

Decision 06-08-032

August 24, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Policies and Rules to Ensure Reliable, Long-Term Supplies of Natural Gas to California.

Rulemaking 04-01-025
(Filed January 22, 2004)

ORDER DENYING REHEARING OF DECISION (D.) 06-05-017**I. SUMMARY**

In Commission Decision (D.) 06-05-017, we found that environmental review pursuant to the California Environmental Quality Act (“CEQA”) was not required in Phase I of Rulemaking (R.) 04-01-025 because Phase I did not constitute a “project” within the meaning of CEQA. Ratepayers for Affordable Clean Energy (“RACE”) challenges this determination. We have reviewed all of the allegations of error raised in the rehearing application, and determine that cause does not exist for granting the application.

II. BACKGROUND

We initiated this Rulemaking proceeding (R.04-01-025) on January 22, 2004. The purpose of the proceeding is “to establish policies, processes and rules to ensure reliable, long-term supplies of natural gas to California.” (Order Instituting Rulemaking (“OIR”), p. 28, Ordering Paragraph 1.) The proceeding has been divided into two phases. Phase I dealt with policy matters related to interstate pipeline capacity contracts, liquefied natural gas access, and interstate pipeline access. (D.04-09-022, p. 2.) Phase II is currently examining issues related to natural gas quality specifications,

transmission capacity, cost allocation, and ratemaking provisions, among other issues.¹ As requested in the OIR, the parties filed proposals in February 2004 addressing the steps necessary to provide California with sufficient natural gas over the long-term. The Phase I Scoping Memo was issued on June 18, 2004 and solicited comments from the parties, which were received by the Commission in July 2004.

In accordance with Rule 14.1 of the Commission's Rules of Practice and Procedure, a draft decision on the Phase I issues was prepared based upon a review of the Phase I proposals and the comments and reply comments of the parties. The Phase I draft decision was mailed for comment on July 20, 2004, and was on our August 19, 2004 agenda for consideration. On August 18, 2004, RACE submitted a motion, arguing for the first time that we were required to undertake an environmental review pursuant to CEQA during Phase I of the proceeding. We did not address this matter at our August 19, 2004 meeting. Instead, an alternate draft decision on the Phase I issues was circulated for comment on August 19, 2004. The draft decision and the alternate draft decision were considered at our September 2, 2004 meeting. We adopted the Phase I draft decision, D.04-09-022, on September 2, 2004. D.04-09-022 adopted policies that would allow potential sources of liquefied natural gas ("LNG") to access the utilities' gas systems, but did not approve the building of any project or authorize any permit, license or application. (D.04-09-022, pp. 41-42.)

On September 3, 2004, the assigned Commissioners issued an Assigned Commissioners' Ruling ("ACR") denying RACE's August 18, 2004 motion regarding the applicability of CEQA to Phase I of R.04-01-025. On October 8, 2004, RACE filed a second motion requesting that we undertake an environmental review in Phase I, and this motion was denied by the assigned Commissioners in a February 28, 2005 Phase II Scoping Memo.

¹ Phase II of R.04-01-025 is ongoing, and we have not yet determined whether environmental review pursuant to CEQA will be conducted as part of Phase II of the proceeding. On August 8, 2006, a proposed decision by ALJ Weissman and an alternate decision by Commissioner Peevey were both mailed for comment. The proposed decision and the alternate decision differ as to whether environmental review pursuant to CEQA should be conducted during Phase II of R.04-01-025.

On March 29, 2005, RACE submitted for filing an “Application for Rehearing of Phase II Scoping Memo and Ruling of the Assigned Commissioners Dated February 28, 2005.” Since an application for rehearing can only be filed in connection with a final order or decision of the Commission, the Commission’s Docket Office, with the consent of RACE, retitled the document as a “Motion for Reconsideration of that portion of the Assigned Commissioners’ Scoping Ruling dated February 28, 2005 that denied RACE’s Motion for a Determination of the Applicability of CEQA.”² As retitled, RACE’s motion was filed by the Commission’s Docket Office on April 1, 2005.

