

ALJ/JSW/sid

Date of Issuance 6/5/2009

Decision 09-06-019 June 4, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Southern California Gas
Company and San Diego Gas & Electric
Company to Expand Existing Off-System
Delivery Authority.

Application 08-06-006
(Filed June 6, 2008)

**DECISION RESOLVING THE AIR QUALITY, WOBBE INDEX AND
CALIFORNIA ENVIRONMENTAL QUALITY ACT ISSUES**

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DECISION RESOLVING THE AIR QUALITY, WOBBE INDEX AND CALIFORNIA ENVIRONMENTAL QUALITY ACT ISSUES

1. Summary

On June 6, 2008, San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas) filed the above-captioned application. The application seeks authority to expand their off-system delivery service of natural gas to all pipeline interconnections on the same terms and conditions as authorized in Decision (D.) 06-12-031. The protests relevant to this decision include protests by the South Coast Air Quality Management District (SCAQMD) and the Southern California Generation Coalition (SCGC). The protests of SCAQMD and SCGC raise air quality, gas quality, and Wobbe Index issues, and whether an environmental analysis of the application is required under the California Environmental Quality Act (CEQA).¹

Today's decision concludes that the air quality, gas quality, Wobbe Index, and the CEQA issues that were raised by SCAQMD and SCGC in this proceeding, were previously addressed in Rulemaking (R.) 04-01-025 through D.06-09-039. As a result, Pub. Util. Code § 1709 bars those issues from being relitigated in this proceeding. In addition, this decision concludes that a CEQA analysis is not required for this application because there is no "project" within the meaning of CEQA.

2. Procedural Background

In D.06-12-031, the Commission authorized SDG&E and SoCalGas to provide off-system delivery of natural gas to Pacific Gas and Electric Company

(PG&E) on an interruptible basis. D.06-12-031 also authorized SDG&E and SoCalGas to file an application after May 1, 2008 to offer off-system delivery to pipeline interconnections other than PG&E. The application in this proceeding was filed in response to that invitation, and was protested by SCAQMD and SCGC.

A prehearing conference (PHC) was noticed for, and held on September 29, 2008. One of the purposes of the PHC was to discuss the issue about the possible impact of the application on the air quality in the Los Angeles basin, as raised in the protests. At the PHC, SCAQMD also stated that the application amounts to a “project,” which requires an analysis under CEQA. The parties at the PHC were provided an opportunity to discuss these issues.

Following the PHC, a scoping memo and ruling (scoping memo) was issued on December 18, 2008. The following two legal issues were included in the scope of this proceeding:

“Have the air quality and Wobbe Index issues already been addressed by the Commission, and if so, should the parties be barred from raising those issues in this proceeding?”

“Does this application constitute a “project” under the CEQA that requires the preparation of an environmental impact report?”

The parties filed opening and reply briefs on these legal issues. Opening briefs were filed by the California Independent Petroleum Association (CIPA) and the California Natural Gas Producers Association (CNGPA), the Indicated Producers, Sempra LNG, Shell Energy North America (US), L.P. (Shell), SDG&E

¹ See Public Resources Code § 21000 et seq., and the “CEQA Guidelines” contained in Title 14 of the California Code of Regulations, § 15000 et seq.

and SoCalGas, SCAQMD, and SCGC. Reply briefs were filed by El Paso Natural Gas Company (El Paso) and Mojave Pipeline Company (Mojave), SDG&E and SoCalGas, Sempra LNG, SCGC, and SCAQMD.

3. Discussion

3.1. Background

The applicants propose that they be authorized to expand the existing authority for interruptible and firm off-system delivery service, which was authorized in D.06-12-031, to all pipeline interconnections. In their reply to the protests and at the PHC, the applicants clarified that if their application is granted, that they should be allowed to make off-system deliveries of gas to all pipeline interconnections on an interruptible basis. For firm off-system deliveries, the applicants clarified that they would file a separate application to do so.

The application's request for off-system delivery to interconnection points other than PG&E provides the ability for transportation customers of SDG&E and SoCalGas to send natural gas to east-of-California markets.

3.2. Protests of SCAQMD and SCGC

Separate protests to the application were filed by SCAQMD and SCGC. SCAQMD and SCGC contend that if the Commission grants the application to allow the delivery of gas to off-system interconnections other than PG&E, that these deliveries could occur by displacement, and delivery to the off-system points upstream of the SoCalGas system would be by backhaul. SCAQMD and SCGC contend that approval of the application will lead to more regasified liquefied natural gas (LNG) being burned in the South Coast Air Quality Basin (Basin) and less interstate pipeline gas being delivered into the SoCalGas system. They further contend that the increase in the use of regasified LNG in the Basin

will result in more nitrogen oxide (NO_x) emissions because regasified LNG has a higher heating value when burned. Since NO_x emissions are a precursor to ozone, SCAQMD and SCGC contend that this will lead to an increase in the ozone levels for the Basin. SCAQMD asserts that such a result will negatively affect its ability to bring the Basin into compliance with federal air quality standards, and that it will potentially threaten the health and environment of its residents.²

At the PHC, SCAQMD argued that the relief requested in the application amounts to a “project” under CEQA, and that an environmental impact report must be prepared before any approval is given.

3.3. Issues Presented

The ultimate issues in this proceeding are whether the Commission should grant the applicants’ request to expand their interruptible off-system deliveries to all other pipeline interconnections, and whether the applicants should file a separate application before firm off-system deliveries to these interconnections are offered. However, before we can address these issues, we need to resolve the two threshold legal issues that were raised by the protests, the responses to the protest, and at the PHC.³

² SCAQMD is responsible for controlling the air pollution in the Basin. The Basin covers an area of approximately 10,743 square miles in Orange County and portions of Los Angeles, Riverside and San Bernardino counties. (See Title 17, Cal. Code Regs. § 60104.)

³ A third legal issue regarding whether the authority requested in the application will affect the Hinshaw exemptions of SDG&E and SoCalGas was also identified in the scoping memo. The parties will address the Hinshaw exemptions issue in the written briefs following the completion of the evidentiary hearings.

