Decision 11-12-056 December 15, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of The Nevada Hydro Company for a Certificate of Public Convenience and Necessity for the Talega-Escondito/Valley-Serrano 500 kV Interconnect Project.	Application 10-07-001 (Filed July 6, 2010)

ORDER DENYING REHEARING OF DECISION (D.) 11-07-036

I. INTRODUCTION

In this Order we dispose of the application for rehearing of Decision (D.) 11-07-036 (or "Decision") filed by San Diego Gas & Electric Company ("SDG&E").

On July 6, 2010, The Nevada Hydro Company ("Nevada Hydro") filed Application (A.) 10-07-001 seeking Commission approval of a Certificate of Public Convenience and Necessity ("CPCN") to construct and operate the Talega-Escondito/Valley-Serrano 500 kV Interconnect Project ("TE/VS 500 kV Interconnect Line" or "Project"), which would be located entirely within California.[1] The Decision addressed Phase 1 threshold issues,[2] and in relevant part concluded that if and when

[1] See Application of The Nevada Hydro Company for a Certificate of Public Convenience and Necessity for the Talega-Escondito/Valley-Serrano 500 kV Interconnection Project Including Proponent's Environmental Assessment ("Application of Nevada Hydro"), dated June 2010, at pp. 1-3.

[2] Phase 1 addressed four threshold issues: (1) whether Nevada Hydro would become a public utility when it obtained a CPCN; (2) whether Nevada Hydro must seek a CPCN from this Commission for a related Lake Elsinore Advanced Pumped Storage ("LEAPS") facility; (3) whether intervenor compensation should be due even if the TE/VS 500 kV Interconnect is not approved and Nevada Hydro does not become a public utility under Sections 216 & 218; and (4) whether Nevada Hydro should post a bond or guarantee some other payment for consultant services pursuant to Section 631. (See D.11-07-036, at pp. 3-4.) Phase 2 will determine whether to grant a CPCN for the TE/VS 500 kV Interconnect. (D.11-07-036, at pp. 9, 16 [Finding of Fact Number 2].)

Nevada Hydro is granted a CPCN, it will become a public utility pursuant to Public Utilities Code Sections 216& 218.[3]

SDG&E filed a timely application for rehearing challenging the Decision on the grounds that: (1) concluding Nevada Hydro will become a public utility contravened established statutory interpretation principles; (2) concluding Nevada Hydro will become a public utility was beyond the scope of Phase 1; and (3) the Commission erred in its determination regarding dedication to public use. No responses were filed.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.11-07-036 because no legal error has been shown.

II. DISCUSSION

A. Statutory Interpretation

SDG&E contends the Decision's finding regarding public utility status erred because it contravened established statutory interpretation principles. Specifically, SDG&E argues it contravenes the plain language of Sections 216 and 218. (Rhg. App., at pp. 5-7.)

Sections 218, 217& 216 combine to establish the criteria for public utility status under the Public Utilities Code. In pertinent part, Section 218 states:

> (a) "Electrical corporation" includes every corporation or person owning, controlling, operating, or managing any electrical plant for compensation within this state….

(Pub. Util. Code, § 218, subd. (a).)

Section 217 defines electric plant as:

> "Electric plant" includes all real estate, fixtures and personal property owned, controlled, or managed in connection with or

[3] D.11-07-036, at pp. 2, 5-8, 16 [Finding of Fact Numbers 2 & 3], p. 17 [Conclusion of Law Number 1], and p. 19 [Ordering Paragraph Number 1]. All subsequent section references are to the Public Utilities Code, unless otherwise stated.

> to facilitate *the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits ducts or other devices, materials, apparatus, or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.*

(Pub. Util. Code, § 217 (emphasis added).)

> Section 216 states in pertinent part:
>
> (a) "Public utility" includes every…electrical corporation…where the *service is performed for, or the commodity is delivered to, the public* or any portion thereof.
>
> (b) Whenever any…electrical corporation…*delivers a commodity to, the public or any portion thereof for which any compensation or payment* whatsoever is received, that… electrical corporation…is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.
>
> (c) When any person or corporation performs any service for, or delivers any commodity to, any person, private corporation, municipality, or other political subdivision of the state, that in turn either directly *or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof,* that person or corporation is a public utility….

