

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
SIERRA PACIFIC POWER
COMPANY for an Order Authorizing
the construction of a tie-in line between
two existing transmission lines near
Hirschdale, in Nevada County,
California. (U 903 E)

Application 06-04-017
(Filed April 19, 2006)

**ORDER GRANTING PARTY STATUS AND DENYING REQUEST
FOR STAY OF DECISION 07-06-038**

I. INTRODUCTION

In this Order, we dispose of the request for stay of Decision (D.) 07-06-038 (“Decision”) filed by Larry and Cheryl Andresen (the “Andresens”). In D.07-06-038 we granted Sierra Pacific Power Company (“SPP”) a Permit to Construct (“PTC”) 2/3 mile 60-kilovolt (“kV”) power line, pursuant to General Order (“GO”) 131-D, near Hirschdale, in Nevada County, California. The project will involve the upgrade of an existing 12.5 kV line, with all construction occurring in an existing SPP distribution line right-of-way. There will be a one-for-one pole replacement of approximately 19 poles, which will be approximately 57.5 feet high. The entire length of the project is approximately 3,500 feet.

This Commission was Lead Agency for the project for purposes of environmental review and the California Environmental Quality Act (“CEQA”). In approving the proposed project we approved and adopted a Final Mitigated Negative Declaration (“FMND”) which concluded that, as mitigated, the project would not result in any significant adverse impacts to the environment.

On July 20, 2007, Larry and Cheryl Andresen (the “Andresens”) filed a motion for party status and an application for rehearing of D.07-06-038 challenging the Decision on the grounds that: (1) SPP failed to provide notice of its application for the project as required by GO 131-D; (2) the Decision failed to consider alternative routes for the project as required by GO 131-D; (3) the Commission failed to prepare an Environmental Impact Report (“EIR”) as required by CEQA; (4) the Commission failed to recirculate the draft MND for comment as required by CEQA; and (5) the FMND and the Decision failed to consider undergrounding of the transmission line as required by the Truckee General Plan and Public Utilities Code section 320.¹ A response to the application for rehearing was filed by SPP. The application for rehearing is pending.

On August 2, 2007, the Andresens filed a request for stay of D.07-06-038 on the grounds that: (1) failure to grant the stay will cause the Andresens serious or irreparable harm; (2) the Andresens are likely to prevail on the merits of the application for rehearing; and (3) on balance, the public interest warrants granting a stay. A response to the request for stay was filed by SPP.

We have carefully reviewed the arguments raised by the Andresens and are of the opinion that good cause has not been established to grant a stay. Accordingly, the request for stay of D.07-06-038 is denied.

II. DISCUSSION

A. Motion for Party Status

Because the Andresens request for stay is intrinsically linked to their pending application for rehearing, it is necessary to address whether they have standing to have their matter considered. Public Utilities Code section 1731 (b) governs standing to file an application for rehearing and provides in pertinent part:

After any order or decision has been made by the
Commission, any party to the action or proceeding, or any

¹ All subsequent section references will indicate the Public Utilities Code, unless otherwise specified.

stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing...(Pub. Util. Code, § 1731, subd. (b).)²

In their motion for party status, the Andresens make no claim that they have standing by virtue of either the statutory requirement or the Commission's Rules of Practice and Procedure.³ Instead they argue that they should be granted standing because they were prejudiced by not receiving adequate notice of the utility's application as required by GO 131-D, § XI.A.1.b, and because they are homeowners and not sophisticated in the Commission's practices and procedures. In addition they contend that because they did participate in the CEQA process, they should have the related opportunity to challenge alleged defects in the FMND.⁴

SPP admits that it did not meet the notice requirements for the application under GO 131-D, but argues the Andresens had actual notice and did generally understand the Commission's procedures as evidenced by their active participation in the CEQA process, attendance at public meetings, and submission of comments on the draft MND.⁵ SPP objects to granting the Andresens' motion, arguing that they fail to meet the statutory criteria and that the Andresens had ample opportunity to properly intervene in a timely fashion. SPP points to several Commission decisions reflecting that we strictly interpret the statutory requirements of section 1731, particularly where an entity intervenes solely for the purpose of seeking rehearing.⁶

² Also see Rule 1.4 of the Commission's Rules of Practice and Procedure, Cal. Code of Regs., tit. 20, § 1.4 Participation in Proceedings.

³ The formal service list for the proceeding verifies that the Andresens did not file an appearance as would be required under Rule 1.4, but were only listed for purposes of "information only."

⁴ See Motion for Party Status, dated July 20, 2007.

⁵ See SPP Response to the Application for Rehearing, dated August 6, 2007, at pp. 2-6; and SPP Response to the Motion for Party Status, dated August 6, 2006.