As noted in the scoping memo, the first legal issue is whether the air quality and Wobbe Index issues that SCAQMD and SCGC raised have already been addressed by the Commission, and if so, whether the parties should be barred from raising those issues again in this proceeding. The second legal issue is whether the application filed by SDG&E and SoCalGas constitutes a “project” under CEQA, and if so, whether the preparation of an environmental impact report is required.

Today’s decision analyzes these two legal issues. Once these legal issues are resolved, we can then determine the course of action to take with respect to the remaining factual issues.⁴

3.4. Collateral Estoppel Discussion

3.4.1. Introduction

The first issue to analyze is whether the air quality and Wobbe Index issues that SCAQMD and SCGC raised have already been addressed by the Commission in prior proceedings. If they have, we must then decide whether the legal doctrine of collateral estoppel should apply so as to prevent SCAQMD and SCGC from raising these issues again in this proceeding.

Pub. Util. Code § 1709 states: “In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.” Pub. Util. Code § 1709 is designed to prevent a party from making a collateral attack on a Commission decision. (D.92-12-023 [47 CPUC2d 51, 55]; D.03-08-036 at 30-31.) A collateral attack is an attempt to invalidate the judgment

⁴ As noted in the scoping memo, following this decision, we anticipate an amended scoping memo will issue that outlines the factual issues to be addressed and the schedule for the remainder of this proceeding.

or order of the Commission in a proceeding other than that in which the judgment or order was rendered. (D.03-08-036 at 30-31; D.07-04-017 at 8; see *Harley v. Superior Court* (1964) 226 Cal.App.2d 432, 435.)

3.4.2. Positions of the Parties

In its protest, SCAQMD argues that “granting the application will increase air pollution in the Basin, the nation’s most polluted region, and will potentially threaten the health and environment of its residents.”⁵ This argument is based on SCAQMD’s contention that allowing off-system deliveries will result in more regasified LNG being delivered into the SoCalGas system, and less interstate pipeline gas being delivered into the system. SCAQMD asserts that this will result in the consumption of more regasified LNG in SoCalGas’ load center. SCAQMD further asserts that the “chemical composition of LNG ... differs qualitatively from conventional natural gas in that it has a higher heating value when burned,” and that more NO_x will be released as a result, which in turn will worsen the ozone levels in the Basin.⁶

SCGC’s protest to the application is similar to the protest of SCAQMD. SCGC contends that allowing the off-system deliveries will result in the physical consumption of regasified LNG in the SoCalGas load center, with less interstate pipeline gas being physically delivered into the SoCalGas system. SCGC asserts that it is “likely that the LNG would have a higher Wobbe index than the displaced interstate pipeline gas,” and as a result, “the Wobbe index of the gas

⁵ SCAQMD’s July 11, 2008 Protest in A.08-06-006 at 3.

⁶ *Id.* at 2-3.

consumed in the SoCalGas load center would be increased.”⁷ SCGC further contends that this could impact the air quality in the Basin, and the electrical generation equipment that burns the gas.

SDG&E and SoCalGas contend that the air quality, Wobbe Index, and CEQA issues “... have been previously and fully adjudicated in other proceedings and thus re-litigation of such issues constitutes an improper collateral attack on final Commission and appellate decisions.”⁸ SDG&E and SoCalGas argue that these three issues have been raised, vetted, and rejected by the Commission, as noted in their chronology of events that took place in R.04-01-025.⁹ SDG&E and SoCalGas also point out that SCAQMD was unsuccessful in its appeals before this Commission and at the California Court of Appeal and California Supreme Court. As a result of D.06-09-039, and the unsuccessful appellate challenges of SCAQMD, SDG&E and SoCalGas contend that collateral estoppel bars SCAQMD and SCGC from raising these issues again in this proceeding.

The position of SDG&E and SoCalGas is supported by CIPA and CNGPA, El Paso and Mojave, Indicated Producers, Sempra LNG, and Shell.

SCAQMD and SCGC contend in response to the parties who oppose the protests of SCAQMD and SCGC, that the air quality and Wobbe Index issues raised in this proceeding do not constitute a collateral attack on the Commission’s prior decisions. SCAQMD argues:

⁷ SCGC’s July 11, 2008 Protest in A.08-06-006 at 5.

⁸ SDG&E and SoCalGas February 2, 2009 Opening Brief in A.08-06-006 at 2.

⁹ *Id.* at 4-9.

“At no point in this proceeding, however, has [SCAQMD] requested reconsideration of the 1385 Wobbe Index set by the Commission in the gas quality proceeding. Nor does [SCAQMD] seek to challenge decisions reached in the rulemaking related to LNG procurement. Rather, [SCAQMD’s] concerns relate to the present Application and its potential impacts on the environment. ...

“Given that [SCAQMD] is not requesting reconsideration of the 1385 Wobbe Index, any assertion that [SCAQMD] is re-litigating an issue conclusively determined by the Commission is unavailing. [SCAQMD] is therefore not barred from raising air quality issues in the present proceeding.”¹⁰

SCAQMD also argues that the gas quality analysis in Phase II of R.04-01-025 and the application in this proceeding “are two fundamentally different projects.”¹¹ SCAQMD argues that in D.06-09-039, the Commission “addressed the need to revise gas quality specifications to accommodate a wider range of natural gas primarily from overseas sources” at a time when no LNG terminals were operational.¹² Since the Energia Costa Azul LNG terminal in Mexico is now operating, SCAQMD contends that if the application to expand off-system delivery service is approved, that this will lead to more supplies of regasified LNG coming into SoCalGas’ service territory from that terminal, which will lead to the physical consumption of this regasified LNG in the SoCalGas load center with less interstate pipeline gas being delivered into the SoCalGas system. SCAQMD asserts that the consumption of this regasified LNG

¹⁰ SCAQMD’s February 13, 2009 Reply Brief in A.08-06-006 at 11-12.

¹¹ SCAQMD’s January 30, 2009 Opening Brief in A.08-06-006 at 15.

¹² *Ibid.*

in the SoCalGas load center will result in an increase in NO_x emissions, which will worsen the ozone level in the Basin.

