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Mail Date
10/28/2002

Decision 02-10-066 October 24, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECRIC COMPANY (U 39 E) For a Certificate of Public Convenience and Necessity Authorizing the Construction of the Tri Valley 2002 Capacity Increase Project .	Application 99-11-025 (Filed November 22, 1999)

ORDER MODIFYING AND DENYING REHEARING OF DECISION 01-10-029

I. SUMMARY

By this Order, the Commission denies the application for rehearing filed by Pacific Gas & Electric Company (PG&E) of Decision (D.) 01-10-029 (Decision or D.01-10-029) timely filed on November 13, 2001. The Decision was issued in the proceedings for Application (A.) 99-11-025, filed on November 22, 1999. In A.99-11-025, PG&E requested a Commission order authorizing the construction of the Tri Valley 2002 Capacity Increase Project (Project.)

D. 01-10-029 granted PG&E's application for a CPCN for the Project. The Commission found that PG&E demonstrated the need for a portion of the Project it proposed in order to maintain the reliability of its electric system. However, the Commission determined that PG&E did not show that all of the facilities it proposed are necessary to serve expected demand. The Commission also rejected PG&E's proposed route and an alternative proposed by the City of Pleasanton and the Kottiger Ranch Homeowner's Association. Rather, the Commission selected

one of the environmentally superior Pleasanton routes that was identified in the Final Impact Report prepared for the Commission. The Decision also granted a CPCN to PG&E to construct its proposed Dublin and North Livermore substations.

In its Application for Rehearing of D.01-10-029, PG&E makes several arguments. PG&E contends that the Commission does not have the statutory authority under state or federal law to review the California Independent System Operator's (ISO) determination that this transmission project is needed or to impose a cost cap on the Project. PG&E also argues that that the Commission wrongly ordered PG&E to show cause why the cost cap should not be lowered. Lastly, PG&E claims that the Commission's reductions of PG&E's cost estimates are arbitrary and unsupported by the factual findings or evidence in the record. PG&E requests oral argument on these issues.

We have carefully reviewed PG&E's contentions and are of the opinion that good cause for rehearing has not been demonstrated. Accordingly, we deny this application for rehearing. However, as explained below, we will modify the Decision to clarify the Commission's bases for jurisdiction.

II. DISCUSSION

A. PG&E's Claim Is Not Ripe For Review.

PG&E's claim that the Commission does not have the authority to determine need is not ripe.[1] The general test for ripeness is that there must be a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality to warrant the issuance of relief. (See *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149; *BKHN, Inc. v. Department of Health Services* (1992) 2 Cal. App. 4th 301, 308.) Thus, "[t]he legal issues posed must be

[1] PG&E's argument that the Commission does not have the jurisdiction to make a need determination may be subject to a mootness challenge as well. PG&E no longer has a personal stake in the controversy over the need determination issue because the Commission agreed with the ISO's determination of need. Thus, a decision on this issue can have no practical impact or provide the parties with effectual relief.

framed with sufficient concreteness and immediacy so that the court can render a conclusive and definitive judgment rather than a purely advisory opinion based on hypothetical facts or speculative future events." (*Hayward Area Planning Assoc., Inc.* (1999) 72 Cal. App. 4th 95, 103.)

PG&E argues we do not have the authority to "second-guess" the ISO's determination of need. (See D.01-05-059 at 19.) Because we do not dispute the ISO's determination of need in the present case, there is not a substantial controversy between parties having adverse legal interests of sufficient immediacy and reality. Moreover, PG&E will not suffer a hardship if this issue is not addressed at the present time because, again, we agreed with the ISO's need determination. Thus, PG&E's claims are not ripe for review. As further discussed below, however, we find PG&E's claims to be without merit and therefore deny rehearing.

B. Jurisdiction

1. The Commission's Basis For Jurisdiction.

a) Public Utilities Code Section 1001.