⁶ *Order Instituting Rulemaking to Promote Policy and Integration in Electric Utility Resource Planning* [D.06-06-071] (2006) __ Cal. P.U.C.3d __, 2006 Cal. PUC LEXIS 237; *Re Southern California Edison*
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The unique facts of this case persuade us to grant the motion for party status and to fully consider the Andresens' request for stay. However, we do not intend our grant of party status in this instance to establish any precedent for other proceedings, and in particular, those involving CEQA.

B. Request for Stay of D.07-06-038

Public Utilities Code section 1735 applies regarding a request for stay in connection with an application for rehearing. Section 1735 states:

[A]n application for rehearing shall not excuse any corporation of person from complying with an obeying any order or decision, or any requirement of any order or decision of the commission theretofore made, or operate in any manner to stay or postpone the enforcement thereof, except in such cases and upon such terms as the commission by order directs.

Commission decisions implementing section 1735 reflect that when the Commission grants a stay pending rehearing of a decision we do so as a matter of discretion.⁷ In exercising this discretion, we often consider the following factors: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing; (3) a balance of the harm to the moving party (or the public interest) if the stay is not granted and the decision is later reversed, against the harm to other parties (or the public interest) if the stay is granted and the decision is later affirmed; and (4) other factors relevant to the particular case.⁸

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[D.03-04-001] (2003) __ Cal. P.U.C.3d __, 2003 Cal. PUC LEXIS 223; *Re Pacific Gas and Electric Company* [D.99-12-024] (1999) 3 Cal. P.U.C.3d 774, 1999 Cal. PUC LEXIS 753; and *Re Pacific Gas and Electric Company* [D.05-10-046] (2005) __ Cal. P.U.C.3d __, 2005 Cal. P.U.C. LEXIS 486.

⁷ See *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 ("SES OIF")* [D.04-07-040] (2004) __ Cal. P.U.C.3d __, 2004 Cal. PUC LEXIS 352, * 2.

⁸ *SES OII, supra*, 2004 Cal. PUC LEXIS * 2 citing to *Pacific Gas and Electric Company* [D.99-09-035] (1999) 2 Cal. P.U.C.2d 329, 1999 Cal. PUC LEXIS 602; *Re Southern California Edison* [D.90-12-101] (1990) 39 Cal. P.U.C.2d 14, 1990 Cal. PUC LEXIS 1316; *Re Line extension Rules of Electric and Gas Utilities* [D.99-09-034] (1999) 2 Cal. P.U.C. 2d 227, 1999 Cal. PUC LEXIS 601; and *Airtouch*

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1. Serious or Irreparable Harm

The Andresens contend that if a stay is not granted they will suffer serious or irreparable harm. To support this claim they state SPP is proposing to erect 58 foot power poles, along with a 60 kV power line, in front of and over their property. In addition, they contend the construction “may” involve the removal of several trees on the property. They argue that once this is completed, the damage will be done. (Andresen Request for Stay, at p. 3.)

We recognize the project will result in certain incremental changes on or near the Andresens’ property which a homeowner would likely regard as undesirable. The Andresens also raise a valid point that here, as with any project involving CEQA generally, once the activity takes place any potential damage is done. However, as explained below, the Andresens offer no specific facts or evidence to convince us that they will suffer serious or irreparable harm absent a stay of D.07-06-038.

The Andresens do not identify how many poles are in fact on or near their property, thus it is impossible to ascertain the actual potential for alleged harm that would be specific to them. In addition, the project will not require the placement of any poles in new locations. It is a one-for-one pole replacement in an existing right-of-way which will not result in the placement of any pole on or near the Andresens’ property where a pole does not already exist.⁹ While the replacement poles will stand approximately 57.5 feet high and hold additional power lines, the Initial Study/Mitigated Negative Declaration (“IS/MND”) reflects that the new height is only 9 feet higher than the existing poles.¹⁰ In accordance with established CEQA criteria for evaluating the potential significance (or seriousness) of any resulting impact, the IS/MND determined

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Communications v. Pacific Bell [D.95-09-122] (1995) 61 Cal. P.U.C.2d 606, 1995 Cal. PUC LEXIS 774.

⁹ See IS/MND, Section 1.6.1 Power Line, at p. 1-6.

¹⁰ See IS/MND, Section 1.6.2 Poles, at p. 1-6.

this to be an incremental change resulting in a less than significant impact to the environment.¹¹ In addition, visual simulations in the IS/MND show that after pole replacement, the electric wires will continue to run above property owner homes and window level, thus not directly obstructing homeowner view lines.