SCAQMD further contends that the air quality and gas quality issues should be revisited in this proceeding because there are three new studies that “further demonstrate the correlation between LNG and NO_x emissions and provide information regarding possible mitigation measures.”¹³ As a result of this new data, SCAQMD contends that “an evidentiary hearing is warranted in the present proceeding to investigate air quality issues and possible mitigation measures with respect to NO_x emissions in the Basin.”¹⁴

3.4.3. Collateral Estoppel Analysis

We agree with the contention of SDG&E and SoCalGas, and the parties supporting their position, that the air quality, gas quality, and Wobbe Index issues that SCAQMD raised in R.04-01-025, and which were decided by D.06-09-039, are the same issues that SCAQMD and SCGC seek to raise in this proceeding. For the reasons discussed below, Public Utilities Code § 1709 prevents these issues from being relitigated in this proceeding.

First of all, the air quality argument that SCAQMD and SCGC raised in this proceeding is integrally related to the gas quality specifications that we decided in D.06-09-039. The air quality argument of SCAQMD and SCGC is based on the assertion that the expansion of off-system deliveries will result in more regasified LNG being burned in the Basin, which will result in more NO_x being produced in the Basin, and which will result in an increase in the

¹³ SCAQMD’s January 30, 2009 Opening Brief in A.08-06-006 at 7.

¹⁴ *Id.*, at 8.

deterioration of the air quality in the Basin.¹⁵ We noted this relationship between air quality and gas quality in Phase I of R.04-01-025 when we stated:

“The second issue which the scoping memo seeks comment on is whether LNG supplies, when regasified, should meet different gas quality specifications than the gas quality specifications that are in the respondents’ Commission-approved tariffs. The gas quality issue is important because it can affect the safety and performance of gas-fired household appliances, manufacturing equipment, turbines, and compressed natural gas (CNG) vehicles. In addition, gas quality specifications can be affected by applicable air quality standards.” (D.04-09-022 at 81.)

This relationship between air quality and gas quality was also noted in D.06-09-039. In D.06-09-039, we summarized the testimony of the SDG&E and SoCalGas witnesses who addressed the potential air quality impacts that could result from “the impact of introducing higher heat content gas, including gas with a Wobbe Index of 1400 and above, to the [Basin],” and the potential air quality impact from using gas with a Wobbe Index of above 1400. (D.06-09-039 at 110.) D.06-09-039 also summarized the gas quality recommendation that SCAQMD made in R.04-01-025 for a “Wobbe Index range of 1332, plus or minus two percent with a maximum of 1360.” (D.06-09-039 at 114.) SCAQMD’s own brief, in response to the December 18, 2008 scoping memo, contains the heading that “The Commission Considered Air Quality and Wobbe Index Issues in Gas Quality Proceeding R.04-01-025,” and states “The Commission developed a substantial record [in R.04-01-025] regarding the various issues surrounding

¹⁵ See SCAQMD’s January 20, 2009 Opening Brief in A.08-06-006 at 2, 6-7, 11, and SCAQMD’s February 13, 2009 Reply Brief in A.08-06-006 at 2-4.

natural gas quality standards.”¹⁶ At pages 3 to 6 of this brief, SCAQMD provided a summary of its involvement in the gas quality phase of R.04-01-025, and the considerations and actions taken by the Commission in D.06-09-039.

Our second reason as to why the air quality, gas quality, and Wobbe Index issues should be precluded from this proceeding is because we specifically considered the same air quality, gas quality, and Wobbe Index arguments that SCAQMD raised during the gas quality phase in R.04-01-025, which led to the adoption of D.06-09-039. One can see the similarities of these arguments by comparing SCAQMD’s January 18, 2006 opening brief and its February 1, 2006 reply brief, which were filed following the evidentiary hearings on the gas quality issues in R.04-01-025, to the January 20, 2009 opening brief that SCAQMD filed in response to the December 18, 2008 scoping memo.

In the January 18, 2006 opening brief in R.04-01-025, SCAQMD stated that the anticipated gas quality decision “on the terms and conditions under which [LNG] may be imported into Southern California will have important impacts on [SCAQMD’s] efforts to attain the federally established national ambient air quality standards in the Basin.”¹⁷ SCAQMD went on to state that it was “concerned that the standard for gas quality proposed by [SDG&E and SoCalGas] would lead to increased emissions of [NO_x] in the Basin, thus making attainment of the federal air quality standard for ozone more difficult.”¹⁸ This argument in R.04-01-025 is virtually identical to what SCAQMD raised in its January 30, 2009 opening brief, in which it states:

¹⁶ SCAQMD’s January 20, 2009 Opening Brief in A.08-06-006 at 3.

¹⁷ SCAQMD’s January 18, 2006 Opening Brief in R.04-01-025 at 1.

¹⁸ *Ibid.*

“The Commission’s decision regarding [SDG&E and SoCalGas’] application to expand existing off-system delivery authority ... will have a significant impact on [SCAQMD’s] ability to fulfill its statutory duty to bring the Basin into compliance with federal and state air quality standards. [SCAQMD] is particularly concerned that granting SoCalGas and SDG&E’s Application will result in more [LNG] from overseas sources being burned in the Basin, thus increasing emissions of [NO_x] – an ozone precursor – and making attainment of the federal and state air quality standard for ozone more difficult.”¹⁹

We resolved this air quality argument in D.06-09-039 by adopting “revised gas quality tariffs for SDG&E and SoCalGas that incorporate a maximum Wobbe Index.” (D.06-09-039 at 148.) We noted that all the parties in R.04-01-025 “agreed that a maximum Wobbe Index should be included as an element of the revised tariff,” and that “As concluded in the NGC + White Paper, the Wobbe Index is the most robust single gas quality parameter.” (*Ibid.*)²⁰ We recognized in D.06-09-039 that “Parties disagree vigorously on what maximum Wobbe Index should be adopted as part of SDG&E/SoCalGas’ tariffs.” (*Id.* at 149.) In adopting the Wobbe Index range for SDG&E and SoCalGas, we stated that “We support the approach of the NGC + White Paper, which explicitly acknowledges the data gaps and recommends a gas quality standard consistent with those gaps.” (*Id.*, at 152.)²¹ SCAQMD had recommended in R.04-01-025 that a Wobbe Index “of

¹⁹ SCAQMD’s January 30, 2009 Opening Brief in A.08-06-006 at 2.

