

Decision 07-09-047

September 20, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Reclamation District No. 2038 and
Lower Jones Company,

Complainants,

vs.

Pacific Gas and Electric Company,

Defendant.

Case 06-09-008
(Filed September 6, 2006)

**ORDER DENYING REHEARING
OF DECISION (D.) 07-01-014**

I. SUMMARY

In Commission Decision (D.) 07-01-014, we determined that Defendant Pacific Gas & Electric Company (“PG&E”) holds the necessary certificates of public convenience and necessity for the construction of Pipeline 57C, connecting the utility’s gas storage facility at McDonald Island in the Bay-Delta region to its backbone transmission system. (See D.07-01-014, p. 16 [Conclusion of Law 2].) We further found that PG&E is permitted under Public Utilities Code Sections 612 and 613¹ to condemn property necessary for the construction and maintenance of its utility plant, and that PG&E is not precluded by Section 625 from exercising its eminent domain power in the construction of Pipeline 57C. (D.07-01-014, pp. 7, 8, 16, 17 [Conclusions of Law 4, 6].) We also determined that PG&E undertook construction of Pipeline 57C solely for the

¹ Unless otherwise noted, all statutory references are to the Public Utilities Code.

necessary purpose of meeting its Commission-ordered obligation to serve associated with McDonald Island gas storage, transmission and distribution. (D.07-01-014, p. 17 [Conclusion of Law 5].) Having made these findings, we determined that there was no triable issue of material fact remaining, and granted judgment as a matter of law for PG&E.

Complainants Reclamation District No. 2038 and Lower Jones Company (collectively, “Complainants”) filed a timely application for rehearing of D.07-01-014 on February 13, 2007. Complainants challenge D.07-01-014 on the ground that Section 625 requires a hearing in advance of any condemnation of property which may be used for competitive purposes, that such hearing must determine whether the proposed condemnation would serve the public interest, and that the Commission erred in concluding that PG&E’s condemnation of property for the construction of Pipeline 57C is exempt from the requirements of Section 625. PG&E filed a response to the rehearing application on February 23, 2007.

We have reviewed all of the allegations of error raised in the rehearing application, and determine that good cause does not exist for granting the rehearing application. Accordingly, we deny Complainants’ application for rehearing of D.07-01-014.

II. BACKGROUND

Reclamation District No. 2038 (“the District”) is a governmental entity organized pursuant to Water Code Section 50,000 *et seq.* The District operates and maintains levees and dredger cuts in the Lower Jones Tract in western San Joaquin County. Lower Jones Company is a general partnership owning land on Lower Jones Tract. Complainants’ land and levees would be crossed by PG&E Pipeline 57C.

The McDonald Island complex provides approximately 25% of available natural gas supply during cold weather months for the 3.7 million customers in PG&E’s service area. PG&E asserts that Pipeline 57C (a 24-inch pipe running approximately 6.4 miles) is being constructed as a back-up facility to ensure that the utility can continue to

provide natural gas to its customers if Pipeline 57B, the existing pipeline, were destroyed or damaged because of a levee failure or other event. PG&E proposes to use horizontal drilling to cross channels, levees, and islands. This method consists of drilling an underground route for the pipeline from one end and then pulling the pipeline back through the underground route from the other end. The horizontal bores are expected to be 90 feet below the toes of the levees.

In various judicial and administrative forums, Complainants have sought to prevent or postpone the construction of Pipeline 57C.² Their concern is that PG&E's construction methods will increase the risk of levee failure on the Lower Jones Tract, primarily by fracturing the formation under the levees and providing a channel along the underground length of the pipeline for water to seep, thereby weakening the stability of the overlying levees. Complainants point to recent levee failures in the Delta and general governmental and public concern about levee safety in the Delta. Complainants also allege that once the horizontal boring is underway, levee failure and flooding could occur, for which money damages would not provide adequate relief.

Because PG&E had already commenced pipeline construction, the Complainants also sought, as part of their complaint, an immediate cease and desist order from the Commission, pursuant to Section 1006 and the Commission's general powers. In a ruling issued on October 2, 2006, the assigned Administrative Law Judge ("ALJ") denied the request for a cease and desist order.

