

Decision 03-08-075 August 21, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the Los Angeles to Pasadena Metro Blue Line Construction Authority for an order authorizing the construction of two light rail transit tracks at-grade crossing West Avenue 45 in the City and County of Los Angeles, California.

Application 00-10-012
(Filed October 11, 2000)

And Related Matters.

- Application 01-16-011
- Application 00-11-050
- Application 00-11-040
- Application 00-11-034
- Application 00-11-033
- Application 00-11-032
- Application 00-11-029
- Application 00-11-016
- Application 00-11-015
- Application 00-10-050
- Application 00-10-039
- Application 00-10-033
- Application 00-10-020

ORDER DENYING REHEARING OF DECISION 02-11-029

In Decision (“D.”) 02-11-029, we denied a petition for modification of D.02-05-047 filed by the Pasadena Avenue Monterey Road Committee (“PAMRC”). On December 10, 2001, PAMRC filed an application for rehearing of D.01-11-029 and a motion for an injunction. BLA filed an opposition to the application and motion.

We have reviewed each and every allegation of error raised in the applications for rehearing and are of the opinion that applicants have not demonstrated good cause for rehearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case involves the construction of light rail service between the Union Station in Los Angeles and Sierra Madre Boulevard in Pasadena by the Los Angeles to Pasadena Metro Blue Line Construction Authority (“BLA” or “Authority”). In D. 02-05-047, mailed on May 21, 2002, the Commission approved numerous grade crossings associated with the Blue Line project. In D.02-10-023, the Commission modified D.02-05-047 and denied applications for rehearing of that decision filed by Citizens Against the Blue Line At-Grade (“NoBLAG”) and Mount Washington Association (“MWA”).

On August 23, 2002, the Pasadena Avenue Monterey Road Committee (“PAMRC”) filed a petition to modify D.02-05-047. PAMRC’s petition sought to modify the portion of D.02-05-047 that approved a single at-grade crossing at Pasadena Avenue in the City of South Pasadena. Rather, PAMRC asked the Commission to approve a dual crossing for Pasadena Avenue, as originally proposed by BLA, thereby leaving intact the Pasadena Avenue/Monterey Road intersection, and to provide access to Railroad Alley from Monterey Road or Pasadena Avenue.

BLA’s original application had proposed two separate at-grade crossings at Pasadena Avenue East and Pasadena Avenue West.¹ According to PAMRC, that configuration had been the subject of community meetings, and had been approved by the general public and the City of South Pasadena. However, the dual-crossing proposal was opposed by the Commission’s Rail Crossings Engineering Section of the Consumer Protection and Safety Division (Staff) on the ground that it was not safe. Staff supported the construction of a grade-separated crossing instead. Staff and BLA eventually agreed on a reconfigured single at-grade crossing at Pasadena Avenue. This was announced in hearings on

¹ BLA filed fourteen separate applications for grade crossings that were consolidated under A.00-10-012. The application dealing with the Pasadena East and West crossings is A.01-06-011.

December 12, 2001. (Tr. 1729-1730.) BLA withdrew the dual-crossing proposal and substituted the single at-grade crossing proposal. (Tr. 1827-1828.) Thus, the dual-crossing proposal was no longer before the Commission. (D.02-11-029 at pp. 2-3.)

PAMRC's petition to modify D.02-05-047 alleged that (1) the approved reconfiguration results in a vacation of a roadway within an area governed by the City of South Pasadena's General Plan without following procedures required by state statutes; (2) the approved reconfiguration was not subject to the required environmental review; (3) issues relating to the impact of the reconfiguration on an important arterial street, local schools, local businesses, and small residential streets in a registered historic area have not been addressed; (4) the approved reconfiguration has not been shown to be safer for all parties using the intersection and adjacent property than the original two at-grade crossings; and (5) the approved reconfiguration lacks public support. In addition, PAMRC contends that withdrawal of the original application by BLA and Staff's approval of the reconfigured crossing subverted the hearing process by not allowing a full evidentiary hearing of the original proposed crossing.

