06-10-004, pp. 24-27.) In the present case, Expo opted for the RCHAR process, culminating in the issuance of Resolution SX-100.

¹ With respect to the issue of compliance with Rule 13.6, we note that the Rule deals with the issue of what rules of evidence are applicable in Commission evidentiary hearings. By its title, Article 13 of the Commission’s Rules of Practice and Procedure addresses “Hearings, Evidence, Briefs and Submission.” Because GO 164-D does not contemplate evidentiary hearings, the requirements of Rule 13.6 are inapplicable. In addition, Rule 13.6 cites as authority Public Utilities Code section 1701, which expressly provides: “No informality in any hearing, investigation, or proceeding ... shall invalidate any order, decision or rule made, approved, or confirmed by the [C]ommission.” (Pub. Util. Code, § 1701(a).) Thus, informality of a proceeding, in and of itself, is not a ground to annul or invalidate a Commission decision.

The procedures outlined in GO 164-D have been utilized twice before the current proceeding.² The two projects previously approved through GO 164-D procedures include the new San Francisco Central Subway (approved by Resolution SX-92, issued on March 12, 2010), and a small commercial trolley line in the City of Glendale (approved by Resolution SX-84, issued on February 1, 2008). No protests or challenges were filed to either project.

As noted above, we have determined that cause exists to grant rehearing on the due process issues raised by NFSR. The due process issues are assigned to an ALJ, along with the other issues addressed in this Order, and any other related issues, for coordinated consideration and review.

C. Allegations of Error Regarding Cost Issues, Compliance with Standards of Practicability and the Commission's Objectivity.

In its rehearing application, NFSR alleges that at-grade light rail crossings are not cheaper, and further alleges that Expo cannot claim cost as a factor in eliminating analysis and adoption of grade separations if Expo did not seek funding for those options. (Reh. App., pp. 9-11, 30-31.) NFSR further alleges that we have lost our objectivity with respect to proceedings involving LACMTA and has failed to serve the public interest. (Reh. App., pp. 28-29.) Finally, NFSR claims that we failed to properly evaluate Expo compliance with the Commission's Standards of Practicability in determining the need for grade separation. (Reh. App., pp. 15-20.) As a general matter, these issues appear to lack the specificity required to challenge Commission determinations under Public Utilities Code Section 1732. (See Pub. Util. Code, § 1732 ["The application for

² The crossings approved by the Commission for Phase 1 of the Expo project were by way of a formal application process. (See *In the Matter of the Application of the Exposition Metro Line Construction Authority for an order authorizing the construction of a two-track at-grade crossing for the Exposition Boulevard Corridor Light Rail Transit Line across Jefferson Boulevard, Adams Boulevard, and 23rd Street, all three crossings located along Flower Street in the City of Los Angeles, County of Los Angeles, California, And Related Matters* ("Expo Phase 1 Decision") [D.10-07-026] (2010) ___ Cal.P.U.C.3d ___, affirmed in *Order Denying Rehearing of D.10-07-026* [D.11-10-022] (2011) ___ Ca..P.U.C.3d ___.)

rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.”].) In particular, the second issue identified above, namely whether we have lost our objectivity and failed to serve the public interest, are not allegations of legal or factual error, and as such rehearing is denied as to these issues.

However, it would be appropriate for an assigned ALJ to consider, in light of a fully developed record, whether the other claims identified above (cost as a factor in choosing grade-separated vs. at-grade crossings, and compliance with the Commission’s Standards of Practicability) have merit. We therefore determine that cause exists to grant rehearing on these two issues and assign them to an ALJ, along with the other issues addressed in this Order, and any other related issues, for coordinated consideration and review. Rehearing is denied as to the allegations regarding the Commission’s objectivity and serving the public interest.

D. Intervenor Compensation

In its rehearing application, NFSR alleges that “the ratesetting categorization wrongly disallows intervenor compensation for parties who are members of the public.” (Reh. App., p. 32.) This statement is incorrect for two reasons. First, it presumes that Resolution SX-100 was somehow categorized as a “ratesetting” proceeding, when in fact resolutions such as this one do not receive formal categorizations as would generally occur in, for example, an application proceeding at the Commission. Second, Public Utilities Code section 1801.3, which governs the types of industry proceedings in which intervenor compensation may be awarded, does not include rail transit agencies. (See Pub. Util. Code, § 1801.3, subd. (a) [It is the intent of the Legislature that the provisions of this article shall apply to all formal proceedings “involving electric, gas, water, and telephone utilities”].) It is for this second reason, and not due to any categorization of the proceeding, that intervenor compensation is unavailable to NFSR. Thus, NFSR’s argument that it is entitled to intervenor compensation lacks merit. Rehearing is denied as to this issue.