Public Utilities Code Section 1001 (Section 1001)[2] gives the Commission authority to approve or disapprove a project based on whether it serves the public convenience and necessity. Thus, we have an independent statutory duty pursuant to Section 1001 to ensure that this project is necessary.

b) California Environmental Quality Act.

In addition to the Commission's authority to make a determination of need pursuant to Section 1001, there are certain aspects of the California Environmental

[2] In relevant part, Section 1001 states: "[n]o . . . gas . . . [or] electric corporation . . . shall begin the construction of a street railroad, or of a line, plant, or system, or of any extension thereof, without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." (Cal. Pub. Util. Code § 1001.)

Quality Act[3] (CEQA) that overlap with need. CEQA applies to discretionary government activities, which are defined as "projects."[4] PG&E's Section 1001 application created the need for a discretionary decision by the Commission. Applying the standard set forth in the CEQA definition of a "project," we find that each of the elements necessary to invoke Commission jurisdiction under CEQA for the Tri-Valley Project existed. Once identified as a lead agency for CEQA purposes, CEQA prohibits the delegation of fulfilling CEQA functions despite any other related jurisdiction by another agency.[5] Thus, the Commission cannot avoid its CEQA duties by unlawfully delegating the duty of the Commission to the ISO.

Under CEQA, the Commission must prepare an EIR whenever a project "may have a significant effect on the environment." (Cal. Pub. Resources Code §§ 21100, 21151.) Section 15126.6(e) of CEQA requires the EIR to contain analysis of a "No Project" alternative.[6] Should the Commission could choose the "No Project Alternative," the Commission would, in effect, determine that the project is not needed. Therefore, the Commission also has authority to make a need determination under the "No Project" alternative of CEQA. Section 15126.6(e) of CEQA is not preempted by state or federal law.

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[3] CEQA is found at California Public Resources Code, Division 13 § 21000, et seq.

[4] The statutory definition of "project" is "the whole of an action, which has the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect change in the environment, and that is any of the following: (1) An activity that is directly undertaken by a public agency; (2) An activity undertaken by a person which is supported in whole or in part through public agency contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies; (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies." (CEQA Guidelines, § 15378; Cal. Pub. Resources Code § 21065.)

[5] CEQA Guidelines, § 15025.

[6] Section 15126.6 (e)(1) states: "[t]he specific alternative of "no project" shall also be evaluated along with its impact."

c) Public Utilities Code Section 1005.5.

The Commission is required to impose a cost cap on the Project pursuant to Public Utilities Code Section 1005.5 (Section 1005.5).[7] The project at issue exceeds the fifty million dollar requirement mandated by Section 1005.5 and therefore, the Commission is required to impose a cost cap. The Commission set the cost cap lower than PG&E's cost estimates. (D.01-10-029 at 137.) Since we could not find PG&E's cost estimate to be reasonable, we complied with the statute by adopting a lower cost cap, at the same time allowing PG&E to refile with evidence of higher actual costs. (*Id.*)

PG&E argues that there is a conflict between Section 1005.5 and AB 1890. PG&E claims that "Section 1005.5 was enacted *prior* to the adoption and codification of AB 1980, and relates to the Commission's *former* jurisdiction over transmission ratemaking . . . [b]ecause the Commission no longer has authority over electric transmission ratemaking, the provisions of Section 1005.5(a) are no longer applicable to electrical transmission projects." (App. for Rehearing at 16-17.) PG&E is mistaken. AB 1890 can be reconciled with Section 1005.5 under a concurrent jurisdiction theory.[8] Furthermore, PG&E's argument would require us to ignore our statutory mandate.

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[7] Section 1005.5 provides that "whenever the commission issues to an electrical . . . corporation a certificate authorizing the new construction of any addition to or extension of the corporation's plant estimated to cost greater than fifty million dollars ($50,000,000), the commission shall specify in the certificate a maximum cost determined to be reasonable and prudent for the facility." (Cal. Pub. Util. Code § 1005.5.)