In D.02-11-029, the Commission denied PAMRC's petition to modify on both procedural and substantive grounds. First, the decision finds that PAMRC's petition, which challenged the decision on the basis on legal error, was actually a late-filed application for rehearing. (See Rules 47 and 85 of the Commission's Rules of Practice and Procedure, and D.98-12-091, 84 Cal.P.U.C.2d 607, 610-611 [a Commission order may be challenged for legal error only by the rehearing process, initiated by an application for rehearing filed within 30 days of the issuance of the challenged decision].)

Second, the decision concludes that PAMRC was not a party to the proceeding pursuant to Rule 54 of the Commission's Rules of Practice and Procedure. Rule 54 states that, in an application proceeding, an appearance may be entered at a hearing without filing a pleading.

Despite the procedural problems, the Commission reached the substantive issues raised in the petition because of the public interest in the Blue Line project. (D.02-11-029 at p. 4.) The decision concludes that (1) the evidence supports the safety of the revised crossing proposal; (2) notice of the revised proposal was provided by BLA in hearings on December 12, 2001, and was provided by both the administrative law judge's ("ALJ's") and the assigned Commissioner's proposed decisions; (3) any environmental issues regarding the revised proposal are untimely; and (4) the only determinations made by the Commission affecting streets were those made pursuant to its jurisdiction over crossings.

On December 10, 2001, PAMRC filed the instant application for rehearing.

II. DISCUSSION

PAMRC's application makes numerous claims of legal error. Although we have reviewed all of PAMRC's claims and found that they do not justify rehearing, this order specifically addresses those claims that are pertinent to the denial of PAMRC's petition for modification.²

A. Whether PAMRC was denied due process

As stated above, in D.02-11-029, the Commission concluded that PAMRC's petition for modification was a late-filed application for rehearing, and

² We note that many of the claims either do not allege specific legal error, appear to be irrelevant to the issues before the Commission in this case, or are impermissibly vague. (See Pub. Util. § 1732.) However, because PAMRC has filed its application for rehearing in propria persona (without attorney representation) we have made every effort to determine whether any of the claims have merit.

that PAMRC was not a party to this proceeding. These issues are related to the issue of due process. If PAMRC did not received proper notice of the proceeding, PAMRC may have some justification for filing its petition for modification three months after D.02-05-047 was issued.

In its petition to modify, filed on August 23, 2002, PAMRC alleged that the hearing process was subverted when BLA withdrew its original application for a dual crossing at Pasadena East/West and instead proposed a single crossing. PAMRC asserted that the dual crossing had been the subject of public hearings and that the City of South Pasadena and the general public supported the dual crossing. PAMRC argued that it had every right to rely on the BLA's support for its original proposal. Finally, PAMRC contended that hearings should have been held on the dual crossing proposal and that staff's protest should have been subject to evidentiary hearings.

In response to PAMRC's claim of lack of notice, D.02-11-029 states that BLA provided notice of its amended proposal in an open hearing on December 12, 2001. D.02-11-029 also states that there is no record of any communication to the ALJ or the Commission from December 12, 2002 to August 23, 2002, when PAMRC filed its petition for modification.

PAMRC now points out, in its application for rehearing of D.02-11-029, that A.01-06-011, the application for the Pasadena East/West crossing, failed to appear on the Commission's Daily Calendar when evidentiary hearings were scheduled.

A review of the Daily Calendars for the relevant time period indicates that, although all of the thirteen other applications were listed separately on the calendar, A.01-06-011 was indeed omitted as PAMRC alleges. The initial filing of A.01-06-011 was noticed on the June 13, 2001 Daily Calendar. However, A.01-06-011 was not specifically noticed when public participation hearings were noticed (Daily Calendar for November 5, 2001), nor when evidentiary hearings

were noticed (Daily Calendar for November 6, 7, 8 and 9, 2001; November 27, 28, 29 and 30, 2001; and for December 12 and 13, 2001).

This appears to have been an inadvertent error. By the time public participation hearings were held, all fourteen applications had been consolidated. Therefore, we believe that the notice was legally sufficient. More importantly, nowhere does PAMRC allege that it was unaware of the hearings because the Daily Calendar did not notice them. Indeed, in its petition for modification, PAMRC did not mention this omission at all. Furthermore, PAMRC's apparent reliance on the BLA to support the original crossing, as indicated in PAMRC's Petition for Modification, does not excuse its lack of participation in the proceeding. Because Commission approval of the crossings was required, PAMRC should have been aware that the crossing might not be approved as originally presented. PAMRC could easily have been added to the service list to monitor the proceeding.