²⁰ For a description of the NGC + White Paper, and a discussion of the Commission’s reliance on that report, see D.06-09-039 at 142-147 and 153.

²¹ As noted in D.06-09-039, we adopted the gas quality specifications recommended in the NGC + White Paper because it was “the consensus recommendation of a group that included representatives of all major segments of the natural gas industry,” the “group reached its recommendation based on the available information and recommended

Footnote continued on next page

1332, plus or minus 2% with a maximum of 1360, for the importation of LNG into the [Basin]" be adopted.²² We adopted a minimum Wobbe Index of 1279 and a maximum Wobbe Index of 1385 in D.06-09-039. This Wobbe Index range was decided upon after a careful review of all the evidence presented in Phase II of R.04-01-025, including all of the gas quality issues that SCAQMD raised in Phase II. (See D.06-09-039 at 114-118.)

Further comparison of the January 18, 2006 opening brief in R.04-01-025 to the January 30, 2009 brief in this proceeding and to D.06-09-039, reveals other similar arguments. SCAQMD had argued in its January 18, 2006 opening brief at page 6 that "Too many questions remain unanswered about the environmental and other effects of importing LNG with a high Wobbe Index."²³ When we summarized SCAQMD's proposed Wobbe Index recommendation in D.06-09-039, we stated that SCAQMD "believes that its proposed [Wobbe Index] standard is necessary because the effects of introducing higher Wobbe Index gas are uncertain." (D.06-09-039 at 115.) In its January 30, 2009 Opening Brief at 7, SCAQMD argues that new studies "conducted and released since the Commission's gas quality proceeding provide further evidence that burning high Wobbe Index LNG results in an increase in NOx emissions."

specific additional studies," and because the NGC + White Paper "received the endorsement" of the Federal Energy Regulatory Commission (FERC) in its June 15, 2006 policy statement on gas quality. (D.06-09-039 at 147, 153.)

²² See SCAQMD's January 18, 2006 Opening Brief in R.04-01-025 at 1, 3-4.

²³ At page 8 of SCAQMD's January 18, 2006 Opening Brief in R.04-01-025, SCAQMD states that "the testimony before the Administrative Law Judge [in R.04-01-025] often highlighted what was not known about the effects of a 1400 Wobbe Index...." In the same brief at 18-29, SCAQMD discussed the conflicting testimony about the potential impacts of a high Wobbe Index.

In D.06-09-039, the Commission addressed the argument about a high Wobbe Index and an increase in NO_x emissions by relying on the NGC + White Paper, and stating that “A maximum Wobbe Index can be applied to address yellow tipping, incomplete combustion, nitrogen oxide emissions and carbon monoxide emissions.” (D.06-09-039 at 144, emphasis added.) In rejecting SCAQMD’s recommendation for a maximum Wobbe Index of 1360 for SoCalGas, we stated:

“We disagree with [SCAQMD’s] conclusion that in the face of uncertainty, the Commission should adopt a policy that would only permit gas supplies that are similar to average historical gas supplies. The job of the Commission is to consider the available evidence and adopt a reasonable policy.” (D.06-09-039 at 152.)

Another argument that SCAQMD raised in its February 13, 2009 Reply Brief in this proceeding is that its air quality concerns in this proceeding do not constitute a collateral attack on prior Commission decisions because it has not requested reconsideration of the 1385 Wobbe Index established in D.06-09-039, nor does it seek to challenge D.08-10-025.²⁴

We disagree with SCAQMD. As discussed earlier, the air quality, gas quality, and Wobbe Index issues that SCAQMD raised previously, and in this proceeding, have already been adjudicated in D.06-09-039. By repeating the

²⁴ SCAQMD’s only reference to D.08-10-025 appears at page 11 of its February 13, 2009 reply brief where it states “Nor does the District seek to challenge decisions reached in the rulemaking related to LNG procurement.” In D.08-10-025, we said that SCAQMD’s recommendation for “monitoring and testing provisions to ensure that LNG will meet the 1385 Wobbe standard mandated in D.06-09-039, and indemnification provisions...” were beyond the scope of D.08-10-025. We also rejected the argument of SCAQMD to conduct a CEQA analysis by concluding that the “utilities’ potential procurement of LNG supply is not a ‘project’ under CEQA....” (D.08-10-025 at 21.)

same arguments that were made in the gas quality phase of R.04-01-025, SCAQMD is simply attempting to persuade the Commission to reconsider the same air quality, gas quality, and Wobbe Index issues that were decided in D.06-09-039.²⁵ Once an adjudicating body has decided an issue of fact or law necessary to its judgment, collateral estoppel precludes relitigation of the issue in a different cause of action involving a party to the first proceeding.

(*Vanderberg v. Superior Court* (1999) 21 Cal.4th 815, 828.) SCAQMD was an active participant in the gas quality phase in R.04-01-025 where it raised the same air quality, gas quality, and Wobbe Index issues that it now seeks to relitigate in this proceeding. SCAQMD's actions to revisit the air quality, gas quality, and Wobbe Index issues in this proceeding amounts to a collateral attack on D.06-09-039 that is barred by Pub. Util. Code § 1709.

A third reason to apply Pub. Util. Code § 1709 is because SCAQMD and SCGC have not been able to distinguish the determinations made in D.06-09-039 from their arguments raised in their protests to this application. SCAQMD contends that the gas quality proceeding adjudicated in D.06-09-039 is a fundamentally different project from this proceeding because R.04-01-025 "addressed the need to revise gas quality specifications to accommodate a wider range of natural gas primarily from overseas sources" at a time when no LNG terminals were operational.²⁶ SCGC contends that "This proceeding, and the

²⁵ SCAQMD also raised the same kinds of arguments in its unsuccessful appeals of D.06-09-039.