[8] This is not the first time that PG&E has argued that both federal law and state law preempt the Commission from making a determination of need. D.99-09-028 discussed the Commission's jurisdiction over the reliability of the transmission grid that, pursuant to AB 1890, had been turned over to the ISO. (D.99-09-028 at 6.) In D.99-09-028, the Commission determined that the "Commission and CAISO share concurrent jurisdiction over elements of the transmission system and system reliability." (D.99-09-028 at 7.) Thus, the Commission found that it "retains its extensive jurisdiction over transmission and reliability, pursuant to provisions of the PU Code unmodified by AB 1890," but the Commission must "share its jurisdiction in the areas where CAISO has been given specific authority and responsibility." (D.99-09-028 at 7; see also *Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 Cal. 3d 945, 950-951.) The Commission determined in D.99-09-028 that PG&E's position conflicts with Public Utilities Code Section 330(f), "which affirms the Commission's ongoing role in regulating the transmission system for the purpose of ensuring reliability, safety, and other goals, and with the fact that . . . AB 1890 did not modify the Commission's traditional sources of jurisdiction over

2. PG&E's Claims That Federal Law Preempts the Commission From Interfering With the ISO's Determination of Need and From Imposing a Cost Cap.

PG&E contends that the California Legislature's adoption of AB 1890 creating the ISO and its order to submit to the Federal Energy Regulatory Commission's (FERC) jurisdiction transferred all jurisdiction over California's transmission system to FERC. (App. for Rehearing at 6-7. 13-15.) As a result, PG&E argues that conflict and field preemption prohibit the Commission from deciding whether a project is needed to ensure transmission system reliability or to impose a cost cap on the Project. (*Id.* at 8.)

According to California law, in order for conflict preemption to apply, there must first be an attempt to harmonize federal and state law in order to avoid any actual conflict. (See *Peatros v. Bank of America NT&SA* (2000) 22 Cal. 4th 147, 167-168 (*Peatros*).) "Conflict preemption of state law by federal law does not automatically and necessarily result in the *complete* displacement of state law by federal law *in its entirety* [but] [r]ather, it does so insofar . . . as there is conflict." (*Peatros* at 172 (italics in original).) Field preemption applies where Congress makes it clear that state law is regulating conduct in a field that Congress intended the Federal Government to occupy. The state and federal laws that PG&E claims preempt the Commission from making its own determination of need and from capping costs can be reconciled with the statutory bases for the Commission's authority.

Neither conflict nor field preemption prevent the Commission from making a determination of need. Conflict preemption does not apply because the ISO and the Commission have concurrent jurisdiction to make a need determination pursuant to their statutory mandate.[9] Thus, Section 1001 and

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reliability, such as §§ 451, 701, and 761." (D.99-09-028 at 6.)

[9] See *Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 Cal. 3d 945. In *Orange County*, the Court demonstrated that the correct way to reconcile conflicting

CEQA can be reconciled with AB 1890. As discussed below, siting is reserved to the states. Therefore, field preemption does not apply either. It is clear that PG&E is cognizant of the fact that it must comply with Section 1001 because it submitted A.99-11-025 for a CPCN. PG&E contends, however, that the Commission must rubberstamp the ISO's determination of need when reviewing an application for a CPCN for a transmission project. PG&E's position ignores the fact that the Commission also has a duty to make a need determination pursuant to Section 1001, and may do so pursuant to CEQA. In this Order, we modify our earlier decisions to clarify our jurisdiction under CEQA, which arises from our approval of this discretionary project.

Nor does federal law preempt Section 1005.5. The passage of AB 1890, and the legislative grant of the operational control over California's electrical transmission grid to the ISO operating under FERC authorization did not explicitly remove the Commission's authority under Section 1005.5, and Section 1005.5 can be reconciled with the ISO tariff.[10]

3. PG&E's Contentions That the Commission Lacks Authority to Make a Determination of Need Or Impose a Cost Cap.

PG&E argues that even if the creation of the ISO had not submitted California's transmission grid to exclusive FERC control under the Federal Power Act (FPA), the Commission still would not have the authority to make a need determination or impose a cost cap under state law. (App. for Rehearing at 11, 16.) We disagree. AB 1890 did not revoke our authority pursuant to Section 1001, CEQA and Section 1005.5. In the absence of explicit Legislative intent to repeal operative sections CEQA, Section 1001 and Section 1005.5, we will continue to enforce these statutes.