On October 3, 2006, PG&E filed a motion for summary judgment as to the complaint filed against it by Complainants in C.06-09-008. The assigned ALJ granted Complainants an opportunity to conduct discovery before filing their opposition to the motion. Complainants' opposition was filed on November 9, 2006, and PG&E filed its reply on November 13, 2006.

² See, e.g., *Reclamation District No. 2024 v. California State Lands Comm'n*, Case No. 06CS00727 (Sacramento County Superior Court); *PG&E v. Lower Jones Co.*, Case No. CV029978 (San Joaquin County Superior Court).

The ALJ's proposed decision resolving PG&E's motion for summary judgment was mailed to the parties on December 26, 2006. Due to public necessity, time was shortened under Commission Rule 14.6(c)(9) for the parties to file comments on the proposed decision. Complainants filed comments on December 29, 2006, and PG&E filed comments on January 4, 2007. We issued D.07-01-014 on January 11, 2007, granting PG&E's motion for summary judgment.

III. DISCUSSION

The crux of Complainants' challenge to D.07-01-014 is that we improperly and erroneously determined that Pipeline 57C was necessary and being constructed solely for the purpose of meeting PG&E's obligation to serve and ensuring reliability of natural gas service from the McDonald Island natural gas storage facility. (Rehearing App., pp. 3-5.) Complainants allege that it is unlikely that Pipeline 57B will ever fail, and for that reason Pipeline 57C will likely never be needed for emergency back-up. (Rehearing App., p. 3.) As a result, Complainants argue that the primary use and benefit of Pipeline 57C will be for noncore service, and that at a minimum Pipeline 57C will also be used for competitive purposes. (Rehearing App., p. 3.) For these reasons, Complainants claim that the hearing exemption contained in Section 625 does not apply, and therefore we erred in failing to hold a hearing as required by Section 625. (Rehearing App., pp. 3-5.) These allegations of error lack merit.³

Sections 612 and 613 provide that gas and electrical corporations "may condemn any property necessary for the construction and maintenance of" its gas and electric plants. (Pub. Util. Code, §§ 612, 613.) Section 625 provides that a utility may not condemn private property for competitive purposes without a hearing and a finding by the Commission that such condemnation is in the public interest. (Pub. Util. Code, § 625, subd. (a)(1)(A), (a)(2)(A).) However, Section 625(a)(1)(B) states that the hearing

³ Complainants raised all of these issues on numerous occasions in the underlying proceeding, and we considered all of these arguments before issuing D.07-01-014. (See, e.g., Complainants' Response to PG&E's Motion for Summary Judgment, filed November 9, 2006; Complainants' Comments on ALJ's Proposed Decision, filed January 5, 2007.)

requirement does not apply “to the condemnation of any property that is necessary solely for an electrical company or gas corporation to meet its commission-ordered obligation to serve.” (Pub. Util. Code, § 625, subd. (a)(1)(B).) In D.07-01-014, we found that PG&E adequately demonstrated that Pipeline 57C was “necessary solely” for the purpose of meeting its obligation to serve, and thus determined that a hearing pursuant to Section 625 was not required. (D.07-01-014, pp. 9-13, 17 [Conclusions of Law 5, 6].)

The Decision discusses at length the evidence submitted by PG&E in support of its contention that Pipeline 57C falls within the hearing exemption of Section 625(a)(1)(B). Specifically, at pp. 9-13 of D.07-01-014, we address the substantial evidence contained in the underlying record in support of PG&E’s contention that construction of Pipeline 57C was being undertaken for reliability purposes. For example, the deposition testimony of Robert Howard, General Manager of Gas Transmission at PG&E, discusses in detail the fact that the purpose of Pipeline 57C is to ensure reliability. (See D.07-01-014, pp. 9-13.) Mr. Howard’s testimony and the documents discussed during his deposition indicate that the purpose of the Pipeline 57C project is to improve reliability and to provide a safety net in the event that Pipeline 57B should fail. (See, e.g., PG&E’s Request for Phase 1 Approval for the Line 57 Reliability Improvement Project (Nov. 1, 2004), Exh. 1 to Howard Deposition (Bates Stamp 2); Line 57C Reliability Project (May 23, 2005), Exh. 6 to Howard Deposition (Bates Stamp 92); Howard Deposition 79:24 to 80:10.)