It appears from the totality of the circumstances that PAMRC discovered this omission after the fact and has seized upon it as a justification for seeking rehearing. Moreover, PAMRC states that a representative attended the May 16 Commission meeting as a non-party to protest D.02-05-047, which approved the Pasadena East/West crossing. Nevertheless, PAMRC did not file its petition for modification until August 19, 2002, three months after D.02-05-047 was voted out. This was well beyond the 30-day deadline for filing applications for rehearing. (See Pub. Util. Code § 1731 and Rule 85 of the Commission Rules of Practice and Procedure.) For all of the foregoing reasons, we have determined that PAMRC's due process rights were not violated.

PAMRC also claims that the decision errs in stating that PAMRC made no communication to the ALJ or the Commission from December 12, 2002 to August 23, 2002. PAMRC points to its comments on D.02-05-047 at the May

16, 2002 Commission meeting. We clarify by this order that PAMRC did make an appearance as a non-party before the Commission at its May 16, 2002 meeting.

B. Whether PAMRC was properly denied party status, and whether PAMRC's petition for modification was a late-filed application for rehearing

As stated above, D.02-11-029 concludes that PAMRC is not a party to the proceeding. D.02-11-029 states that, in an application proceeding such as this, an entity may be given party status upon filing a pleading early in the proceeding, such as a protest or response, by filing a motion to intervene, or by entering an appearance at a hearing pursuant to Rule 54 of the Commission Rules of Practice and Procedure. PAMRC points to its appearance at the May 16, 2002 Commission meeting and to its comments to the proposed decision, filed on November 4, 2002, which include a request for a special appearance.

PAMRC's appearance and comments at the May 16, 2002 Commission meeting were made as a member of the public and do not constitute an appearance for purposes becoming a party to the proceeding. Thus, it is clear that, prior to filing its petition for modification, PAMRC was not a party. We note that, pursuant to Rule 47(e), a non-party may file a petition for modification. Such petitioner may become a party for purposes of resolving the petition, provided the petition specifically states how the petitioner is affected by the decision and why the petitioner did not participate in the proceeding earlier. We need not reach this issue here, however, because we believe that D.02-0-11-029 correctly finds that PAMRC's petition was actually a late-filed application for rehearing. Thus, as discussed below, even if PAMRC were a party to the proceeding, the petition was properly denied.

PAMRC's instant application for rehearing does not appear to directly address the issue of whether its petition for modification was actually a late-filed application for rehearing of D.02-05-047. However, in its comments on the

proposed decision, PAMRC asserted that the petition was timely because it was filed within one year under Rule 47(d) of the Commission Rules of Practice and Procedure. PAMRC is correct that petitions for modification may be filed within one year of the effective date of the decision, and even after one year, if justified. (See Rule 47 (d).) However, PAMRC's petition for modification sought to overturn the approval of the Pasadena East/West crossing on both legal and policy grounds. Moreover, the only way the petition could be granted would be to reopen the case for additional evidentiary hearings. Thus, the subject-matter of the petition and the relief sought goes well beyond the bounds of a petition for modification as set forth in Rule 47.

A similar issue was addressed by the Supreme Court in Northern Cal. Assn. v. Pub. Util. Com. (1964) 61 Cal.2d 126. There, petitioner sought review of decisions denying reopening of a certificate decision (original decision), and denial of rehearing with respect to denial of reopening. The court found that the petitioner was actually seeking rehearing of the original certificate decision. Quoting Young v. Industrial Acc. Com. (1944) 63 Cal.App.2d 286, 291-292, the court stated:

“Having failed to apply for a rehearing within the time limit fixed by the code [petitioner] cannot accomplish the same purpose by a petition to reopen, that petition differing in form only, not in its substance, from a petition for a rehearing.”

(Northern Cal. Assn. v. Pub. Util. Com., *supra*, at p. 134.) The court further ruled that even if taken as a petition to reopen, the pleading came too late. “There is no statutory right to reopen commission proceedings once submitted and decided.” (Ibid.)