On August 30, 2005, RACE filed a petition for writ of mandate in the California Supreme Court, arguing that the Commission erred in not conducting an environmental review pursuant to CEQA during Phase I of R.04-01-025.

On October 18, 2005, an ACR was issued which reclassified RACE’s April 1, 2005 motion for reconsideration as a petition to modify D.04-09-022. The ACR provided an opportunity for RACE and other interested parties to file supplemental responses regarding the applicability of CEQA to Phase I of R.04-01-025. Responses to the ACR were due on November 14, 2005, and replies to any responses were due on November 30, 2005.³

On October 28, 2005, the Commission filed a motion to dismiss RACE’s petition for writ of mandate in the California Supreme Court. The basis of the Commission’s motion was that RACE was not challenging a final order or decision of the Commission, but instead was challenging certain interim rulings and orders issued by the presiding ALJ and/or the assigned Commissioners. On December 16, 2005, RACE filed a request for dismissal without prejudice of its petition in the California Supreme Court. The Court dismissed the petition on December 20, 2005.

² Pursuant to Commission Rule 3(e), the Commission retitled RACE’s application for rehearing as a motion for reconsideration so as to prevent it from being rejected for filing pursuant to Public Utilities Code Section 1731 and Commission Rule 85.

³ RACE apparently served its supplemental response to the October 18, 2005 ACR on or about November 14, 2005 on some of the parties to R.04-01-025. However, it appears RACE’s supplemental response was never filed with the Commission’s Docket Office. On November 30, 2005, a joint reply to RACE’s supplemental response was filed by SDG&E, SoCal Gas and PG&E. On that same day, RACE filed its reply to the supplemental responses permitted by the October 18, 2005 ACR.

On March 21, 2006, ALJ Wong issued for comment a draft decision denying RACE's petition to modify D.04-09-022.⁴ Parties filed comments and reply comments on this draft. On May 11, 2006, we issued D.06-05-017 and determined that environmental review is not required in Phase I of R.04-01-025 because Phase I does not constitute a "project" under CEQA. On June 27, 2006, the Commission's Executive Director, pursuant to Resolution A-4661, issued an opinion modifying D.06-05-017 to correct inadvertent errors and omissions.

On June 12, 2006, RACE filed a timely application for rehearing of D.06-05-017. On June 26, 2006, a joint reply to RACE's rehearing application was filed by SDG&E, PG&E, SoCal Gas, Coral Energy Resources, and Sempra LNG.

III. DISCUSSION

In its rehearing application, RACE challenges D.06-05-017 on the following grounds: (1) the Commission erred in concluding that R.04-01-025 is not a "project" within the meaning of CEQA; and (2) R.04-01-025 is a "discretionary" project under CEQA, and thus environmental review is required. These claims do not demonstrate error.

A. Phase I Of R.04-01-025 Is Not A "Project" Within The Meaning Of CEQA

RACE asserts that Phase I of R.04-01-025 is a "project" within the meaning of CEQA, and that therefore we erred in concluding that environmental review pursuant to CEQA was not required. (Rehearing App., pp. 2-9.) RACE further argues that R.04-01-025 will cause indirect physical changes to the environment, and as such environmental review was required. (Rehearing App., pp. 3-6.) These allegations of error lack merit.

Generally, environmental review pursuant to CEQA is triggered when a public agency exercises its discretionary power to carry out or approve a project that may

⁴ The draft decision fully considered RACE's supplemental response to the October 18, 2005 ACR, despite the fact that RACE's supplemental response was never filed with the Commission's Docket Office. RACE filed comments on the draft decision on April 10, 2006.

have a significant physical impact on the environment. (Title 14, Cal. Code Regs. § 15002.)⁵ Before CEQA is triggered, the public agency conducts a preliminary review to determine whether CEQA applies to the proposed activity. (Title 14, Cal. Code Regs. § 15060.) If the activity is not a “project” as defined by CEQA, or falls within an exemption to CEQA, the inquiry does not need to proceed further, and environmental review is not required. (See, e.g., Title 14, Cal. Code Regs. § 15378; Cal. Pub. Resources Code §§ 21065, 21080.) If the agency determines that CEQA is applicable to a project, the agency must consider whether the project will have a significant physical impact on the environment and will prepare either a negative declaration or an environmental impact report. (Title 14, Cal. Code Regs. § 15002.)