Further, the Andresens are incorrect that the project may involve the removal of trees on their property. The residential area is along Floriston Road in Hirschdale, and generally between pole locations 5 to 11.¹² In response to homeowner concerns regarding tree removal in residential areas, the project and FMND were revised to specify that no tree removal will occur in that area, and the approved construction practices will minimize any potential impacts.¹³ In other locations where SPP may need to remove trees, the activity is governed by and must comply with requirements of the Department of Forestry and Fire Protection.¹⁴ Such activity must also comply with the procedures adopted in the FMND to minimize any potential impacts.¹⁵ We are aware that tree trimming may occur at locations including residential areas. However, the FMND indicates that tree trimming which would occur would be required by, and must be conducted in accordance with, the requirements of the Commission's GO 95.

The Andresens make only broad allegations they will suffer potential harm. When balanced against the nature of this project (one-for-one pole replacement in existing right-of-way), and findings of no significant environmental impact which the

¹¹ See IS/MND, Section 2.1-1 Aesthetics, at p. 2-1.

¹² According to comment letters sent to the Commission on the Draft MND, the Andresens' home is located at 10867 Floriston Ave. (See FMND Comment Letter 1.)

¹³ See IS/MND Figure 1-3, at p. 1-5; also see FMND Response F-3, at p. 2-12.

¹⁴ See FMND, Comment Letter K, at p. 2-46. The Department of Forestry and Fire Protection would review any proposed tree cutting pursuant to California Code of Regulations, § 1103 and Public Resources Code, § 4581.

¹⁵ See IS/MND, Section 1.8.1.5 Vegetation Removal, at pp. 1-9, 1-10; also see Section 2.4 Biological Resources, at pp. 2.4-1 to 2.4-17 and adopted mitigation measures.

FMND reached pursuant to established CEQA criteria, we find no compelling evidence to support a conclusion the Andresens will suffer serious or irreparable harm absent a stay.

2. Likelihood of Prevailing on the Merits

As an element of determining whether to grant a stay, we generally consider, at least preliminarily, whether we believe the applicant is likely to prevail on the merits of the application for rehearing. Because the application for rehearing is still pending, our conclusions here do not predetermine our more thorough review or decision on rehearing. However, as briefly explained below we do not believe the Andresens are likely to prevail on the merits.

The Andresens' rehearing application raises the following challenges: (1) SPP failed to provide notice of its application for the project as required by GO 131-D; (2) the Decision failed to consider alternative routes for the project as required by GO 131-D; (3) the Commission failed to prepare an EIR as required by CEQA; (4) the Commission failed to recirculate the draft MND for comment as required by CEQA; and (5) the FMND and the Decision failed to consider undergrounding of the transmission line as required by the Truckee General Plan and Public Utilities Code section 320.

We do not believe the Andresens are likely to prevail on their notice argument. Even if SPP failed to notify them of the application for a PTC as required by GO 131-D, SPP's failure does not constitute legal error with D.07-06-038 because the claim is against the utility and not an action or determination of the Commission. There is no claim the Commission failed to comply with the notice requirements it is required to meet as Lead Agency under CEQA. We are also aware the Andresens actively participated in the CEQA process well before we issued D.07-06-038. Thus, we do not believe they were in fact prejudiced as to either knowledge of the project or opportunity to participate in the CEQA review process.

We do not believe the Andresens are likely to prevail on the argument that alternatives should have been considered pursuant to GO 131-D, Section IX.B.1.c.. Preliminary review suggests it is likely the project was exempt from that requirement

pursuant to GO 131-D Section III.B.1.b and/or Section III.B.g. Further, relevant CEQA statutes and Guidelines provide that an alternatives analysis is only required when an EIR must be prepared.¹⁶ As discussed below, it does not appear an EIR was required here.

We do not believe the Andresens are likely to prevail on the argument that an EIR was required. Public Resources Code Section 21064.5 provides in pertinent part that it is appropriate to prepare and MND when an Initial Study has identified potentially significant effects on the environment, but:

(1) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and

(2) there is no substantial evidence in light of the whole record before the public agency that the project, as revised, may have a significant effect on the environment.¹⁷

Further, case law indicates that an agency is afforded some discretion in determining what type of environmental document to prepare.

We believe CEQA Guideline Section 15073.5(c) will support a conclusion that the Andresens are not likely to prevail on the argument that the FMND should have been recirculated for comment. CEQA Guideline 15073.5(c) provides that recirculation is *not* required under the following circumstances:

(1) Mitigation measures are replaced with equal or more effective measures pursuant to Section 15074.1.