E. Oral Argument

In its rehearing application, NFSR requests oral argument pursuant to Rule 16.3 of the Commissions Rules of Practice and Procedure. NFSR argues that the complexity of the case requires oral argument to assist us in resolving its rehearing application. (Reh. App., pp. 32-33.) NFSR further contends that oral argument is proper as the Decision raises issues of major significance and departs from existing Commission and other legal precedent without adequate explanation. (Reh. App., p. 33.)

We have broad discretion to determine the appropriateness of oral argument in any particular matter. (See Rule 16.3(a) of the Commissions Rules of Practice and Procedure, Cal. Code of Regs., tit. §20, 16.3, subd. (a).)

Rule 16.3 states:

If the applicant for rehearing seeks oral argument, it should request it in the application for rehearing. The request for oral argument should explain how oral argument will materially assist the Commission in resolving the application, and demonstrate that the application raises issues of major significance for the Commission because the challenged order or decision: (1) adopts new Commission precedent or departs from existing Commission precedent without adequate explanation; (2) changes or refines existing Commission precedent; (3) presents legal issues of exceptional controversy, complexity, or public importance; and/or (4) raises questions of first impression that are likely to have significant precedential impact.

(Rule 16.3 of the Commission's Rules of Practice and Procedure, Code of Regs., tit. 20, §16.3.)

Because we have determined that cause exists to grant limited rehearing and assign many of the issues raised by NFSR to an ALJ, we find that NFSR's oral argument request is moot.

F. Other Issues

In our review of the rehearing application, we discovered an error in Resolution SX-100 related to two overhead structures situated above new crossing locations. The two overhead structures are the I-405 freeway in one instance, and the Palm Park pedestrian

bridge in the other instance. As to two of the crossings approved by Resolution SX-100, the Resolution does not identify these overhead structures as part of the existing environmental baseline for purposes of CEQA. CEQA Guidelines Section 15125(a) states that “[a]n EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant.” (Guidelines, § 15125(a); see also, Guidelines, § 15126.2(a), stating that an EIR shall focus on the significant environmental effects of the proposed project and shall examine any changes in the existing physical conditions in the affected area.) The assigned ALJ is directed to consider whether Resolution SX-100 should be modified or revised to include these two overhead structures, and whether an addendum is required by CEQA. We assign this issue, along with the other rehearing issues addressed herein, to an ALJ for coordinated consideration and review.

G. Scope of Proceeding

We direct the issues identified in sections A-C and F of this Order to be assigned to an ALJ for coordinated consideration and review. We direct the assigned ALJ to do all of the following in the course of addressing these issues: (1) assemble the administrative record for Resolution SX-100, which shall become part of the administrative record for the rehearing proceeding, and which will be lodged with the Commission’s Central Files office, so that the record is available to all parties involved in this rehearing proceeding; (2) ask the interested parties to supplement this record, as necessary, by way of prepared testimony and/or additional comments; (3) based on the record evidence, make specific findings for each significant effect of the project that is related to the Commission’s crossing jurisdiction; (4) provide opportunity for interested parties to comment on whether, in light of a fully developed record, the crossings approved in Resolution SX-100 should be revised, modified or re-approved by the Commission on rehearing; (5) determine whether the baseline issues

addressed in section F, above, require a CEQA addendum, and if so, to prepare such an addendum with the assistance of the Commission's CEQA Staff; and (6) determine whether any related, pending Commission proceedings should be consolidated with the issues addressed herein to facilitate coordinated consideration and review.

IV. CONCLUSION

For the reasons stated above, limited rehearing of Resolution SX-100 is hereby granted.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of Resolution SX-100 is hereby granted to address the issues outlined in sections A-C and F of this Order.
2. The issues addressed in sections A-C and F of this Order are hereby assigned to an ALJ for coordinated consideration and review.
3. The ALJ should hold a prehearing conference to set forth the issues for the rehearing granted in today's decision.
4. The scope of the proceeding is as outlined in Section G.
5. The request for oral argument is denied as moot.
6. Rehearing of Resolution SX-100 is denied in all other respects.

This order is effective today.

Dated June 21, 2012, at San Francisco, California.

TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON

Commissioners

Commissioner Michael R. Peevey, being necessarily absent, did not participate.