Section 15060(c) of the CEQA Guidelines states that an activity is not subject to CEQA if, among other things, it is not a “project” as defined in Section 15378. Section 15378 defines a “project” as follows:

“Project” means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:
(1) An activity directly undertaken by any public agency. . . ;
(2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (CEQA Guidelines, § 15378.)

In addition, in order for CEQA to apply, a project must have a significant effect on the environment. A “significant effect on the environment” is defined in Section 15002(g) of the CEQA Guidelines as “a substantial change in the physical conditions which exist in the area affected by the proposed project.” (CEQA Guidelines, § 15002(g).) Thus, pursuant to the CEQA Guidelines, if an activity undertaken by a

⁵ Chapter 3 of Division 6 of Title 14 of the California Code of Regulations may also be referred to herein as “CEQA Guidelines.”

public agency does not meet the definition of a “project” as defined by CEQA and case law interpreting CEQA, the inquiry is at an end, and no environmental review is required. Only if the activity is determined to be a “project” does the obligation arise to examine whether the project will have a significant physical impact on the environment.

In analyzing whether an activity constitutes a “project” under CEQA, courts generally look to the following factors: (1) whether the agency is undertaking a “specific new development project” (*Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 568-69); (2) whether the activity involves “the issuance of permits, leases and other entitlements” to a private party by the public agency (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 262); (3) whether the proposed activity is so unspecified and uncertain in nature that any environmental review would be purely speculative (*Pala Band of Mission Indians, supra*, 68 Cal.App.4th at 576; *Lake County Energy Council v. County of Lake* (1977) 70 Cal.App.3d 851, 854-55; *Topanga Beach Renters Association v. Department of General Services* (1976) 58 Cal.App.3d 188, 196); (4) whether the activity is primarily in the planning and/or policymaking stages of development (*Pala Band of Mission Indians, supra*, 68 Cal.App.4th at 576); and (5) whether the activity commits the public agency to any particular course of action or specifically identifies sites that will or may be used for future development (*Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School District* (1992) 9 Cal.App.4th 464, 475-76; *Stand Tall on Principles v. Shasta Union High School District* (1991) 235 Cal.App.3d 772, 780-81.)

Kaufman & Broad, supra, is particularly helpful in terms of examining what constitutes a “project” within the meaning of CEQA. In *Kaufman & Broad*, a school district’s attempt to create a Mello-Roos district was challenged by a developer on the ground that the formation of the Mello-Roos district constituted a “project” for which environmental review was required under CEQA. The Court disagreed, stating that CEQA review was not required because the activity did not commit the district to any definite course of action, did not narrow the field of options and alternatives available for the district, and did not dictate how any funds would be spent. (*Kaufman & Broad*,

supra, 9 Cal.App.4th at 476.) The Court specifically found that “[t]here is simply not enough specific information about the various course of action available to the District to warrant review at this time.” (*Id.*)

In Phase I of R.04-01-025, we established general policies regarding the process by which utilities may enter into contracts with gas suppliers such as interstate pipelines or LNG suppliers, the terms and conditions of access for new gas supplies transported over either new interstate pipelines or from LNG facilities, and the addition of new receipt points generally. (D.04-09-022, pp. 6-7; see also D.06-05-017, p. 16.) We determined that a clearly articulated, flexible and expeditious interstate pipeline capacity approval process was needed to allow the utilities to acquire core capacity in an efficient and cost effective manner. (D.04-09-022, p. 86, Finding of Fact 4.) We noted in D.04-09-022 that “we are not deciding in this decision whether certain proposed LNG projects should be built in California, or on the West Coast,” and further stated that “today’s decision is only addressing what needs to be in place for potential sources of LNG supply to connect to the gas transmission and distribution systems of the California gas utilities.” (D.04-09-022, pp. 41-42.)