(Pub. Util. Code, § 216, subds. (a), (b) & (c) (emphasis added).)

We agree with SDG&E that the starting point for determining the meaning of a statute is to first look to its plain language, giving words their ordinary or "plain meaning."[4] Here, the record evidence shows that if Nevada Hydro receives a CPCN it will then engage in actions which comport with the plain language of Sections 217, 218, & 216.

It was undisputed that the proposed transmission line is "electric plant" within the plain meaning of Section 217, as it will be used to transmit, deliver, and

[4] See e.g., *People v. Canty* (2004) 32 Cal.4th 1266, 1276-1277; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

furnish electricity for use as light, heat, or power as required by the statute.[5] Nevada Hydro would also be an "electrical corporation" as defined by Section 218 because it will construct and operate the line,[6] and it will receive compensation.[7]

Finally, Nevada Hydro would be a "public utility" pursuant to Section 216 because the line will be used to furnish transmission capacity to SDG&E for use by its or other California utility customers.[8] And again, it would receive compensation such that the transmission service will be integrated with the statewide electric grid.[9]

SDG&E does not challenge the veracity of these facts or Nevada Hydro's stated intent to become a public utility subject to the jurisdiction of this Commission. The issue SDG&E raises is one of timing. SDG&E argues it was impermissible to determine that the above facts would constitute public utility status because Nevada Hydro has *not yet* satisfied the statutory requirements. To support its position, SDG&E argues that the statutes are phrased using an active, present verb tense. In SDG&E's view, the plain language thus shows it is impermissible to consider and/or determine public utility status until Nevada Hydro's *present* actions satisfy the statutory requirements. SDG&E argues that nothing in the statutes allow for consideration based on future facts not yet in existence.

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[5] Application of Nevada Hydro, dated June 2010, at pp. 1-2 [Project objectives include to: (1) provide additional high-voltage transmission capacity to reduce congestion on the CAISO grid…; (2) provide at least 1,000 MW of additional import capacity to SDG&E system at all times…; (3) provide at least 1,000 MW incremental transmission capability for SDG&E under G-1/N-1 conditions to satisfy reliability criteria and to reduce the cost to SDG&E ratepayers…"]; and pp. 11-12 ["…the TE/VS Interconnect will connect into a proposed Santa Rosa substation …to serve local load in the immediate Lake Elsinore area."].

[6] Application of Nevada Hydro, dated June 2010, at p. 2 ["The TE/VS Interconnect will be constructed and operated by [Nevada Hydro Company] NHC…"].

[7] Application of Nevada Hydro, dated June 2010, at p. 2 ["…upon energization, NHC would transfer control of the TE/VS Interconnect to the California Independent System Operator ("CAISO") while NHC recovers its costs plus a reasonable rate of return through the Transmission Access Charge."].

[8] See *ante*, fn. 5.

[9] See *ante*, fn. 7..

We do not dispute that the statutes at issue use an active verb tense. However, we are aware of no authority that establishes verb tense should control our interpretation of the Public Utilities Code. In fact, SDG&E appears to disregard relevant statutory interpretation principles that weigh against the rigid and literal interpretation of the statutes that SDG&E suggests.

For example, Courts will generally not disturb our interpretation of the Public Utilities Code unless it fails to bear a reasonable relation to the statutory purposes and language.[10] SDG&E does not allege or establish our interpretation was unrelated to the statutory language. SDG&E also ignores that relevant case law which cautions against applying a rigid literal interpretation of statutory language. A statute's overall intent and purpose will take precedence, such that the meaning should not be dictated by any single word or sentence.[11] A literal construction will not prevail if it is contrary to the legislative intent apparent in the statute.[12] And a statute will be interpreted to effectuate the spirit of the act,[13] and the overall purpose of the law.

In keeping with these principles, the Courts have expressed a policy favoring a practical application of statutes. For example, in *Schlessinger v. Rosenfield, Meyer, & Susman* ("*Schlessinger*") (1995) 40 Cal.App.4th 1096 the Court stated:

> …the provision must be given a reasonable and *common sense* interpretation consistent with the apparent intent of the lawmakers, *practical* rather than technical in nature, *which upon application will result in wise policy rather than mischief or absurdity*…

(*Schlessinger, supra*, 40 Cal.App.4th at p. 1239 (emphasis added).)[14]

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[10] *Greyhound Lines, Inc. v. Public Utilities Commission, supra,* 68 Cal.2d at p. 410. See also *Pacific Gas and Electric Company v. Department of Water Resources* ("*PG&E v. DWR*") (2003) 112 Cal.App.4th 477, 496.