(2) New project revisions are added in response to written or verbal comments on the project's effects identified in the

¹⁶ See CEQA Guideline Section 15120 (contents of an EIR generally), Section 15126.6 (alternatives analysis required in EIR), also see Section (decision to prepare a negative declaration or mitigated negative declaration), and Section 15071 (contents of a negative declaration).

¹⁷ See also CEQA Guideline Section 15070.

proposed negative declaration which are not new avoidable significant effects.

(3) measures or conditions of project approval are added after circulation of the negative declaration which are not required by CEQA, which do not create new significant environmental effects and are not necessary to mitigate an avoidable significant effect.

(4) New information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration.

(Cal. Code of Regs., tit. 14, § 15073.5, subd. (c).)

We do not believe the Andresens are likely to prevail on the argument that we failed to consider the Truckee 2025 General Plan and Public Utilities Code section 320 with respect to whether undergrounding was required. The IS/MND explicitly discusses both the Truckee General Plan and section 320 in relation to the proposed project.¹⁸

3. Public Interest

In determining whether to grant a stay, we generally apply a public interest analysis which balances harm to the applicant (or public interest) if the stay is denied and the decision is later reversed, against the harm to the other parties (or public interest) if the stay is granted and the decision is affirmed.¹⁹ The Andresens argue that “if this project is allowed to go forward without a determination by the Commission whether compliance with CEQA was achieved, the public interest will be irreparably harmed.”²⁰ (Andresen Request for Stay, at p. 4.) We note however, that subsequent to adoption of the FMND and project mitigation measures to minimize or avoid any potential

¹⁸ See IS/MND, Section 2, Aesthetics, at p. 2-15. Also see Section 2.9, at p. 2.9-2 regarding the Commission’s exclusive jurisdiction regarding electric power line projects.

¹⁹ See *SES OII, supra*, 2004 Cal. PUC LEXIS, at * 2.

²⁰ Citing to *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 714

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environmental impacts, only the Andresens have claimed our Decision has the potential for harm. We see little potential for harm if the stay is denied and the Decision is later reversed because as previously discussed, there is not a compelling basis to show the Andresens will suffer any serious or irreparable harm if the project is allowed to move forward.

We must also consider the potential harm to SPP or the public if we grant the stay only to later affirm D.07-06-038. The Andresens argue that any a delay caused by granting the stay would not harm SPP because there is no evidence of imminent power outages or other hazards, and at worst there will be only a slight delay in beginning construction. (Andresen Request for Stay, at p. 4.)

Contrary to the Andresens' assertion it does appear that there could be harm to SPP and the public if a stay is granted and we later affirm D.07-06-038. The IS/MND indicates that SPP's existing 12.5 kV distribution line and/or associated facilities (Lines 608, 621, and the Glenshire Substation) are old, costly to maintain, difficult to access, and insufficient to serve increased development in the area.²¹ SPP proposes the project is needed to ensure transmission system reliability.

SPP originally contemplated that the new line would be operational by October 2, 2007. SPP claims that if the Andresens' request is granted and certain construction is not completed by October 15, 2007, the project will not be operational until summer 2008.²² SPP argues such delay heightens the reliability risk by preventing the provision of an alternate source of power (via Line 621) during the peak winter electrical demand which will leave residents of Hirschdale and surrounding areas

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for the proposition that an agency's compliance with CEQA is an "issue of public interest."

²¹ See IS/MND Section 1.2 Project Objective, at p. 1-2; also see Section 2.9 Land Use, Planning, and Policies, at pp. 2.9-1 to 2.9-4.

²² SPP Response to Andresen Request for Party Status, dated August 6, 2007, at p. 10 referring to regulations of the RWQCB (Lahontan Region) which prohibit certain necessary construction after October 15 of each year until the following spring or summer.

dependent solely on Line 608 as the source of power into the Glenshire Substation.²³ SPP argues that the potential loss of power under winter alpine conditions is a tangible threat to public health and safety.²⁴

It is impossible to predict with any certainty the actual potential for failure of the existing facilities if the project construction is delayed. However, given a balance between the interests of one homeowner vs. ensuring the provision of electric service to all other customers potentially at risk, we believe it is our responsibility to ensure the latter. Therefore, we believe a public interest analysis here supports a conclusion to deny the stay.

III. CONCLUSION

For the reasons specified above, the request for stay of D.07-06-038 is denied.

THEREFORE, IT IS ORDERED that:

1. The request for stay of D.07-06-038 is hereby denied.

This order is effective today.

Dated August 23, 2007, at San Francisco, California.

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

²³ *Id.*

²⁴ Sierra Pacific Response to the Request for Stay, dated August 13, 2007, at p. 10.