²⁶ SCAQMD's January 30, 2009 Opening Brief in A.08-06-006 at 15.

potential off-system services by SoCalGas and SDG&E, present different real-world implications from ... R.04-01-025, which culminated in D.06-09-039.”²⁷

It is clear, however, that in the development of the air quality and gas quality specifications in D.06-09-039, the Commission and SCAQMD expected that these specifications would apply to any gas supply that flows into the SDG&E and SoCalGas transmission systems, including regasified LNG that might come from the Energia Costa Azul LNG terminal in Mexico. When we initiated R.04-01-025 on January 22, 2004, we recognized at page 13 of the rulemaking that we would have to establish “guidelines for how natural gas supplies from LNG facilities can access each of their intrastate pipelines and distribution facilities to the extent that LNG terminals are constructed on the West Coast.”

In Ordering Paragraph 17 of D.06-09-039, SDG&E and SoCalGas were directed to file revised Rule 30 tariffs to incorporate the gas specifications adopted in D.06-09-039. Rule 30 for both SDG&E and SoCalGas provide that the natural gas entering onto their gas transmission systems must meet the gas quality specifications set forth in Rule 30 or in applicable agreements and contracts. In D.06-09-039 at 78, we noted that the LNG project in Mexico, “may be closer to fruition” than the LNG project sponsored by Woodside Natural Gas. And in SCAQMD’s January 18, 2006 Opening Brief in R.04-01-025, there were several statements that the Energia Costa Azul project could be a potential source of LNG supply. Thus, the gas quality phase of R.04-01-025 clearly

²⁷ SCGC’s February 13, 2009 Reply Brief in A.08-06-006 at 1.

contemplated the potential sources of LNG when the gas quality specifications were adopted in D.06-09-039.

The fourth reason as to why SCAQMD and SCGC should be barred from raising the same air quality and gas quality issues in this proceeding is because of the unsuccessful appellate efforts of SCAQMD.

SCAQMD sought unsuccessfully to appeal the determinations reached in D.06-09-039. On October 25, 2006, SCAQMD, along with two other parties, filed separate applications for rehearing of D.06-09-039. SCAQMD's rehearing application argued that the gas quality standards adopted in D.06-09-039 had the potential to impact the environment and that a CEQA analysis was required. SCAQMD also alleged that the gas quality standards were adopted in D.06-09-039 without sufficient support. We denied the applications for rehearing in D.07-02-032 and rejected the arguments of SCAQMD. We stated in part that the establishment of a maximum Wobbe Index of 1385 was "supported by substantial evidence in the record, by the research and findings contained in the [NGC + White Paper], and by recent statements from the FERC." (D.07-02-032 at 14.)

On March 21, 2007, SCAQMD filed a petition for a writ or review of D.06-09-039 in the California Supreme Court and at the California Court of Appeal. On November 7, 2007, the California Court of Appeal denied the petition for a writ, and on July 16, 2008, the California Supreme Court denied the petition for a writ. A well-established line of cases have held that the denial of a petition for review of an order of this Commission "is a decision on the merits both as to the law and the facts presented in the review proceedings," and has res judicata effect. (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d at 630; *Consumers Lobby Against Monopolies v. California Public Utilities Commission* (1979)

25 Cal.3d 891, 901; see *Communications Telesystems International v. California Public Utilities Commission* (9th Cir. 1999) 196 F.3d 1011, 1018-1019.) As discussed earlier, since SCAQMD raised the same air quality and gas quality issues that were adjudicated in D.06-09-039, and SCAQMD's petition for a writ to review D.06-09-039 was denied by the California Supreme Court and the California Court of Appeal, SCAQMD and SCGC should be precluded from relitigating those same issues again in this proceeding.

Our fifth reason for applying Pub. Util. Code § 1709 to the air quality and gas quality issues raised by SCAQMD and SCGC in this proceeding is that we are not persuaded that the three new reports cited by SCAQMD merit a reevaluation of the air quality and gas quality issues that were adjudicated in D.06-09-039.

SCAQMD argues that collateral estoppel should not apply to the application in this proceeding because three new studies have been released since the adoption of D.06-09-039. SCAQMD contends that these new studies demonstrate "that burning high Wobbe Index LNG results in an increase in NO_x emissions," and that the studies will provide information regarding possible mitigation measures.²⁸ The January 30, 2009 Opening Brief of SCAQMD contains a description of these three studies. SCAQMD contends that due to these new studies, and because "more LNG will likely be burned in Southern California should SoCalGas and SDG&E expand their off-system delivery service, an evidentiary hearing is warranted in the present proceeding to investigate air

²⁸ SCAQMD's January 30, 2009 Opening Brief in A.08-06-006 at 7.

quality issues and possible mitigation measures with respect to NO_x emissions in the Basin.” (*Ibid.*)

The February 13, 2009 reply briefs of SDG&E and SoCalGas, and Sempra LNG, were critical of the three new studies cited by SCAQMD. Sempra LNG argues that the new studies cited by SCAQMD “addresses *exactly the same issues* that were resolved in the gas quality proceeding,” and that the test results “are either inapplicable or fail to provide substantial evidence of significant and reasonably foreseeable environmental impact.”²⁹

We do not believe that these additional studies should lead to a reexamination of the air quality and gas quality issues that were adjudicated in D.06-09-039. Ample evidence of the effects of natural gas with a high Wobbe Index was presented in the gas quality phase of R.04-01-025.³⁰ The three new studies do not provide any additional relevant information beyond what we already considered in D.06-09-039.

We recognized in D.06-09-039 that the NGC + White Paper contained “data gaps,” and that it “recommended that additional research on gas quality be performed to fill specific data gaps.” (D.06-09-039 at 152, 159.) We also agreed in D.06-09-039 “that further research is needed to fully understand the impacts of higher Wobbe Index gas on emissions and end-use equipment performance,” and that all stakeholders should be encouraged to “participate in the collaborative effort necessary to complete further research.” (D.06-09-039 at 152, 160.)