[11] *Latkins v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659.

[12] *Id.*

[13] *Lungren v. Deukmejian, supra,* 45 Cal.3d at p. 735.

[14] See also *Kennard v. Rosenberg* (1954) 127 Cal.App.2d 340, 345.

Similarly, the plain language of a statute is unlikely to control if a literal construction would lead to an absurd result and/or frustrate the overall purpose and intent of a statute.[15]

We interpret the spirit and purpose of Sections 218, 217 & 216 to be reasonably straightforward. The statutes set out the actions and criteria that determine public utility status. Common sense and practicality would dictate that when, as here, an application is filed showing an entity would act to fulfill the statutory criteria if the desired approval is granted, it is only reasonable to consider the facts presented and put the parties on notice whether the statutes would be triggered.[16] That is all our Decision did.[17] SDG&E's attempt to constrain this Commission's ability to render such a determination based on a literal application of verb tense would produce an absurd result that frustrates our ability to effectuate the spirit, purpose, and intent of the statutes.[18]

Finally, SDG&E contends it was legal error to conclude that holding a CPCN (per Section 1001) is sufficient to confer public utility status under Sections 218 & 216.[19] SDG&E argues there must be a case specific application of the facts to those statutes. (Rhg. App., at p. 6.)

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[15] See *PG&E v. DWR, supra,* 112 Cal.App.4th at p. 496.

[16] We also briefly noted our policy basis for taking such action. (D.11-07-036, at pp. 7-8; and *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* [D.04-10-039] (2004) __ Cal.P.U.C.3d __, at pp. 15-25 (slip op.).)

[17] SDG&E suggests that we set aside the requirements of the statutes. (Rhg. App., at p. 5, fn. 8.) However, that would only be true had we found that Nevada Hydro is currently a public utility. We did not.

[18] SDG& E also suggests that we exceeded our authority by not waiting until Nevada Hydro actually receives its CPCN to determine it would then be a public utility. (Rhg. App., at p. 3, relying on *Southern California Gas Company v. Public Utilities Commission* ("*SoCalGas v. PUC*") (1979) 24 Cal.3d 653.) That is incorrect and case law supports our broad authority to act unless a specific limit is placed on our power. (See e.g., *Southern California Edison Company v. Peevey* (2003) 31 Cal.4th 781, 792.) SDG&E identifies no express limit.

[19] Along those lines SDG&E also argues that finding public utility status under Section 1801 (intervenor compensation) is insufficient for purposes of compliance with Sections 218 & 216. (Rhg. App., at p. 6.) That is probably true. However, nothing in the Decision relied on a Section 1801 analysis to render findings related to Sections 218 & 216.

As discussed above, our Decision did specifically apply the facts as presented in this case to Sections 218 & 216.[20] SDG&E appears to disregard that discussion. SDG&E also ignores the interrelated nature of Sections 1001 and Sections 216 & 218.

As part of our regulation of public utilities, the Commission regularly grants "certificates" (i.e., CPCNs) to public utilities seeking to operate in California.[21] It is well established that CPCN determinations often go hand in hand with evaluating the type of services that may trigger public utility status.[22] That is all we reasonably and lawfully did here.[23] SDG&E states that it disagrees with such precedent. (Rhg. App., at

[20] See e.g., D.11-07-036, at p. 5 ["…Nevada Hydro states that it will both own electric transmission facilities and will dedicate these facilities to public use; therefore, it will meet the statutory definition of an electrical corporation (§ 218) and will satisfy the dedication to public use test (§216)."], and p. 8 ["Section 218(a) defines an electrical corporation as….Here, Nevada Hydro is proposing to construct a transmission line that would be used, for example, to transmit power from the Talega-Escondito line to the Valley-Serrano line and vice versa. In addition, Section 216(a) states that a public utility includes….Nevada Hydro acknowledges that it will become and electrical corporation and that it will dedicate its facilities to public use, consistent with the Pub. Util. Code."].

