

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of the Pasadena Avenue Monterey Road Committee for variance of General Order 143B and authority to explore and enter into negotiations for consideration and implementation pursuant to Public Utilities Code (PUC) §§ 1202, 7604 as a pilot project as permitted by SB 1491.

Application 03-01-013
(Filed January 16, 2003)

Application of the Pasadena Avenue Monterey Road Committee and City of South Pasadena for Variance of General Order 75-C.

Application 03-07-049
(Filed July 25, 2003)

In the Matter of the Application of the City of South Pasadena for Approval of Ordinance 2121 Relating to Limitations of Train Speeds Pursuant to Section 7658 of the California Public Utilities Code.

Application 03-07-050
(Filed July 25, 2003)

**ADMINISTRATIVE LAW JUDGE'S RULING
DENYING MOTION FOR PROTECTIVE ORDER**

Background

These applications are among a series of applications related to the construction of the Los Angeles to Pasadena Blue Line light rail system.¹ Unlike

¹ Since the initial applications were filed, the line has been renamed the Gold Line.

the initial applications, which were filed by the Los Angeles to Pasadena Metro Blue Line Construction Authority (Construction Authority) for permission to construct a number of crossings for the light rail system, these applications were filed by a community group in South Pasadena, Pasadena Avenue Monterey Road Committee (PAMRC), and the City of South Pasadena (City).²

After written testimony had been distributed for the evidentiary hearing scheduled for June 2, 2004 in these consolidated proceedings, the City, the Los Angeles County Metropolitan Transportation Authority (LACMTA), and the Construction Authority (settling parties) entered into a settlement agreement covering all three of these consolidated proceedings. Pursuant to Rule 51.1 of the Commission's Rules of Practice and Procedure,³ the settling parties filed a Motion of the City of South Pasadena, Los Angeles to Pasadena Metro Blue Line Construction Authority and Los Angeles County Metropolitan Transportation Authority for Adoption of Proposed Settlement on April 1, 2004. PAMRC is not a party to the settlement and contests it.

² Application (A.) 03-01-013 requests that variances from some of the requirements of General Order (GO) 143-B be granted to eliminate the sounding of horns or other audible warning devices by Gold Line trains in South Pasadena. A.03-07-049 requests a variance from GO 75-C to limit or eliminate the sounding of bells on the crossing gates at all eight South Pasadena at-grade crossings of the Gold Line. A.03-07-050 requests, pursuant to Pub. Util. Code § 7658, that the Commission approve the City's Ordinance 2121, which, among other things, would impose a speed limit of 20 miles per hour on Gold Line trains in South Pasadena.

³ Unless otherwise indicated, all subsequent citations to rules refer to the Rules of Practice and Procedure, which are codified at Chapter 1, Division 1 of Title 20 of the California Code of Regulations, and citations to sections refer to the Public Utilities Code.

An Administrative Law Judge's (ALJ) Ruling dated July 23, 2004 (July 23 Ruling) set a schedule for the rest of this proceeding, including a Limited Evidentiary Hearing (LEH) on certain issues related to the proposed settlement. The July 23 Ruling also identified certain documents referred to in the written testimony of Darren Nielson distributed prior to the filing of the proposed settlement as relevant to evaluation of the proposed settlement, and required the Construction Authority or the LACMTA, as appropriate, to serve copies of these documents on the parties and the ALJ by August 4, 2004.

The Construction Authority served one document on August 4⁴ and filed a Motion for a Protective Order covering three other documents that it had identified as potentially responsive to the July 23 Ruling.⁵ At a conference call among the active parties and the ALJ on August 6, 2004, the parties agreed to revisions to the schedule for this proceeding in order to allow for resolution of the request for a protective order. In accordance with the parties' agreement, the Construction Authority supplemented its motion with additional information and provided the ALJ with both complete and redacted copies of the documents for in camera inspection. On August 13, 2004, the City filed a response to the motion for protective order and PAMRC filed an opposition to the motion.

⁴ Memorandum from Darren Nielson, ATS Consulting, to Eric Olson, Construction Authority, dated March 20, 2003.

⁵ Memorandum from Nielson to Michael Estrada, Richards, Watson & Gershon, dated October 9, 2003; memorandum from Nielson to Estrada, dated February 2, 2004; "Short-Term Noise Measurements" document, undated.

Discussion

Protective Order

In its request for a protective order, the Construction Authority contends both that the documents may be used against it in future litigation and that the documents are potentially covered by evidentiary privileges, including the attorney-client privilege (Evid. Code Section 950 et seq.) and the attorney work product privilege (Evid. Code Section 2018). The Construction Authority does not, however, assert any privileges as the basis for granting the protective order it seeks. Rather, it asks for the order so that it may preserve its ability to advance claims of privilege relating to the documents in possible future litigation in other forums.

The City argues in its response that public policy favors disclosure of the information apparently contained in the documents. The City also questions the applicability of any privileges to the documents at issue. PAMRC's opposition argues that the documents are not properly subject to either the attorney-client or attorney work product privilege. PAMRC also objects both to the redactions made by the Construction Authority and to the content of the proposed protective order.

GO 66-C governs public disclosure of information provided to the Commission. It incorporates the definition of "public records" found in the Public Records Act, Govt. Code Section 6252, and lists exclusions from the general requirement of disclosure of such records.