²⁹ Sempra LNG February 13, 2009 Reply Brief in A.08-06-006 at 3 and 8.

³⁰ See the summaries of the parties’ positions on gas quality and on the NGC + White Paper in D.06-09-039 at 106-147.

The three studies that SCAQMD seeks to introduce into this proceeding, however, are not the end product of the data gaps that the NGC + White Paper had identified, and do not provide additional information beyond what we considered in D.06-09-039. In addition, these three studies were not the result of all stakeholders participating in a collaborative research effort. Thus, we decline to hold an evidentiary hearing to consider these new studies in this proceeding.

In conclusion, SCAQMD and SCGC have not demonstrated that the air quality, gas quality, and Wobbe Index issues that they raised in their protests to this proceeding are different from what we adjudicated in D.06-09-039. Instead, the air quality, gas quality, and Wobbe Index issues raised by SCAQMD in R.04-01-025 and adjudicated in D.06-09-039, are identical to the protests and arguments raised by SCAQMD and SCGC in this proceeding. For the reasons discussed above, Pub. Util. Code § 1709 bars relitigation of the air quality, gas quality, and Wobbe Index issues in this proceeding.

3.5. CEQA Discussion

3.5.1. Introduction

The second legal issue that we discuss is whether the application in this proceeding requires a CEQA analysis.

CEQA environmental review is triggered when a public agency exercises its discretionary power to carry out or approve a project that may have a direct, or a reasonably foreseeable indirect, physical impact on the environment.

(Public Resources Code § 21065; CEQA Guidelines, § 15002.) Before CEQA review is triggered, the agency conducts a preliminary review to determine if CEQA applies to the proposed activity. (CEQA Guidelines, § 15060.) If the activity is not a “project” as defined by CEQA, or falls within an exemption to CEQA, the CEQA inquiry ends. (Public Resources Code §§ 21065, 21080; CEQA

Guidelines, § 15378.) If the agency determines that the activity is a “project” and no exemptions apply, the agency must consider whether the project will have a significant physical impact on the environment. (CEQA Guidelines, § 15002.) If the agency determines the project will not have a significant physical impact on the environment, a negative declaration is then issued. (CEQA Guidelines, § 15002.) If the agency determines that the project will have a significant physical impact on the environment and there is substantial evidence to support this determination, an environmental impact report must be prepared. (Public Resources Code § 21080(d); CEQA Guidelines § 15002.) The term “substantial evidence,” as used in CEQA, does not include argument, speculation, or unsubstantiated opinion or narrative. (Public Resources Code § 21080(e)(2).)

Section 15060(c) of the CEQA Guidelines provides that an activity is not subject to CEQA if: (1) it does not involve the exercise of discretionary powers by a public agency; (2) it will not result in a direct or reasonably foreseeable indirect physical change in the environment; or (3) it is not a “project” as defined in § 15378 of the CEQA Guidelines.

3.5.2. Positions of the Parties

SCAQMD and SCGC contend that if off-system deliveries to interconnections other than to PG&E are permitted, that more regasified LNG from overseas sources will be burned in the Basin through displacement, which will increase emissions of NO_x, an ozone precursor, and detrimentally affect air quality in the Basin. Thus, SCAQMD and SCGC contend that the proposal for off-system deliveries of natural gas constitutes a “project” under CEQA because of the foreseeable environmental and health effects, and that an environmental analysis is required. SCGC also argues that the application will lead to the

building of more LNG terminals and to an increase in the use of LNG in southern California, which will result in significant environmental impacts.

SCAQMD and SCGC contend that the application in this proceeding is fundamentally different from what the Commission addressed in D.06-09-039 regarding R.04-01-025. They contend that in D.06-09-039, the Commission decided that a CEQA analysis was not required when the new Wobbe Index limit was adopted because no LNG terminals on the west coast were operating at the time that decision was adopted. They contend that the application in this proceeding is different because allowing additional off-system interconnections will lead to the importation and an increase in the burning of regasified LNG in the Basin, especially from the Energia Costa Azul facility which is now in operation.

SQAQMD also infers that the Administrative Law Judge's (ALJ) proposed decision in R.04-01-025 on the gas quality issues was correct, and that the Commission's reliance on the NGC + White Paper for adopting the revised gas quality specifications in D.06-09-039, and that the decision's conclusion that the revised gas quality specifications did not trigger CEQA review, was wrong.³¹

SDG&E and SoCalGas assert that the CEQA provisions do not apply to the application in this proceeding because the protestants' CEQA assertions amount to a collateral attack on the Commission's CEQA determination in D.06-09-039, and because the authority being requested does not constitute a "project" within the meaning of the CEQA provisions. SDG&E and SoCalGas contend that the fundamental issue that was addressed in D.06-09-039 was whether the adoption

³¹ See SCAQMD's January 30, 2009 Opening Brief in A.08-06-006 at 5.

of the revised gas quality specifications with the Wobbe Index range constituted a project under CEQA. The utilities also contend that the Commission's approval of the request for interruptible off-system deliveries at all the pipeline interconnections "would not cause a direct physical change to the environment, nor would it constitute a 'necessary step' to any potential future physical change to the environment."³² SDG&E and SoCalGas also point out that the authorization being requested in this application does not require the construction or modification of any facilities in order to provide the interruptible off-system delivery service.

SDG&E and SoCalGas further contend that "Even if a connection between the authority requested by the Application and a future physical change to the environment could be imagined, at this stage it would be purely speculative to attempt to identify any environmental effects that might ultimately be caused by such a physical change."³³

The Indicated Producers, Sempra LNG and Shell argue that the authorization requested of the Commission in this proceeding regarding the terms and conditions for expanded interruptible off-system delivery, does not constitute a "project" under CEQA, and therefore an environmental impact report is not required.

3.5.3. Analysis

Our CEQA analysis is twofold. First, we examine whether the protests of SCAQMD and SCGC on the grounds that a CEQA review is required is

³² SDG&E and SoCalGas' February 2, 2009 Opening Brief in A.08-06-006 at 2-3.