[21] See Section 1001, stating in pertinent part:

> No railroad corporation…gas corporation, *electrical corporation*…telephone corporation, water corporation…shall begin the construction of…a *line*, plant, or system, or any extension thereof, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction.

(Pub. Util. Code, § 1001. See also *Southern California Gas Company v. City of Vernon* (1995) 41 Cal.App.4th 209, 215 ["under the Constitution, as to matters over which the [Commission] has been granted regulatory power, [its] jurisdiction is exclusive."].)

[22] Examples of such determinations in the natural gas industry include: *Application of Gill Ranch Storage, LLC for a Certificate of Public Convenience and Necessity for Construction and Operation of Natural Gas Storage Facilities* [D.09-10-035] (2009) __ Cal.P.U.C.3d __, at pp. 2-5 (slip op.); *Application of Lodi Gas Storage, LLC for Certificate of Public Convenience and Necessity for Construction and Operation of Gas Storage Facilities* [D.00-05-048] (2000) __ Cal.P.U.C.3d __, at pp. 2-8 (slip op.); and *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* [D.04-10-039] (2004) __ Cal.P.U.C.3d __, at pp. 15-25 (slip op.). Examples of such determinations in the telecommunications industry include: *Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411, 414-415; and *Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 648-650.

[23] To be granted a CPCN, and entity is, by definition, a public utility whether the Commission explicitly states that fact or not.

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p. 7.) However, disagreement does not establish legal error,[24] and such determinations have been upheld by the Courts.[25]

B. Scope of Phase 1

SDG&E contends the Decision erred because: (1) Phase 1 was only scoped to resolve legal issues, not the factual question of whether an entity is a public utility under Section 216; and (2) Nevada Hydro must show compliance with Sections 216 & 218, and the record is silent on the requisite facts. (Rhg. App., at pp. 7-8.)

SDG&E is wrong regarding the Phase 1 scope. The Phase 1 Scoping Memo clearly established that whether Nevada Hydro would become a public utility was an issue to be evaluated and determined. For example, the Scoping Memo stated:

> At the pre-hearing conference (PHC), the assigned Administrative Law judge (ALJ) raised several threshold issues to be addressed in either testimony or initial briefs….The Ruling also set a briefing schedule for certain threshold issues, including a) whether or not TNHC would be a public utility (as defined in Pub. Util. Code § 218 [and 216]) upon issuance of a CPCN."[26]

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[24] *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8 ["The fact that Edison does not like the Commission's findings and conclusions simply does not provide grounds for reversal."].

[25] See e.g., *Anderson v. Time Warner Telecom of California* (2005) 129 Cal.App.4th 411 [Court found Time Warner Telecom was a telephone corporation pursuant to Section 234 and 7901 because it possessed a CPCN from the Commission]; and *Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642 [Court determined company was a telephone corporation pursuant to Sections 234 and 7901 because it held a CPCN].

[26] See Joint Assigned Commissioner's and Administrative Law Judge's Phase 1 Scoping Memo Ruling, dated January 19, 2011, at pp. 3. See also Scoping Memo at p. 4 stating: "It is reasonable to consider the following threshold issues in the scope of Phase 1 of this proceeding…:

> 1. Entities applying for a CPCN at the Commission are generally certificated as public utilities if and when the project is approved. If the project is not approved, for some reason, the entity would not be determined to be a public utility. Is there a reason to proceed any differently in this matter? Why or why not?

The established scope did not distinguish between legal and factual considerations, nor did it limit consideration to only legal issues. We also disagree with SDG&E's suggestion that there are separate legal and factual inquiries involved in determining public utility status. Any finding regarding public utility status is inherently dependant on consideration of both the law and the facts of any given case. And we note that in this proceeding the parties, including SDG&E, submitted briefs encompassing both types of issues.[27]

The record is also not silent on the requisite facts. As discussed above, Nevada Hydro did present evidence to show how it would comply with the statutes.[28] SDG&E simply failed to refute the facts presented.

C. Dedication to Public Use

SDG&E asserts that in order to be deemed a public utility, there must be a dedication to public use consistent with the applicable legal standard. SDG&E argues the Decision erred in finding dedication in this case. (Rhg. App., at pp. 8-9.)

The law regarding dedication establishes that it may be express or implied. The test to determine whether dedication has occurred is:

> …whether or not [a person has] held himself out, expressly or impliedly, as engaged in the business of supplying [a service or commodity] to the public as a class, not necessarily to all of the public, but to any limited portion of it, as contradistinguished from his holding himself out a serving or ready to serve only particular individuals, either as [an] accommodation or for other reasons peculiar and particular to them.

(*Independent Energy Producers Association, Inc. v. State Board of Equalization* ("*Indep. Energy Producers*") (2004) 125 Cal.App.4th 425, 442-443.)

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[27] See e.g., Opening Brief of SDG&E, dated November 19, 2010, at pp. 2-3; Brief of the Nevada Hydro Company in Response to the Administrative Law Judge's Ruling Establishing Date for Service of Supplemental Testimony and Setting Briefing Dates Dated October 6, 2010 ("Nevada Hydro Opening Brief"), dated November 19, 2010, at pp. 2-10.

[28] See *ante*, fns. 5, 6, 7. See also Application of Nevada Hydro, dated June 2010, at pp. 5, 11-12, 19, 23.

To allege error, SDG&E again raises its argument regarding timing. In particular, SDG&E contends it was premature to presume that dedication had occurred solely on the basis of Nevada Hydro's plans and representations.[29]

As discussed above, it was not unlawful to interpret the statutes based on the facts presented in Phase 1. Moreover, we did not presume or determine that the dedication requirement has already been satisfied. We recognized that dedication will depend on whether Nevada Hydro's planned actions come to pass. Thus, our Decision was clear that only *then* would Nevada Hydro meet the necessary statutory requirements.[30]

SDG&E also cautions that because transmission lines *may* be privately held, it should not be a foregone conclusion that a transmission-owning applicant will, in fact, dedicate its facilities to public use. The fact that transmission lines may be held by private entities is of no relevance here. There was no evidence to indicate that anyone other than Nevada Hydro would own and operate the TE/VS 500 kV Interconnect. Thus, SDG&E's concern is nothing more than speculation.

Finally, SDG&E contends the Decision erred because Phase 1 was not intended to address when or over what electric plant Nevada Hydro would dedicate to public use. SDG&E attempts to create uncertainty where none exists. Nevada Hydro's application is clear on its face. It seeks a CPCN for one facility, i.e., the TE/VS 500 kV Interconnect. That is the facility Nevada Hydro states it would construct, operate,

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[29] SDG&E also argues that dedication is never presumed without "unequivocal intention." (Rhg. App., at p. 9, fn. 18.) That is correct. However, SDG&E offers no evidence that would raise any doubt regarding Nevada Hydro's intent in this proceeding.

[30] See D.11-07-036, at p. 4, Number 1 ["…If the project is not approved, for some reason, the entity would not be determined to be a public utility…."]. SDG&E also contests the Decision stating at least one Court has determined that selling electricity, in and of itself, does not result in a dedication sufficient to make an entity a public utility. (Rhg. App., at p. 9, relying on *Indep. Energy Producers, supra,* 125 Cal.App.4th at p. 444.) That is true. However, the Court went on to explain that where no public utility status was found, the entities had sold their product to only a few individuals and not the public at large. (*Id.*) That does not appear to be the case here since Nevada Hydro would sell electricity in the competitive marketplace, for delivery to the public (at large). (See Application of Nevada Hydro, dated June 2010, at p. 2; Brief of Nevada Hydro, dated November 19, 2010, at pp. 6-7.)

and dedicate to public use, and that is the facility specifically considered in this proceeding.[31]

III. CONCLUSION

For the reasons stated above, the application for rehearing of D.11-07-036 is denied because no legal error has been shown.

THEREFORE, IT IS ORDERED that:

1. The application for rehearing of D.11-07-036 is denied.

This order is effective today.

Dated December 15, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
Commissioners

[31] See Scoping Memo, dated January 19, 2011, at p. 1. See also D.11-07-036, at p. 1 ["In this application Nevada Hydro Company (Nevada Hydro) requests a Certificate of Public Convenience and Necessity (CPCN) for the Talega-Escondito/Valley Serrano 500 kilovolt Interconnect Project."], and pp. 5, 8 ["Indicating that if the CPCN is granted, the transmission line will be dedicated to public use.].