In its request for a protective order, the Construction Authority is, in essence and without citation to GO 66-C, asserting that the documents at issue here are "[r]ecords or information of a confidential nature furnished to, or obtained by the Commission." (GO 66-C, § 2.2.) This assertion is not, however,

supported by any relevant facts or legal argument. The Construction Authority concedes that the possible use of the documents in threatened litigation elsewhere is not in itself a sufficient basis for the requested protective order.⁶ This claim is especially weak support for a protective order when the report of the threatened litigation (in the form of a news article appended to the motion) occurred almost six months after the date of the later of the two memoranda at issue.

The Construction Authority also specifically disclaims reliance on any particular privilege as the grounding of its claim of confidentiality for the documents it wishes to have protected. This position leaves the Commission with no legal basis on which to determine that the documents should be protected. The Construction Authority's evident desire to shield the documents from further dissemination is not a sufficient justification for issuing a protective order. The motion for a protective order should be denied.

Redactions

The July 23 Ruling contemplated that the responsive materials would provide "some information about operational Gold Line noise levels," in the form of "tests, test results, measurements, etc." (July 23 Ruling, p. 5.) Such information would assist the Commission in reviewing the proposed settlement, which is the subject of the LEH now scheduled for August 31, 2004. The Construction Authority contends that some portions of the documents, whether or not they are privileged or otherwise protected, are not responsive to the

⁶ See also Decision 91-12-019, in which the Commission overruled the objections of Southern California Edison (SCE) that the public release of a report prepared for the then-Division of Ratepayer Advocates would prejudice SCE's position in litigation.

July 23 Ruling. It has therefore excised those portions. As generally described in its supplement to its motion for a protective order, the Construction Authority removed the identification of locations of “the sites where noise measurements were taken, recommendations for actions to be taken regarding recorded noise levels, and preliminary conclusions regarding recorded noise levels.” (Supplement, p. 4.) The City and PAMRC object to the described redactions.

The redactions present an awkward question. As the City points out, had redacted documents been served on August 4, the parties would have had the benefit of at least some information much earlier and the dispute about the validity of the redactions would have been better informed, if not avoided altogether. This is in keeping with the intention of the July 23 Ruling to expedite, rather than delay, the provision of relevant information for the LEH on the proposed settlement. Events having unfolded otherwise, however, the documents have instead been reviewed in camera for responsiveness to the July 23 Ruling since, as noted above, the Construction Authority does not claim that the redactions are based on specific privileges.

As an initial matter, none of the redactions of locations of noise measurements are justified. The location of the measurements is an essential element of the measurement itself; the results are virtually meaningless without the location. Second, most of the evaluative comments and observations in the two memoranda are responsive to the July 23 Ruling, since they explain the significance of the measurements and, in some instances, give a concise summary of the operational responses of LACMTA and/or the Construction Authority to the measurements. Third, two sections of the February 2, 2004 memorandum, headed “Ongoing Work” and “Other Considerations,” are generally not

responsive to the July 23 Ruling, since they contain proposals for additional work, rather than reports of completed measurements.

The Construction Authority should therefore serve the October 9, 2003 memorandum without redactions. The Construction Authority should serve the February 4, 2004 memorandum with redactions only to the “Ongoing Work” and “Other Considerations” sections. The Short-Term Noise Measurements document has not been subject to any redactions. It should be served in its entirety since, as the Construction Authority notes, it provides the measurements underlying the February 2, 2004 memorandum.

Additional Data

The Construction Authority also produced for in camera inspection a document that was not originally identified in the motion for a protective order, consisting of a sample of the data files from which the information in the Short-Term Noise Measurements document was extracted. Although formally responsive to the July 23 Ruling, these data files appear to be extensive and are not now captured in existing paper documents. The Construction Authority is not required to generate and produce new paper documents with these data files in response to the July 23 Ruling, as this would be too burdensome to the Construction Authority in the current timeframe of this proceeding.

IT IS RULED that:

1. The Construction Authority’s Motion for a Protective Order, dated August 4, 2004, is denied.
2. Not later than noon, Thursday, August 19, 2004, the Construction Authority must serve (i.e., the document must be received) on all parties and the ALJ a complete and unredacted copy of the Memorandum from Darren Nielson,

ATS Consulting, to Michael Estrada, Richards, Watson & Gershon, dated October 9, 2003.

3. Not later than noon, Thursday, August 19, 2004, the Construction Authority must serve (i.e., the document must be received) on all parties and the ALJ a complete copy of the Memorandum from Darren Nielson, ATS Consulting, to Michael Estrada, Richards, Watson & Gershon, dated February 2, 2004, subject to the Construction Authority's redaction of the sections headed "Ongoing Work" and "Other Considerations."

4. Not later than noon, Thursday, August 19, 2004, the Construction Authority must serve (i.e., the document must be received) on all parties and the ALJ a complete and unredacted copy of the document headed "Short-Term Noise Measurements," undated.

Dated August 19, 2004, at San Francisco, California.

/s/ ANNE E. SIMON

Anne E. Simon
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have by mail this day served a true copy of the original attached Administrative Law Judge's Ruling Denying Motion for Protective Order on all parties of record in this proceeding or their attorneys of record.

Dated August 19, 2004, at San Francisco, California.

/s/ FANNIE SID

Fannie Sid

N O T I C E

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.