Examining the actions taken by the Commission in Phase I of R.04-01-025, we conclude that Phase I did not involve a “project” within the meaning of CEQA, and thus we correctly determined in D.06-05-017 that environmental review was not required. We have consistently viewed the Phase I issues as matters of policy and planning designed to “ensure reliable, long-term natural gas supplies to California at reasonable rates.” (OIR, pp. 2-3.) Neither the OIR nor any other decision or ruling issued in Phase I proposes that construction activity be undertaken by a public agency, or that an activity be undertaken by a person or entity supported by public agency contracts, permits, grants or licenses. The OIR expressly limited the scope of Phase I to providing guidelines as to how certain designated utilities should: (1) enter into contracts with interstate pipelines; (2) provide access to supplies of LNG; and (3) provide access to additional supplies of natural gas transported on interstate pipelines. (OIR, p. 24.) We further stated that the issue of whether and where individual LNG projects should be built would be addressed

in the applicable regulatory proceedings examining each individual proposed project. (*Id.*) Finally, as noted in D.06-05-017, a request for authorization to build a specific project would require a utility to file a separate application with the Commission, and no such applications were filed as part of Phase I of R.04-01-025. (D.06-05-017, p. 23, Finding of Fact 7.)

In its rehearing application, RACE points to four cases in support of its position that environmental review was required during Phase I of R.04-01-025: *City of Livermore v. Local Agency Formation Commission of Alameda County* (1986) 184 Cal.App.3d 531; *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398; *County Sanitation District No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544; and *Plastic Pipe and Fitting Association v. California Building Standards Commission* (2004) 124 Cal.App.4th 1390. None of these cases compel a different conclusion than that reached in D.06-05-017.

In *City of Livermore, supra*, the Court determined that revised plans for the physical boundaries and service areas of local government entities (referred to as “spheres of influence”) were subject to CEQA review because the plans constituted a “a major policy shift that would affect land use throughout the entire region.” (*City of Livermore, supra*, 184 Cal.App.3d at 540.) In *City of Redlands, supra*, the Court found that amendments to the general plan of San Bernardino County were subject to CEQA review because the amendments constituted “drastic changes to the County’s general plan” that would lead to substantial environmental impacts including, for example, an amendment that would permit the County to bypass grading requirements on cliffs located in the County. (*City of Redlands, supra*, 96 Cal.App.4th at 414.) In *County Sanitation District No. 2, supra*, the Court determined that a Kern County ordinance implementing more rigorous standards for dumping “sewage sludge” on uninhabited land within the County was subject to CEQA review because the ordinance constituted the completion of a project that was subject to CEQA, and without court intervention the County would be free to implement the ordinance without regard for the possible environmental consequences. (*County Sanitation District No. 2, supra*, 127 Cal.App.4th

at 1583, 1602.) Finally, in *Plastic Pipe and Fitting Association, supra*, the Court concluded that an ordinance related to the types of materials to be included or excluded in piping projects was subject to CEQA review because “grave concerns” were raised regarding the particular material proposed to be used in piping projects, including the possible contamination of drinking water. (*Plastic Pipe and Fitting Association, supra*, 124 Cal.App.4th at 1407.)

In each of the cases described above and cited by RACE in support of its rehearing application, the governmental decision involved would produce a foreseeable environmental impact. Here, we only established a framework compatible with LNG connections and explicitly did not decide whether certain LNG projects should be built. (D.04-09-022, pp. 41-42; D.06-05-017, pp. 18-19.) In addition, most of the cases cited by RACE also involved complex issues related to land use, development and possible environmental contamination. None of these concerns are implicated by Phase I of R.04-01-025 because Phase I did not involve permitting, site selection or construction of any LNG facilities. Moreover, since Phase I solely addressed issues related to policy and future planning, any analysis of possible environmental impacts in Phase I would be entirely speculative at this stage.