In the instant case, the petition for modification does not differ in substance from an application for rehearing. Therefore, the decision correctly concludes that the petition was in fact an untimely application for rehearing.

C. Whether there is sufficient evidence to support the safety of the single crossing

Although not required to do so, we also addressed the substance of PAMRC's complaint in the decision and found that there was sufficient evidence in the record to support the safety of the single crossing. PAMRC argues that the approval of the reconfigured Pasadena East/West crossing is not supported by substantial evidence. Among other things, PAMRC has asserted that the reconfigured crossing has not been shown to be safer for all parties.

On the contrary, the evidence indicates that the reconfigured single crossing would be safer than the dual crossing. (See Tr. 1734-1743; 1822-23.) Moreover, as the decision points out, because BLA withdrew its original proposal, the only proposal before the Commission was the single at-grade crossing. (D.02-11-029 at p. 3.) Thus, the issue before the Commission was not whether the dual crossing was better than the reconfigured single crossing, but whether the reconfigured crossing was safe.

D. Whether the environmental review was adequate

PAMRC makes numerous allegations regarding the adequacy of the environmental review of the Blue Line project. The instant decision determined that, as noted in D.02-10-023 (decision denying rehearing of D.02-05-047), environmental issues have been addressed repeatedly and extensively in the course of this proceeding. The decision further states that, with limited exceptions, a final EIR is presumed to be valid and binding on a responsible agency (the Commission) unless a timely challenge is filed pursuant to Public Resources Code section 21167.

A responsible agency may conduct further independent environmental review where a subsequent EIR is required. A subsequent EIR or negative declaration may be required where (1) substantial changes are proposed in the project which will require major revisions to the EIR; (2) substantial changes occur with respect to the circumstances under which the project is being

implemented undertaken which will require major revisions to the EIR; or (3) new information becomes available, which was not known and could not have been known at the time the EIR was certified. (Pub. Resources Code § 21166; see also CEQA Guidelines § 15162.) We have determined that the reconfigured single crossing at Pasadena Avenue East/West does not meet the criteria for a subsequent environmental review.

E. Whether any other claims made by PAMRC have merit

PAMRC also alleges that the Commission lacks jurisdiction to alter, relocate or physically close Monterey Road or Pasadena Avenue East and West. As pointed out in the decision, the Commission has not ordered any street alterations or closings. (D.02-11-029 at p. 6.) Rather, the Commission has exercised its jurisdiction over the safety of grade crossings. Moreover, the local governmental authority having jurisdiction over the streets involved in the crossing must approve any alterations or closures in any event.³

PAMRC further claims that the Commission violated Public Utilities Code section 1708 when it modified D.02-05-047 in its decision denying rehearing (D.02-10-23). Section 1708 requires the Commission to provide notice and opportunity to be heard when it modifies decisions. This has generally been interpreted to require evidentiary hearings when there are disputed issues of fact that are material to the case. PAMRC's argument is misplaced. First, as with many of PAMRC's contentions, this claim does not address the decision denying its petition for modification. Second, section 1708 is not applicable to modifications made pursuant to rehearing applications because, pending resolution of the rehearing applications, the decision is not yet final.

³ PAMRC's own exhibits indicate that the City Council of South Pasadena approved the reconfiguration.

F. Motion for injunction

PAMRC's application also includes a motion for an injunction. Because PAMRC's application for rehearing has not demonstrated legal error, the motion should be denied.

III. CONCLUSION

For all of the foregoing reasons, we find that PAMRC has not demonstrated good cause for rehearing nor for the issuance of an injunction. While we understand the frustrations of the residents and business owners who may be adversely affected by the approved Pasadena Avenue East/West crossing, the Commission's role here is to ensure the safety of the crossing, which we have done.

Therefore **IT IS ORDERED** that:

1. PAMRC's application for rehearing of D.02-11-029 is denied.
2. PAMRC's motion for an injunction is denied.

This order is effective today.

Dated August 21, 2003, at San Francisco, California.

MICHAEL R. PEEVEY
President
CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
SUSAN P. KENNEDY
Commissioners