

Decision 04-07-040

July 8, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation Into The
Proposal Of Sound Energy Solutions To
Construct And Operate A Liquefied
Natural Gas Terminal At The Port Of
Long Beach

I. 04-04-024
(Filed April 22, 2004)

**ORDER DENYING REQUEST FOR STAY OF
INVESTIGATION 04-04-024**

On April 27, 2004, the Commission mailed Order Instituting Investigation Into the Proposal of Sound Energy Solutions (“SES”), Inc. to Construct and Operate a Liquefied Natural Gas (“LNG”) Terminal at the Port of Long Beach, (I.) 04-04-024. The Commission opened I. 04-04-024 “to promote public safety and California’s environmental welfare, consistent with state and federal law,” (p. 1) and ordered SES to file an application for a certificate of public convenience and necessity (“CPC&N”) if it intends to pursue construction of the project. The Commission concluded in I.04-04-024 that SES’s proposed project, as described in SES’s application to the Federal Energy Regulatory Commission (“FERC”), Docket No. CP04-58, an LNG storage and gasification facility located at the Port of Long Beach and an accompanying pipeline interconnecting with the intrastate gas transmission system of the Southern California Gas Company (“SoCalGas”), would make SES a public utility pursuant to California Public Utilities Code Sections 216, 221, 222, 227 and 228.

SES initiated an informal “prefiling” process at the FERC in September 2003, Docket No. PF03-6. On October 30, 2003, the CPUC sent a

letter to SES explaining that based upon SES's representations to the public, the project would require a CPC&N. On January 26, 2004, SES filed with the FERC an application, Docket No. CP04-58, pursuant to Section 3(a) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717b, requesting authorization to site, construct and operate an LNG terminal located in the Port of Long Beach, and describing its proposed project in detail. In its application to FERC, SES stated that it had "complied in all material respects with the applicable laws and regulations of the State of California."¹ On February 23, 2004, the Commission filed a protest at the FERC to SES's application and motion to intervene, arguing that the FERC failed to possess exclusive jurisdiction over the SES proposal due to the express language of Section 3 of the NGA and the absence of any interstate transportation of the imported LNG. On March 24, 2004, the FERC issued a Declaratory Order Asserting Exclusive Jurisdiction, 106 FERC ¶ 61,279 (2004), finding it had exclusive jurisdiction over the SES project despite the lack of interstate transportation and inviting the Commission to participate in FERC's proceeding, which it stated would address safety and security concerns. On April 23, 2004, the Commission filed a request for rehearing of FERC's Declaratory Order. On June 9, 2004, the FERC issued an Order Denying Requests for Rehearing, Denying Request for Stay, and Clarifying Prior Order, 107 FERC ¶ 61,263 (2004), reiterating its determination that the FERC possessed exclusive jurisdiction over the project, and further clarifying that no evidentiary hearings would be held to review the project, although technical workshops would be held in which parties such as the Commission could participate.

On May 27, 2004, SES filed an "Application of Sound Energy Solutions For Rehearing of Order Instituting Investigation and Request for Stay of the Proceeding" in I. 04-04-024. No other party filed in support of or opposition to the SES application.

¹ Exhibit C to Application in Docket No. CP04-58-000.

Public Utilities Code section 1735 states that an application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision of the Commission, or operate to stay or postpone the enforcement of any order, “except in such cases and upon such terms as the commission by order directs.” Thus, the Commission’s authority to stay a decision is discretionary.

The Commission considers a number of factors in determining whether there is good cause to grant a stay pending rehearing of its own decisions. Those factors include whether the moving party will suffer serious or irreparable harm if the stay is not granted and whether the moving party is likely to prevail on the merits. (Pacific Gas and Electric Company (1999) 1999 Cal. PUC Lexis 602; Re Southern California Gas Co. (1990) 39 Cal.P.U.C.2d 14.) In addition, the Commission balances harm to the applicant or the public interest, if the decision is later reversed versus harm to other parties or the public interest if the decision is affirmed. (Re Line Extension Rules of Electric and Gas Utilities (1999) 1999 Cal. PUC Lexis 928; AirTouch Communications v. Pacific Bell (1995) 61 Cal.P.U.C.2d 606.) In addition, the Commission may consider other factors relevant to a particular case.

SES requests a stay of the OII in order to avoid any uncertainty created by the Commission’s jurisdictional dispute with the FERC (and SES) over the proposed Long Beach LNG terminal. SES asserts that “[f]or the Commission to proceed with the OII prior to a resolution of the underlying legal issues [in the jurisdictional dispute] will create uncertainty and delay in securing new natural gas supplies for California and the United States.” (SES Application, p. 5). SES also asserts that proceeding with the OII could “potentially ensnare the SES project in unnecessary litigation over conflicting environmental and regulatory rulings.” (Id.) SES argues that the uncertainty and delay associated with the Commission’s OII would cause them and the public serious or irreparable harm, and if the CPUC were to adopt any conflicting conditions and mitigation

measures, SES would be “caught in the middle.” SES notes that the Commission suspends its own proceedings to avoid conflicts with other rulings, although the examples involve conflicts with other Commission proceedings rather than with the FERC. SES also argues that the Commission has the alternative of pursuing an appeal of FERC orders to the U.S. Court of Appeals for the D.C. Circuit, pursuant to 15 U.S.C. § 717r(b), and that granting a stay of the OII would not prejudice the Commission’s ability to assert jurisdiction if courts confirm the Commission’s jurisdiction. SES does state that if the Court of Appeals determines that SES must file for a CPCN, it will then “promptly file the appropriate application before the CPUC to seek a CPCN.” (SES application, p. 10). SES claims that it would bear the risk of any delay in gaining permits for its project, and states it assumes the risk of the delay in filing its CPCN at the Commission.

We do not believe that SES has demonstrated good cause for a stay. First, SES has not demonstrated that it will suffer irreparable harm if the decision is not stayed. SES complains about the delay it alleges will be caused by the Commission starting this OII, but accepts the delay it causes by waiting to file an application for a CPC&N to the Commission until the jurisdictional issues are resolved by a court. SES fails to acknowledge that it has the choice of going forward with a CPC&N pending final disposition of any jurisdictional dispute between SES, the FERC and the CPUC. Nor does SES seem to acknowledge the public interest in going forward with the OII prior to the resolution of the jurisdictional dispute. The Commission has a right and a duty to examine the environmental and safety aspects of the operations of the proposed LNG terminal in the Port of Long Beach in order to ensure the well-being of California citizens and the safe and reliable provision of natural gas. SES has not similarly requested that the FERC suspend its proceedings pending a court determination regarding jurisdiction, and neither has the Commission. By accepting the delay of not going immediately forward with a CPC&N application, SES obviously does not believe that delay in filing at the Commission causes “irreparable harm.”

It is true that the OII will require SES to respond to discovery requests and participate in a hearing. However, under federal and state common law, it has long been established that the mere time and expense of participating in an administrative hearing does not constitute irreparable harm. (Renegotiation Board v. Bannerkraft Clothing Co. (1974) 415 U.S. 1, 24; Board of Police Commissioners v. Superior Court (1985) 168 Cal.App.3d 420, 433.)

The arguable “uncertainty” currently caused by the Commission’s jurisdictional dispute with the FERC remains until it is resolved by a court, regardless of whether or not the Commission proceeds now with an OII into the construction and operation of the LNG terminal at the Port of Long Beach or waits until the jurisdictional dispute is resolved to proceed with the OII. SES has failed to explain how proceeding with the OII prior to the judicial resolution of the underlying legal issues causes any additional delay due to adding further uncertainty than would granting the stay and merely waiting for any court review. The Commission appreciates the extra resources it will entail to participate in the OII, but disagrees that such a proceeding is duplicative, unnecessary or wasteful.

In I. 04-04-024, the Commission stated that “SES’ jurisdictional claims before the FERC are antithetical to state and federal law and the interests of California consumers, communities, businesses and economy. The legal disputes before the FERC in SES’ application may extend out to an indefinite future. In order to avoid delay of our review of this project, we will not wait for a final resolution of those jurisdictional questions concerning the facilities. We choose instead to conduct a review of relevant issues by opening this investigation and providing hearing procedures, including an opportunity for discovery by interested parties.” (OII, p. 7). Thus, the Commission was fully aware of the jurisdictional dispute between it and the FERC when issuing the OII and rejected delaying the issuance of this OII until such disputes were resolved. Nothing has transpired since the issuance of the OII to change the Commission’s position.

The Commission also rejects a stay based on any claim of the likelihood of SES prevailing on the merits of its jurisdictional argument.

The Commission is denying SES's motion without prejudice. We see no reason to stay the commencement of an investigation into the operation and construction of SES's proposed LNG terminal at the Port of Long Beach. However, the Commission reserves the right to revisit the stay issue pending resolution of the Application for Rehearing and as circumstances warrant.

Therefore **IT IS ORDERED** that:

1. The Request of Sound Energy Solutions for a Stay of I. 04-04-024 is denied without prejudice.

This order is effective today.

Dated July 8, 2004, at San Francisco, California.

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