Thus, RACE’s allegation of error regarding whether Phase I of R.04-01-025 constitutes a “project” within the meaning of CEQA, and thus requires environmental review, lacks merit.

B. Because Phase I Of R.04-01-025 Is Not A “Project,” Questions Of Discretion And Exemptions Are Beside The Point

RACE next argues that Phase I of R.04-01-025 constitutes a “discretionary” project under CEQA, and that therefore environmental review was required. (Rehearing App., pp. 9-11.) RACE further claims that no statutory or regulatory provision exempts the Commission from complying with CEQA with respect to Phase I of R.04-01-025. (Rehearing App., p. 11.) These allegations of error also lack merit.

In its rehearing application, RACE concedes that an activity undertaken by a public agency must first be determined to constitute a “project” before there can be any

inquiry as to whether it also constitutes a “discretionary” project under Public Resources Code Section 21080(a). (Rehearing App., p. 2.) In other words, if the activity is not a “project” under the CEQA Guidelines, the inquiry is at an end. (See, e.g., CEQA Guidelines, §§ 15002, 15060, 15378; Cal. Pub. Resources Code §§ 21065, 21080.) Because RACE believes that Phase I of R.04-01-025 does indeed meet the definition of a “project” under the CEQA Guidelines, RACE further argues that Phase I also constitutes a “discretionary” project for which CEQA review is required. However, as discussed above, because we conclude that Phase I does not constitute a “project” within the meaning of CEQA, there is no need to address whether Phase I of R.04-01-025 meets the definition of “discretionary” because it does not constitute a “project” for which environmental review is required.⁶

As to RACE’s final argument, that no statutory or regulatory provision exempts the Commission from complying with CEQA as to Phase I, we have never claimed that one of the specific exemptions contained in CEQA applies to Phase I. What has been consistently articulated on at least three prior occasions (the September 3, 2004 ACR; the February 28, 2005 Phase II Scoping Memo; and D.06-05-017) by both the assigned Commissioners and the Commission is that Phase I of R.04-01-025 does not constitute a “project” within the meaning of CEQA and the CEQA Guidelines. Because this basic threshold requirement of a “project” cannot be satisfied, no CEQA review is required.

⁶ RACE argues that Phase I amounts to a “discretionary” project that is subject to CEQA because Phase I involved the issuance of an administrative order and required the Commission to promulgate administrative regulations and exercise its considered judgment in balancing the various interests involved. (Rehearing App., p. 10.) In support of this argument, RACE cites two cases: *Nunn v. State of California* (1984) 35 Cal.3d 616, and *Burgdorf v. Funder* (1966) 246 Cal.App.2d 443. These are not CEQA cases, and they are inapposite. *Nunn, supra*, involved whether the executrix of the estate of a private security guard who was killed on duty could sue the State of California and a government agency for wrongful death. In *Burgdorf, supra*, a taxpayer filed a libel suit arguing that a letter written to him by the Chief of the Division of Tax Collection & Refund was libelous because it allegedly accused the taxpayer of perjury. RACE apparently cites these cases in support of the proposition that the issues addressed in Phase I constitute discretionary functions of an administrative agency, but insofar as the cases do not involve CEQA, they are of marginal relevance. As the party seeking rehearing, RACE bears the burden of demonstrating, with citation to relevant legal authority, that the Commission erred. Vague assertions as to the record or the law may be accorded little attention. (Rule 86.1 of the Commission’s Rules of Practice & Procedure.)

Thus, RACE's allegations of error regarding whether Phase I constitutes a "discretionary project" that is subject to environmental review, and whether Phase I is subject to any specific CEQA exemption or exclusion, lack merit.

IV. CONCLUSION

Rehearing of D.06-05-017 is hereby denied because no legal error has been demonstrated.

IT IS THEREFORE ORDERED THAT:

1. Rehearing of D.06-05-017 is denied.

This order is effective today.

Dated August 24, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
RACHELLE B. CHONG
Commissioners

Commissioner John A. Bohn recused
Himself from this agenda item and was
Not part of the quorum in its consideration.