³³ *Id.* at 3.

precluded from being relitigated in this proceeding because of collateral estoppel. Second, we address whether this application amounts to a project under CEQA.

As we discussed in the collateral estoppel analysis, the issues that SCAQMD and SCGC raised in R.04-01-025 about the air quality, gas quality, and Wobbe Index are the same issues they are attempting to raise in this proceeding. The CEQA argument of SCAQMD and SCGC is based on the premise that approval of the application will result in hotter burning gas from the Energia Costa Azul LNG terminal being burned in the Basin. However, as explained in the collateral estoppel analysis, the relationship of hotter burning gas to the Wobbe Index range that was adopted in D.06-09-039 was extensively litigated in R.04-01-025. We concluded in D.06-09-039 that no CEQA review was required because the “narrowing of the parameters of the gas quality standards in SoCalGas Rule 30 is not an essential step culminating in action that may affect the environment....” (D.06-09-039, COL 47 at 177.)

The argument of SCAQMD and SCGC that approval of this application will lead to the burning of more regasified LNG in the Basin, which will produce more emissions in the Basin, ignores what we stated in D.07-02-032, the decision addressing the rehearing of D.06-09-039. In footnote 9 of D.07-02-032, we noted that the proper baseline for measuring possible adverse environmental effects was the permissible Wobbe Index range as it existed before the issuance of D.06-09-039, i.e., 1271-1437. We stated that “Reducing the upper Wobbe Index limit in D.06-09-039 [to 1385] does not create the potential for significant, adverse environmental impacts,” and that the “tightening of gas quality standards in D.06-09-039 will not cause significant, adverse environmental effects.” (D.07-02-032 at 11.) Since D.06-09-039 enacted stricter gas quality specifications

than what had been in place prior to D.06-09-039, a CEQA review was not required in R.04-01-025. (*Id.* at 10.)³⁴

Since the CEQA argument of SCAQMD and SCGC is premised on the proposition that hotter burning LNG will result in more air emissions, and because that issue was squarely addressed in D.06-09-039 and rejected on appeal by the California Supreme Court's denial of SCAQMD's petition for a writ of review, the CEQA argument may not be relitigated in this proceeding because of Pub. Util. Code § 1709. When the issues are the same, collateral estoppel prohibits a subsequent CEQA challenge. (See *Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1168; *Chamberlin v. City of Palo Alto* (1986) 186 Cal.App.3d 181, 187.)

That brings us to the second part of our CEQA analysis. SCAQMD and SCGC argue that a CEQA challenge to a prior project does not have collateral estoppel effect on a CEQA challenge to a subsequent project if the two projects are different in any way.

We do not agree with the assertions of SCAQMD and SCGC that this application for interruptible off-system delivery is a "project" within the meaning of CEQA because it is different from what the Commission considered during the gas quality phase in R.04-01-025. Under Public Resources Code § 21065 and CEQA Guidelines § 15378, CEQA does not apply if the activity or decision at issue is not a "project" as defined within the meaning of the statute. A "project" is defined under CEQA as "an activity which may cause either a

³⁴ In footnote 10 of D.07-02-032, we also noted the inconsistency of SCAQMD's argument on rehearing that its recommendation for the adoption of a Wobbe Index

Footnote continued on next page

direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....” (Public Resources Code § 21065.)

The argument of SCAQMD and SCGC that the application in this proceeding is a new project, because it is different from what was adjudicated in D.06-09-039, is unpersuasive for five reasons. First, there will be no direct physical change in the environment, or a reasonably foreseeable indirect physical change, in the environment, if we approve the application for the interruptible off-system delivery service. All of the natural gas that enters the gas transmission systems of SDG&E and SoCalGas must still meet the gas quality specifications contained in their gas tariffs, including the Wobbe Index range that was adopted in D.06-09-039. Thus, if the application in this proceeding is approved, the gas that will be burned in the Basin will not affect the environment because the same Wobbe Index range that was adopted in D.06-09-039, and in which CEQA review was denied, must still be met. As we stated in D.08-10-025, the “utilities’ potential procurement of LNG supply is not a ‘project’ under CEQA....” (D.08-10-025 at 18.)

Second, the application in this proceeding is seeking approval for interruptible off-system delivery. Due to the interruptible nature of this service, that means the service will only be provided when the gas transmission system can accommodate the off-system deliveries. (See SoCalGas Schedule No. GIT.) A customer of SoCalGas seeking to deliver gas supply to a pipeline interconnection other than PG&E is likely to utilize this service when it has excess gas supply and can sell the gas to someone who receives gas from that

ceiling of 1360 would not trigger a CEQA review, while the adoption of the adopted Wobbe Index ceiling of 1385 would trigger a CEQA review.

other pipeline. It is highly unlikely that the interruptible nature of this service will lead to more regasified LNG coming from Mexico and being transported into SoCalGas' service territory. Instead, as El Paso and Mojave point out in their February 13, 2009 reply brief, any increase in the physical flow of gas into California is likely to come from the interstate gas pipelines, which have excess capacity.

The third reason as to why approval of this application will not result in a change to the environment is because of the economics of natural gas. In order for the regasified LNG to flow from Mexico into the Basin, the price of LNG will have to compete against the price of domestic gas supplies. Recently, in D.08-10-025, we stated that "current LNG prices substantially exceed those of domestic natural gas," and that "LNG suppliers will be attracted to the West Coast market when the West Coast market offers attractive prices relative to other international markets...." (D.08-10-025 at 8-10.) The current recession, and the price of domestic gas supplies as compared to LNG, is unlikely to change that outlook in the near future.

Fourth, assuming that the regasified LNG can overcome the economics of natural gas, the argument that more regasified LNG will be burned in the Basin overlooks the fact that the regasified LNG coming into SoCalGas' service territory from the Energia Costa Azul facility in Mexico will end up being mixed with domestic gas supplies. In order for the regasified LNG to reach SoCalGas' service territory, the regasified LNG from Mexico will need to travel from Otay Mesa or from SoCalGas' interconnection with the North Baja pipeline at Blythe, which will lead to the blending of the regasified LNG before it reaches SoCalGas' service territory. The total amount of regasified LNG that may be transported

from Mexico into SoCalGas' service territory, and whether this regasified LNG will lead to an increase in NOx emissions, is speculative.³⁵

The fifth reason that this application is not a project is because the application will not result in any new facilities being built if the application is approved. No new LNG terminals will be built, and no new pipeline construction will take place if the application for off-system delivery service is approved. Instead, the interruptible off-system delivery service will use the existing infrastructure to effectuate the delivery of natural gas to the other interconnection points.