In addition to Mr. Howard’s testimony, other declarations submitted by PG&E in support of Pipeline 57C reinforce Mr. Howard’s testimony and further demonstrate that providing a back-up to Line 57B for reliability purposes was the motivating force behind the project. (See D.07-01-014, p. 11, fn. 9.) For example, the August 14, 2006 Supplemental Declaration of Gary Grelli, Senior Pipeline Engineer and Project Manager in the California Gas Transmission Department of PG&E, indicates that “Line 57C is not being constructed for any competitive purpose PG&E must improve the reliability of Line 57 to ensure the continuous supply of gas for PG&E’s business and residential customers; this is the purpose of the Project.” (Supplemental

Declaration of Gary Grelli (Complainants' Exh. 7 in Support of Request for Immediate Stay), p. 2, ¶ 5.) In addition, the September 21, 2006 Declaration of Roger Graham, Manager of Product Management in the Gas Transmission and Distribution Department of PG&E, indicates that "Line 57C will provide a second line to the McDonald Island facility to ensure that PG&E will be able to continue to store and withdraw natural gas from the facility even if Line 57B fails." (Declaration of Roger Graham (Complainants' Exh. 10 in Support of Request for Immediate Stay), p. 4, ¶ 7.) These declarations support PG&E's contention that the purpose of Pipeline 57C is to ensure reliability and provide a back-up in the event that Pipeline 57B should fail.

After reviewing all of the arguments and evidence submitted by Complainants and by PG&E, we determined as a factual matter that "Pipeline 57C is being constructed as a back-up facility to ensure that PG&E can continue to provide natural gas to its customers if Pipeline 57B, the existing pipeline, were destroyed or damaged because of a levee failure or other event." (D.07-01-014, p. 16 [Finding of Fact 6].) We further found that "Complainants have presented nothing in their opposition to PG&E's motion [for summary judgment] indicating that this is a triable issue of material fact." (D.07-01-014, p. 16 [Finding of Fact 7].) As such, we granted PG&E's motion for summary judgment.

In their rehearing application, Complainants allege that Section 625 requires a hearing if the property being condemned could conceivably be used for any purpose other than meeting the Commission-ordered obligation to serve. (Rehearing App., p. 3.) That is not what the plain language of Section 625 requires. The inquiry under Section 625(a)(1)(B) is whether the condemnation is "necessary solely" to meet the relevant utility's obligation to serve. (Pub. Util. Code, § 625, subd. (a)(1)(B).) In D.07-01-014, we properly determined, given the evidence submitted by the parties, that "but for" its need to ensure system reliability, PG&E would not be undertaking the construction of Pipeline 57C. (D.07-01-014, p. 11.) The fact that there may be some incidental effect on storage expansion does not in any way alter the reason why Pipeline

57C is being built in the first place, namely to act as a safety net in the event that Pipeline 57B should suffer a catastrophic failure. (D.07-01-014, p. 13.)

Complainants clearly disagree with our conclusions regarding the underlying purpose of the Pipeline 57C project. However, Complainants' rehearing application fails to provide a basis for their assertion that our determinations on these issues are incorrect. As noted above, Complainants have raised these same issues many times during the underlying proceeding, and we fully considered all of the arguments and evidence submitted by all parties before issuing D.07-01-014. The fact that we reached conclusions contrary to some of the positions advocated by Complainants does not mean that we failed to consider such arguments. Commission decisions will be upheld as long as they are supported by record evidence. (See Pub. Util. Code, §§ 1757, 1757.1.)

IV. CONCLUSION

Accordingly, Complainants' allegations of error lack merit. Thus, rehearing of D.07-01-014 is denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED THAT:

1. Rehearing of D.07-01-014 is hereby denied.
2. This proceeding is closed.

This order is effective today.

Dated September 20, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners