Decision **DRAFT DECISION OF ALJ WONG (Mailed 3/21/2006)**

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)

OPINION REGARDING THE PETITION FOR MODIFICATION OF DECISION 04-09-022

Summary

This decision addresses the April 1, 2005 motion filed by Ratepayers for Affordable Clean Energy (RACE), which was subsequently reclassified by the assigned Commissioners as a petition for modification (petition) of Decision (D.) 04-09-022.[1] RACE's petition challenges prior determinations made in this proceeding that the California Environmental Quality Act (CEQA) does not apply.

Today's decision concludes that the activities related to the Phase I issues, and which led up to the adoption of D.04-09-022, did not amount to a project within the meaning of CEQA and therefore CEQA did not apply to the Phase I activities. Accordingly, RACE's reclassified petition for modification of D.04-09-022 is denied.

[1] Assigned Commissioners' Ruling (ACR) dated October 18, 2005.

Background

To aid in the understanding of the procedural activities leading up to RACE's reclassified petition for modification of D.04-09-022, a brief chronology of the relevant events is provided below.

The Commission initiated this rulemaking (rulemaking or OIR) on January 22, 2004. The rulemaking sought comments from the gas utilities and interested parties on the Phase I and Phase II issues.[2] The Phase I proposals were filed, and comments and reply comments were filed. In the Phase I scoping memo and ruling of June 18, 2004, the assigned Commissioners ruled that no evidentiary hearings would be held on the Phase I issues.[3] In accordance with Rule 14.1 of the Commission's Rules of Practice and Procedure (Rules), a draft decision on the Phase I issues was prepared based on a review of the Phase I proposals and the comments and reply comments. The Phase I draft decision was mailed for comment on July 20, 2004, and placed on the Commission's August 19, 2004 agenda for consideration. (*See* D.04-09-022, pp. 7-9, 82.)

On August 18, 2004, the day before the Commission was scheduled to consider the Phase I draft decision, RACE submitted its "Motion for a Determination of Applicability of the California Environmental Quality Act To

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[2] The Phase I issues addressed interstate pipeline capacity contracts, access on the intrastate pipelines to future LNG supplies, and access on interconnecting facilities with interstate pipelines. The Phase II issues address infrastructure adequacy and slack capacity guidelines, natural gas quality, and a standardized operational balancing agreement.

[3] RACE appealed the scoping memo's categorization of this proceeding as quasi-legislative. That appeal was denied in D.04-07-030. The Phase II issues were categorized as ratesetting.

The Phase I Draft Decision" to the Commission's Docket Office for filing.[4] RACE's August 18, 2004 motion stated that the motion was "submitted pursuant to CPUC Rules 45, 17.1 and 17.2."[5]

An alternate draft decision on the Phase I issues was issued for comment on August 19, 2004. As a result, the Commission's consideration of the draft decision and the alternate draft decision was deferred to the Commission's September 2, 2004 meeting, at which time the Commission issued D.04-09-022.

The following day, the assigned Commissioners denied RACE's August 18, 2004 motion, ruling that "since there is no specific project being approved in the Phase I decision, CEQA does not apply at this juncture." (September 3, 2004 ACR, p. 5.)

On October 8, 2004, RACE filed a motion to apply CEQA to the Phase I and Phase II decisions. RACE's October 8, 2004 motion sought a determination that CEQA applies to "the Phase I Decision, Phase II Draft Decision and the Rulemaking as [a] whole." (RACE October 8, 2004 Motion, p. 3.)[6]

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[4] RACE's August 18, 2004 motion was not filed with the Docket Office because RACE failed to include a certificate of service and a service list with its submission, as required by Rules 2.3 and 3. (*See* September 3, 2004 ACR Regarding Motion, fn. 1, p. 1.)

[5] Rules 17.1 and 17.2 address the procedures for filing a motion for determining whether a proceeding involves a project subject to or exempt from CEQA, and Rule 45 addresses motion practice in general.

[6] As noted in footnote 1 of the February 28, 2005 scoping memo and ruling, no Phase II Draft Decision or Phase II Proposed Decision had been issued as of that date. Evidentiary hearings into the Phase II infrastructure adequacy and slack capacity issues were held in August and September 2005. A proposed decision on those Phase II issues is expected shortly. Evidentiary hearings into the gas quality issues were held in December 2005, and a proposed decision on those issues is expected in the near future.

On February 28, 2005, the assigned Commissioners issued a scoping memo and ruling which described the Phase II issues, and denied RACE's October 8, 2004 motion, noting that RACE's October 8, 2004 motion was virtually identical to RACE's August 18, 2004 motion which was previously denied.

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 Commission order or decision,[7] the Docket Office, with the consent of RACE, renamed the document as a "Motion for Reconsideration of that portion of the Assigned Commissioner's Scoping Ruling dated February 28, 2005 that denied R.A.C.E.'s Motion for a Determination of the Applicability of C.E.Q.A." and filed it on April 1, 2005 (the April 1, 2005 motion).[8]

The assigned Commissioners subsequently reclassified the April 1, 2005 motion as a petition for modification (petition) of D.04-09-022, in order to "allow the full Commission to address RACE's contention of whether CEQA should apply to the Phase I decision … independent of any determination by the full Commission of whether CEQA should apply to the Phase II issues." (October 18, 2005 ACR, p. 4.) The ACR also permitted RACE and other

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[7] *See* Pub. Util. Code § 1731 and Rule 85.

[8] On August 30, 2005, RACE filed a petition for writ of mandate in the California Supreme Court requesting that the Commission be directed to undertake an environmental review pursuant to CEQA. Subsequently, RACE requested that it be dismissed without prejudice, and on December 20, 2005, the Supreme Court ordered that RACE's petition for writ of mandate be withdrawn.

interested parties to file supplemental responses and replies on whether CEQA should or should not apply.

On November 14, 2005, Coral Energy Resources, L.P. (Coral) filed a response, and San Diego Gas & Electric Company (SDG&E), Southern California Gas Company (SoCalGas), and Pacific Gas and Electric Company (PG&E) filed a joint response.

It appears that on or about November 14, 2005, RACE served its "Supplemental Response Permitted By Assigned Commissioners' Ruling Reclassifying the April 1, 2005 Motion as a Petition for Modification of Decision 04-09-022" on some of the parties to this proceeding, but never filed its response with the Commission, as evidenced by a lack of an entry for RACE in the Commission's Docket Card records around the November 14, 2005 period. Nor was RACE's response served on administrative law judge (ALJ) Wong despite RACE's certificate of service listing ALJ Wong as having been served.[9]

On November 30, 2005, SDG&E, SoCalGas and PG&E filed a joint reply to RACE's supplemental response, and RACE filed its "Reply to Supplemental Responses Permitted by Assigned Commissioners' Ruling Reclassifying the April 1, 2005 Motion as a Petition for Modification of Decision 04-09-022."[10]

RACE's Position

RACE's supplemental response reaffirms the arguments made in its petition. The only change to its earlier arguments is to substitute two citations to

[9] Despite these shortcomings on RACE's part, we address RACE's supplemental response in this decision because the utilities were apparently served with RACE's supplemental response as evidenced by the utilities' November 30, 2005 joint reply to RACE's supplemental response.

[10] ALJ Wong was not served with RACE's reply until December 4, 2005.

support its earlier reliance on Muzzy Ranch Company v. Solano County Airport Land Use Commission (2005) 125 Cal.App.4th 810, which may no longer be cited because the Supreme Court of California granted review of that decision.[11]

As set forth in RACE's petition, RACE contends that CEQA applies to this entire proceeding because the Commission's actions constitute a "project" under CEQA. RACE asserts that this rulemaking is identical to the revisions to the sphere-of-influence guidelines which took place in City of Livermore v. Local Agency Formation Commission of Alameda County (1986) 184 Cal.App.3d 531.[12] In that decision, the Court of Appeal held that the revised guidelines fit within CEQA's broad definition of a project because the revisions will have an ultimate impact on the environment. RACE points to Finding of Fact 25 and to Conclusions of Law 12 and 13 of D.04-09-022 to demonstrate that this rulemaking will ultimately have an impact on the environment because the decision "facilitates 'access' to gas systems, sanctions the establishment of 'receipt points,' and approves the designation of a 'common receipt point.' " (Petition, p. 3.)

RACE contends that "despite the lack of a specific project and the lack of immediate adverse impacts, this proceeding should be subject to review under CEQA." (Petition, p. 4.) RACE asserts that CEQA and its guidelines focus on the ultimate impact of a project, and not on whether the project is tangible or intangible. RACE points out that the rulemaking will have an impact on energy

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[11] RACE substitutes County Sanitation District No. 2 v. County of Kern (2005) 127 Cal.App.4th 1544 (referred to herein as County Sanitation District), and Plastic Pipe & Fittings Association v. California Building Standards Commission (2004) 124 Cal.App.4th 1390 (referred to herein as Plastic Pipe & Fittings) for its citation to the Muzzy Ranch decision.

[12] Referred to herein as City of Livermore.

conservation, and that the reliance on liquefied natural gas (LNG) will lead to construction and operations-related impacts from LNG regasification facilities, as well as increased marine traffic. RACE asserts that all of these activities will lead to substantial changes to the environment, and that a full CEQA review is required for this proceeding.

According to RACE, this proceeding constitutes a "discretionary project" under CEQA, which requires the exercise of judgment or deliberation of the public agency. RACE asserts that relying on other agencies to look at the environmental impacts of specific LNG projects does not relieve the Commission of its legal duty to consider the broader environmental impacts that will result from this proceeding.

In reply to Coral's response and to the joint response of the three utilities, RACE contends that both of the responses miss RACE's point "that the CPUC is taking action through this rulemaking proceeding that will either directly, indirectly, or cumulatively have an adverse impact on the environment." (RACE Supplemental Response, p. 2.) RACE asserts that the cases cited in the responses of Coral and the utilities to RACE's point are distinguishable and have no bearing on the point that RACE is making.

RACE contends that the utilities' response confirms that there are "proposed LNG facilities" and that "backbone transmission facilities" are anticipated. RACE contends that these proposed and anticipated facilities, as well as other foreseeable development, are the foreseeable impacts of this proceeding and CEQA should apply. RACE questions why this rulemaking was opened if the Commission did not foresee the construction of the LNG facilities and other infrastructure.

RACE cites the following passage from City of Livermore at page 538 to support its view that even though the "precise effects are difficult to assess at this stage," because the "impact is easily foreseen … the revisions must be considered a project under CEQA."

RACE asserts that a tiered environmental impact report (EIR) should apply to this proceeding. RACE contends at page 4 of its reply that under the CEQA Guidelines, a tiered EIR is "especially appropriate when the lead agency is analyzing the impacts of a 'policy statement' – which is precisely how the CPUC and other parties have characterized this rulemaking proceeding." RACE contends that a tiered EIR makes sense because only the Commission "is able to analyze the statewide impacts of California's reliance on LNG as a fuel source; such impacts would certainly be outside the purview and expertise of, say, the City of Long Beach in considering the environmental impacts of the LNG terminal proposed by Sound Energy Solutions for Long Beach Harbor." (RACE November 29, 2005 Reply to Supplemental Responses, pp. 4-5.)

Other Parties' Positions

Coral contends that CEQA applies when a "project," which may have a significant physical impact on the environment, is proposed to be carried out or approved by a public agency. Coral asserts that RACE failed to explain how the issues addressed in D.04-09-022 constitute a "project" that is subject to CEQA. Coral asserts that this rulemaking is addressing policy matters, and D.04-09-022 did not endorse or approve any specific LNG project or specific pipeline project. D.04-09-022 was 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.[13] Coral asserts that RACE's argument that D.04-09-022 will have an impact on the environment is speculative because D.04-09-022 did not address, approve, or implement any specific project that will have a physical impact on the environment.

Coral asserts that when a public agency issues a policy decision, as was done in D.04-09-022, the California courts have concluded that an environmental impact report is not necessary. (*See* Pala Band of Mission Indians v. County of San Diego (1998) 68 Cal.App.4th 556, 567-568;[14] Sherwin-Williams v. South Coast Air Quality Management District (2001) 86 Cal.App.4th 1258, 1286.) D.04-09-022 merely set forth a procedure for the review of utility contracts for pipeline capacity, set forth the terms of access at new and existing receipt points, and established a policy of equal treatment for all gas supplies. D.04-09-022 did not approve a specific project or cause a project to be undertaken. Since no specific project was considered or approved in D.04-09-022, Coral asserts that CEQA is not applicable to the rulemaking or to D.04-09-022.

Coral also points out that in addressing the applications for rehearing of D.04-09-022, the Commission stated that the rulemaking was instituted "to establish policies and rules to ensure reliable, long-term supplies of gas to California," and that the policies adopted in D.04-09-022 were part of "California's overall effort to implement and fulfill the Energy Action Plan's

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[13] Coral notes that the September 3, 2004 ACR stated that in order for CEQA to apply, the agency action must involve a "project." Since no specific project was to be approved in the Phase I decision, the ACR ruled that CEQA did not apply at that point. The ACR also noted that the environmental issues that RACE raised regarding the proposed LNG projects were being addressed in other forums.

[14] Referred to herein as Pala Band of Mission Indians.

(EAP) goal." (D.05-10-045, p. 3.) Coral asserts that throughout the rulemaking process, the Commission emphasized that it was addressing only policy matters, and it has not approved any new supply projects and has not expanded natural gas usage in California.

The three utilities contend that the provisions of CEQA do not apply to this rulemaking nor to D.04-09-022 because neither is a "project" within the meaning of CEQA. Since the rulemaking and D.04-09-022 address only policies and procedures, the utilities assert that the rulemaking and the decision are exempt from CEQA's definition of a project because they do not cause a direct or reasonably foreseeable indirect change in the environment.

The utilities contend that the City of Livermore case, which RACE cited, is distinguishable because in that case revisions were being made to the "sphere-of-influence guidelines" that would directly affect land use in Alameda County. Due to the potential impact of the revisions to the guidelines, the Court of Appeal concluded that the revisions should be considered a project under CEQA. The utilities contend that the City of Livermore case is distinguishable because none of the actions proposed in the rulemaking will cause either a direct physical change in the environment or a reasonably indirect physical change in the environment, which is required to constitute a project under CEQA. The utilities assert that nothing in the rulemaking or in D.04-09-022 compels any specific, direct changes to the environment, and that RACE concedes at page 4 of its petition that there is no "specific project," and that there is a "lack of immediate adverse impacts."

The utilities point out that RACE appears to contend that the rulemaking and D.04-09-022 will set into motion activities that will eventually result in physical changes to the environment, specifically, the construction of one or

more LNG terminals, and the construction of new utility receipt point facilities. The utilities assert that in order for CEQA to apply, the project must constitute an "essential step in a chain of actions" that will culminate in a reasonably foreseeable physical change in the environment. The utilities assert that nothing in the rulemaking or D.04-09-022 contemplates any needed approvals that amount to an "essential step."

As for the statement in D.04-09-022 that SDG&E and SoCalGas may establish new receipt points as they become needed to accommodate regasified LNG, the utilities contend that this interconnection policy is merely a continuation of past Commission decisions which require utility interconnection with new pipelines as a matter of policy, and such decisions do not trigger a CEQA review. (*See* D.91-11-025 [41 CPUC2d 668, 686].)

The utilities also assert that neither the rulemaking nor D.04-09-022 contains or contemplates any approvals needed to construct additional backbone transmission facilities. Without such approvals, the "essential step" needed to construct new backbone transmission facilities is missing.

The utilities argue that the factual circumstances regarding the rulemaking and D.04-09-022 are similar to the facts in Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School District (1992) 9 Cal.App.4th 464,[15] in which the Court of Appeal held that the formation of a Mello-Roos facilities district lacked the causal link with the alleged environmental impact of new schools being constructed. The Court of Appeal concluded that the formation of the facilities district would not create a need for new schools, and the construction of new

[15] This case is referred herein as Kaufman & Broad.

schools was not entirely dependent on the formation of the facilities district. The utilities assert that the causal link between the rulemaking and D.04-09-022, and any future LNG facility or pipeline construction, is missing here as well. In addition, the interconnections with LNG facilities and construction of other new receipt points do not depend on the rulemaking or D.04-09-022. The utilities contend that it is completely unknown whether any particular California LNG projects will materialize and whether any actual utility facilities will be constructed to accept and redeliver regasified LNG. Since the policies adopted in the rulemaking and D.04-09-022 are not essential steps that will result in any physical changes to the environment, neither is a project under CEQA.

The utilities also argue that the rulemaking and D.04-09-022 do not meet the "foreseeability" requirement that is needed in order to be a "project" subject to CEQA. The only foreseeable impact from the rulemaking and D.04-09-022 is that a number of new sources of supply might or might not materialize, and the utilities will need to respond accordingly. At this point, however, the utilities contend that the Commission cannot determine which facilities might or might not be constructed, and therefore the potential environmental effects cannot be reasonably foreseen.

In their reply to RACE's supplemental response, the utilities assert that the County Sanitation District and Plastic Pipe & Fittings cases, which RACE cited, do not support RACE's position that CEQA should apply to this proceeding. The utilities assert that the agency actions under review in those two cases could have caused a reasonably foreseeable direct or indirect physical change in the environment. However, in this proceeding, the Commission "did not take any action that would cause the development of liquefied natural gas terminals or the construction of utility transmission or interconnection facilities and therefore the

'causal link' between the Commission's actions and a physical change in the environment is missing…." (SDG&E, SoCalGas, PG&E Reply to Supplemental Response, p. 3.)

The utilities assert that the County Sanitation District and Plastic Pipe & Fittings cases merely stand for the proposition that a CEQA review is necessary when an agency seeks to adopt an ordinance or regulation that will potentially cause environmental effects. Since neither the rulemaking nor D.04-09-022 will cause any direct or indirect physical change in the environment, they are not projects within the meaning of CEQA, and CEQA review was not needed before D.04-09-022 was issued.

Discussion

Today's decision is limited to the issue of whether CEQA should apply to the activities that were examined and resolved in D.04-09-022, the Phase I decision.

RACE's argument for the application of CEQA to the Phase I decision centers around the proposition "that the CPUC is taking action through this rulemaking proceeding that will either directly, indirectly, or cumulatively have an adverse impact on the environment." (RACE November 29, 2005 Reply to Supplemental Responses, p. 2.) RACE acknowledges and "fully understands that the CPUC is not currently approving or causing the construction of any specific facility." (Ibid.) RACE further acknowledges in its reclassified petition for modification at page 4 that even though there is a "lack of a specific project and the lack of immediate adverse impacts, this proceeding should be subject to review under CEQA."

CEQA is triggered when a public agency exercises its discretionary power to carry out or approve a project that may have a significant physical impact on

the environment. Before CEQA is triggered, the public agency conducts a preliminary review to determine whether CEQA applies to the proposed activity or if the activity is exempt from CEQA. If the activity is not a "project" or is exempt from CEQA, the CEQA inquiry does not need to proceed further. If the agency determines that CEQA is applicable to the project, the agency must consider whether the project will have a significant physical impact on the environment. If it is determined that the project will not have a significant physical impact on the environment, the agency is to issue a negative declaration. If the agency determines that the project will have a significant physical impact on the environment, an environmental impact report must be done. (*See* Title 14, Cal. Code Regs. §§ 15002, 15060, 15061;[16] *see* Pub. Resources Code §§ 21065, 21080.)

Section 15060(c) of the CEQA Guidelines provides that an activity is not subject to CEQA if:

> "(1) The activity does not involve the exercise of discretionary powers by a public agency;
>
> "(2) The activity will not result in a direct or reasonably foreseeable indirect physical change in the environment; or
>
> "(3) The activity is not a project as defined in Section 15378."

In order for CEQA to apply, there must be a project. A "project" is defined in §15378 of the CEQA Guidelines as follows:

> " 'Project' means the whole of an action, which has a potential for resulting in either a direct physical change in the

[16] Chapter 3 of Division 6 of Title 14 of the California Code of Regulations is cited herein as the "CEQA Guidelines."

> environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:
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> (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."

Section 15378(b)(2) of the CEQA Guidelines specifically provides that a "project" does not include "Continuing administrative or maintenance activities, such as … general policy and procedure making…."

In order for CEQA to apply, there must also be a significant effect on the environment. (CEQA Guidelines, § 15061.) A "significant effect on the environment" is defined in §15002(g) of the CEQA Guidelines to mean "a substantial adverse change in the physical conditions which exist in the area affected by the proposed project."

To determine whether a "project" was contemplated by the activities which led up to the issuance of the Phase I decision, D.04-09-022, we need to examine the procedural steps that we went through. As stated in the "Purpose of the Rulemaking" section beginning at page 5 of D.04-09-022, this rulemaking was issued in response to concerns that "in the long-term, there may not be sufficient natural gas supplies and/or infrastructure to meet the future requirements of all California residential and business consumers." (*See* OIR, p. 2.) In the rulemaking, we stated:

> "In order to ensure reliable, long-term natural gas supplies to California at reasonable rates, the Commission must make certain decisions in 2004 with regard to the California natural

> gas public utilities, which the Commission regulates, so that: (1) increased demand reduction efforts (*e.g.,* energy efficiency and renewable energy programs) help moderate the potential supply imbalance in the future; (2) sufficient firm interstate and intrastate pipeline capacity will be available to serve California; (3) the benefits and flexibility of storage facilities will be fully appreciated and utilized; and (4) access to imported natural gas supplies (*e.g.,* from LNG facilities) will be available to meet the new challenges we face."
> (OIR, pp. 2-3.)

The rulemaking did not propose that construction activity be undertaken by a public agency, or that an activity be undertaken by a person supported by public agency contracts, grants, subsidies, loans, or other forms of public assistance.

In the rulemaking we established two phases and directed the gas utilities to file proposals for Phase I and Phase II. The Phase I issues were to be addressed by the Summer of 2004 because of "the long lead time to construct LNG facilities and due to certain deadlines in 2004 involving existing interstate pipeline capacity contracts and open seasons for new pipelines, including pipelines related to LNG projects." (OIR, p. 3.) We stated in the rulemaking that:

> "The scope of Phase I of the OIR is to adopt rules, which will provide guidelines over how the designated utilities should: (1) enter into contracts with interstate pipelines (whether new contracts or renewals of existing contracts) to meet core supply obligations; (2) provide access to LNG supplies of natural gas; and (3) provide access to additional supplies of natural gas transported on interstate pipelines." (OIR, p. 24.)

In the rulemaking, we preliminarily determined the category of this proceeding to be quasi-legislative, and that a decision for Phase I would be based on the filed pleadings without evidentiary hearings. In the June 18, 2004 Phase I scoping memo and ruling, the assigned Commissioners reiterated that Phase I

was "to address policy issues in a timely manner…," and confirmed "that the issues raised by the respondents and the other parties should be categorized as quasi-legislative," and that no hearings would be held. (June 18, 2004 Scoping Memo, pp. 6, 9.)

RACE then filed an appeal of the categorization of Phase I as a quasi-legislative proceeding. RACE's appeal made three arguments, including the argument that the "Commission in Phase I needs to evaluate whether additional natural gas supplies, in the form of LNG, will benefit California," and that "this evaluation needs to take place before the Commission puts LNG contracts and LNG connection costs into ratebase." (D.04-07-030, p. 2.) We denied RACE's appeal in D.04-07-030, stating that because the Phase I decision "will only address policy issues, and is not establishing rates for a specific company," that the categorization of Phase I as a quasi-legislative proceeding was correct.[17]

The Phase I proposals were filed by the utilities in February 2004, and responses and replies to the proposals were filed in March and April of 2004. None of the utilities or LNG project sponsors requested as part of this rulemaking that a "lease, permit, license, certificate, or other entitlement" be

[17] D.04-07-030 also noted that RACE had requested through its March 9, 2004 motion that the Commission schedule evidentiary hearings in this proceeding. That motion was denied in the ALJs' ruling of March 18, 2004, which pointed out that Rules 14.1 and 14.2 and Pub. Util. Code § 1701.1(c) support the Commission's right to use a rulemaking to establish policy.

authorized so that they could build a specific project.[18] (*See* CEQA Guidelines, §§ 15060(a), 15378(a)(3).)

At the outset of this rulemaking, we decided that the Phase I issues should be resolved by reviewing the Phase I proposals and comments instead of holding evidentiary hearings. As provided for in Rule 14.1 and 14.2 and Pub. Util. Code § 1701.1(c), a rulemaking is appropriate when the Commission is establishing policy in the form of rules, regulations, and guidelines for a class of public utilities.

The essence of a rulemaking proceeding is for the Commission to develop regulatory policies. The CEQA Guidelines specifically state that "general policy and procedure making" is not a project under CEQA. As set forth in the CEQA Guidelines, CEQA is intended to be used in conjunction with a governmental agency's discretionary approval of a project that has the potential for either direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment, and which involves the issuance of a lease, permit, license, certificate, or other entitlement. (CEQA Guidelines, §§ 15040, 15357, 15378.)

As discussed above, the assigned Commissioners and the Commission have consistently viewed the Phase I issues as policy matters. D.04-09-022 at page 41 notes that "The focus of this proceeding is to ensure that policies and rules are in place to ensure long-term supplies of gas." Since Phase I only involves policy determinations by this Commission without causal connection to future physical impacts to the environment, CEQA review is not required.

[18] We note that a request for authorization to build a specific project would have required the utility to file a separate application as required under Rules 15 and Rule 18.

Furthermore, the utilities and the LNG project sponsors did not request as part of this proceeding, that the Commission authorize or issue any lease, permit, license, certificate or other entitlement to them. We specifically stated the following in the "Supply Access" section at page 41 of D.04-09-022:

> "At the outset of this LNG discussion, we point out that we are not deciding in this decision whether certain proposed LNG projects should be built in California, or on the West Coast. Instead, 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. Such an analysis furthers the Energy Action Plan's goal of ensuring that California has a reliable supply of reasonably priced natural gas. …
>
> "Today's Phase I decision addresses the access policies that need to be in place to allow potential sources of LNG to access the utilities' gas systems. Earlier in this decision, we discussed how diverse gas supplies, including potential sources of LNG, can benefit California. However, the issue of whether individual LNG projects should be built in California, in Federal waters offshore of California, or in Mexico, is or will be addressed in the applicable regulatory proceedings examining each individual project." (D.04-09-022, pp. 41-42.)

Nowhere in the ordering paragraphs of D.04-09-022 did we approve the building of any project, nor did we authorize any lease, permit, license, certificate or other entitlement.[19] Instead, we directed the gas utilities to submit "non-discriminatory open access tariffs for all new sources of supply, including potential liquefied natural gas (LNG) supplies," and allowed SoCalGas and SDG&E "to establish receipt points, as needed, at Otay Mesa, Salt Works Station

[19] In Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 262, the California Supreme Court held that a project involves "the issuance of permits, leases and other entitlements" to a private party by the governmental agency.

and Center Road Station, or at other receipt points." D.04-09-022 also designated Otay Mesa as a common receipt point for both SoCalGas and SDG&E.[20] We do not believe that allowing these open access interconnections to occur is an essential step in a chain of events which will lead to a change in the physical environment. (S*ee* Kaufman & Broad, 9 Cal.App.4th at 474.)

In addition, CEQA does not require the analysis of potential environmental impacts that are remote and speculative. (*See* e.g., Pala Band of Mission Indians, 68 CalApp.4th at 576.) D.04-09-022 reflects the uncertain status of LNG projects on the west coast.[21] For example, at page 20, we noted a party's concern about "the uncertainty of new sources of supply such as LNG…." At page 39 of D.04-09-022, we recognized "the uncertainties over how the LNG markets in California will develop…." In discussing the issue of rolled-in versus incremental ratemaking treatment for utility infrastructure improvements, we noted the uncertainties over when LNG projects will ultimately be developed, the significant hurdles facing the projects before the projects can be completed, and that the "potential construction costs to accept and redeliver significant volumes of gas at multiple new receipt points varies widely, depending on

[20] Ordering paragraph 7.a. of D.04-09-022 authorized an interim transportation rate for gas deliveries through Otay Mesa. However, in D.05-10-045, this interim transportation rate was eliminated.

[21] Where the future development is unspecified and uncertain, no purpose would be served by an environmental review that could only speculate as to possible future environmental consequences. (*See*, e.g., Lake County Energy Council v. County of Lake (1977) 70 Cal.App.3d 851, 854-855; Topanga Beach Renters Association v. Department of General Services (1976) 58 Cal.App.3d 188, 196.)

which new sources of supply actually materialize and the volumes to be delivered at each new receipt point." (D.04-09-022, p. 65.)[22]

We also note that the recent enactment of the Energy Policy Act of 2005 provides that the Federal Energy Regulatory Commission (FERC) has the jurisdiction to authorize LNG terminals in the United States, and that the Commission may participate in that FERC hearing. (*See* D.05-11-010.)

All of the actions that we have taken regarding the Phase I issues leading up to D.04-09-022, and FERC's authority over the siting of LNG terminals, can only lead us to conclude that the activities related to the Phase I issues in this proceeding did not amount to a "project" within the meaning of CEQA, and CEQA therefore does not apply to the Phase I activities that were undertaken in connection with the Phase I decision. Instead, the activities relating to the Phase I issues that were addressed in D.04-09-022 are policy-related actions, which are exempt from CEQA. (CEQA Guidelines, §§ 15060, 15061, 15378.) Accordingly, RACE's reclassified petition to modify D.04-09-022, which seeks to apply CEQA to the Phase I activities which were reviewed and resolved in D.04-09-022, is denied.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with §311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed _____.

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[22] In this regard, our actions in D.04-09-022 are similar to the facts in Kaufman & Broad where CEQA did not apply because the school district's creation of the facilities district did not commit it to build any specific school expansion or development project. (Kaufman & Broad, 9 Cal.App.4th at 475-476.)

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner.[23] David K. Fukutome and John S. Wong were the assigned ALJs at the time D.04-09-022 was issued. Steven A. Weissman and John S. Wong are currently the assigned ALJs.

Findings of Fact

1. RACE's April 1, 2005 motion seeks to challenge the ruling reached in the February 28, 2005 scoping memo regarding the applicability of CEQA to the entire proceeding.

2. The October 18, 2005 ACR reclassified the April 1, 2005 motion as a petition for modification of D.04-09-022 so that the Commission can address RACE's contention that CEQA should have applied to the Phase I decision.

3. RACE acknowledges that the Commission did not approve or cause the construction of any specific facility in this rulemaking.

4. This rulemaking was issued in response to concerns that in the long-term, there may not be sufficient natural gas supplies and/or infrastructure to meet the future requirements of all California consumers.

5. The rulemaking did not propose that construction activity be undertaken by a public agency, or that an activity be undertaken by a person supported by public agency contracts, grants, subsidies, loans, or other forms of public assistance.

6. None of the utilities or LNG project sponsors requested as part of this rulemaking that a lease, permit, license, certificate, or other entitlement be authorized so that they could build a specific project.

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[23] Prior to January 1, 2006, Susan P. Kennedy was the co-assigned Commissioner.

7. A request for authorization to build a specific project requires a utility to file a separate application with the Commission.

8. The CEQA Guidelines state that general policy and procedure making is not a project under CEQA.

9. The assigned Commissioners and the Commission have consistently viewed the Phase I issues as policy matters.

10. D.04-09-022 directed the gas utilities to submit non-discriminatory open access tariffs for all new sources of supply, to establish receipt points as needed, and that Otay Mesa be designated as a common receipt point for both SoCalGas and SDG&E.

Conclusions of Law

1. This decision is limited to the issue of whether CEQA should apply to the Phase I activities that were examined and resolved in D.04-09-022.

2. A rulemaking proceeding is appropriate when the Commission is establishing policy in the form of rules, regulations, and guidelines for a class of public utilities.

3. The ordering paragraphs in D.04-09-022 did not approve the building of any project, nor did it authorize any lease, permit, license, certificate or other entitlement.

4. Allowing the open access interconnections to occur is not an essential step in a chain of events which will lead to a change in the physical environment.

5. The activities related to the Phase I issues in this proceeding did not amount to a "project" within the meaning of CEQA.

6. CEQA does not apply to the Phase I issues that were undertaken in connection with the Phase I decision.

7. RACE's reclassified petition to modify D.04-09-022, which seeks to apply CEQA to the Phase I activities which were reviewed and resolved in D.04-09-022, should be denied.

O R D E R

IT IS ORDERED that Ratepayers for Affordable Clean Energy's April 1, 2005 "Motion for Reconsideration of that portion of the Assigned Commissioner's Scoping Ruling dated February 28, 2005 that denied R.AC.E.'s Motion for a Determination of the Applicability of C.E.Q.A.," which was reclassified as a "Petition for Modification of Decision 04-09-022" by the October 18, 2005 ACR, is denied.

This order is effective today.

Dated _____, at San Francisco, California.