Since the CEQA issues raised by SCAQMD and SCGC are the same issues that were previously adjudicated in D.06-09-039, and because the application will not result in any direct or indirect physical change to the environment, we conclude that the CEQA arguments raised in the protests to this application are barred by Pub. Util. Code § 1709 from being relitigated, and that the application at issue in this proceeding does not involve a project within the meaning of CEQA and therefore an environmental review of the application is not required.

This proceeding remains open to address the remaining issues identified in the December 18, 2008 scoping memo. As provided for in that scoping memo, the assigned ALJ shall prepare an amended scoping memo to address the process for resolving the remaining issues in this proceeding.

³⁵ We note that SCAQMD has proposed the adoption of Rule 433 on natural gas quality as part of its own administrative procedures. That proposed rule would require SoCalGas to monitor the quantity, composition and Wobbe Index of regasified LNG entering the SoCalGas system.

4. Comments on Proposed Decision

The proposed decision of ALJ John S. Wong in this matter was mailed to the parties in accordance with § 311 of the Public Utilities Code and comments were allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments were filed.

5. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and John S. Wong is the assigned ALJ in this proceeding.

Findings of Fact

1. The air quality argument raised in this proceeding by SCAQMD and SCGC is integrally related to the gas quality specifications adopted in D.06-09-039 because it is based on the assertion that the expansion of off-system deliveries will result in more regasified LNG being burned in the Basin, which will result in more NO_x being produced in the Basin, and which will result in an increase in the deterioration of the air quality in the Basin and threaten the health and environment of its residents.

2. We specifically considered the air quality, gas quality, and Wobbe Index arguments that SCAQMD raised in its protest to this application during the gas quality phase in R.04-01-025, which led to the adoption of D.06-09-039.

3. SCAQMD was an active participant in the gas quality phase in R.04-01-025 where it raised the same air quality, gas quality, and Wobbe Index issues that it now seeks to relitigate in this proceeding.

4. The gas quality phase of R.04-01-025 clearly contemplated that the gas quality specifications adopted in D.06-09-039 would apply to any gas supply that flows into the SDG&E and SoCalGas transmission systems, including the potential sources of LNG supply.

5. The approval of the off-system delivery application is unlikely to cause more regasified LNG to enter the SoCalGas system because LNG supplies will have to compete with the price of domestic gas supplies.

6. In order for the regasified LNG to reach SoCalGas' service territory, the regasified LNG from Mexico will need to travel from Otay Mesa or from SoCalGas' interconnection with the North Baja pipeline at Blythe, which will lead to the blending of the regasified LNG before it reaches SoCalGas' service territory.

7. The total amount of regasified LNG that may be transported from Mexico into SoCalGas' service territory, and whether this regasified LNG will lead to an increase in NO_x emissions, is speculative.

8. SCAQMD sought unsuccessfully to appeal D.06-09-039 before this Commission, and before the California Supreme Court and the California Court of Appeal.

9. We decline to hold an evidentiary hearing to consider the three new studies cited by SCAQMD because those studies are not the end product of the data gaps that the NGC + White Paper had identified, do not provide additional information beyond what we considered in D.06-09-039, and were not the result of a collaborative research effort by all stakeholders.

10. SCAQMD and SCGC have not demonstrated that the air quality, gas quality, and Wobbe Index issues that they raised in their protests to this proceeding are different from what we adjudicated in D.06-09-039.

11. The CEQA argument of SCAQMD and SCGC is tied to their assertion that hotter burning LNG will be burned in the Basin as a result of the granting of the application to offer interruptible off-system service.

12. The relationship of hotter burning gas to the Wobbe Index range was extensively litigated in R.04-01-025.

13. We concluded in D.06-09-039 that no CEQA review was required because reducing the upper Wobbe Index limit to 1385, from 1437, was not an essential step culminating in action that may affect the environment.

14. If the application in this proceeding is approved, the gas that will be burned in the Basin will not affect the environment because the same Wobbe Index range that was adopted in D.06-09-039 must still be met.

15. No new facilities or LNG terminals will be built if the application is approved.

Conclusions of Law

1. Once an adjudicating body has decided an issue of fact or law necessary to its judgment, collateral estoppel precludes relitigation of the issue in a different cause of action involving a party to the first proceeding.

2. SCAQMD's actions to revisit the air quality, gas quality, Wobbe Index, and CEQA issues in this proceeding amounts to a collateral attack on D.06-09-039 that is barred by Pub. Util. Code § 1709.

3. A line of cases have held that the denial of a petition for review of an order of this Commission is a decision on the merits both as to the law and the facts presented in the review proceedings, and has res judicata effect.

4. The argument of SCAQMD and SCGC that the approval of the off-system delivery service in this proceeding will result in more LNG being burned in the Basin is entirely speculative.

5. Since the application will not result in any direct or indirect physical change to the environment, the application at issue in this proceeding does not

involve a project within the meaning of CEQA, and an environmental review of the application is not required.

6. This proceeding remains open to address the remaining issues.

O R D E R

IT IS ORDERED that:

1. The air quality, gas quality, Wobbe Index, and the California Environmental Quality Act issues that were raised in the protests to Application 08-06-006 by the South Coast Air Quality Management District and Southern California Generation Coalition shall not be relitigated in this proceeding because of Pub. Util. Code § 1709.

2. An environmental review of A.08-06-006 is not required under California Environmental Quality Act.

3. A.08-06-006 shall remain open to address the remaining issues.

This order is effective today.

Dated June 4, 2009, at San Francisco, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

RACHELLE B. CHONG

TIMOTHY ALAN SIMON

Commissioners