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jurisdictional statutes pertaining to two state-created entities is to conclude that they have concurrent jurisdiction because a limited grant of jurisdiction to a new body does not deprive another entity of its existing jurisdiction. (4 Cal. 3d at 951.)

[10] See *Infra* for discussion of 15 U.S.C. § 79 and the reservation to the states of the right to site transmission.

a) Cost Cap

We correctly asserted our jurisdiction under Section 1005.5 and ordered PG&E to show cause why the cost cap should not be lowered. (D.01-10-029 at 149.) PG&E argues that when jurisdiction over transmission rates was transferred to the FERC, the Commission lost the ability to impose cost caps as well. (App. for Rehearing at 18.) PG&E contends that FERC's authority over transmission rates completely occupies the field preempting all state regulation that intrudes even indirectly into this sphere. PG&E also claims that even if Section 1005.5 were applicable to the Project, the Commission has no authority pursuant to Section 1005.5 to require PG&E to show cause why the costs should not be lowered. (App. for Rehearing at 18.)

Applying Section 1005.5 to transmission projects subject to ISO control does not exceed the Commission's statutory authority under state law, nor is the Commission preempted from doing so by the FPA. Section 731 of the FPA determines that siting is reserved to the states. Specifically, the FPA states: "[n]othing in this title or in any amendment made by this title shall be construed as affecting or intending to affect, or in any way to interfere with, the authority of any State or local government relating to environmental protection or the siting of facilities." (15 U.S.C. § 79.) Thus, states retain control over transmission siting. AB 1890 did not transfer siting authority from the Commission to the ISO. We have a statutory duty under Section 1001 to ensure that a project of this magnitude is necessary. Further, we must determine whether costs for the Project are reasonable pursuant to Section 1005.5.

C. PG&E's Contention that D.01-10-029's Reduction of PG&E's Costs Estimates Is Unsupported By Factual Findings or Evidence in the Record.

PG&E argues that the Decision arbitrarily reduced PG&E's cost estimates in violation of Public Utilities Code Section 1757(a)(4) and is therefore subject to reversal. (See Pub. Util. Code § 1757(a).) PG&E has the burden of

proving the reasonableness of its cost estimates. The Decision disallowed several portions of PG&E's cost estimate because PG&E did not prove the reasonableness of its cost estimates. Because of PG&E's insufficient showing, we properly reduced the cost cap, allowing PG&E to apply to increase the cost cap if necessary.

D. PG&E's Requests For Oral Argument.

PG&E also requested oral argument. Rule 86.3 of the Commission's Rules of Practice and Procedure states that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Cal. Code of Regs., Tit. 20, § 86.3). Contrary to its assertions, PG&E has not persuaded us that the Decision departs from existing precedent or establishes new precedent. Oral arguments will not materially assist the Commission here, and therefore, PG&E's request for oral argument is denied.

III. CONCLUSION

PG&E has not established legal error. We will, however, modify our decision to clarify our authority pursuant to CEQA. Therefore, the application for rehearing of D.01-10-029, as modified below, is denied.

Therefore **IT IS ORDERED** that:

1. D.01-10-029, p. 148, is modified to include the following Conclusion of Law:

   Conclusions of Law

   17. The Commission may make a need determination pursuant to Public Utilities Code Section 1001. Under the Commission's authority to grant a CPCN pursuant to Section 1001, the Commission may also make a need determination under the

"No Project" alternative pursuant to Section 15126.6(e) of CEQA.

2. Rehearing of D.01-10-029, as modified, is hereby denied.
3. PG&E's request for oral argument is denied.
4. This proceeding is closed.

This order is effective today.

Dated October 24, 2002, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
CARL W. WOOD
GEOFFREY F. BROWN
MICHAEL R. PEEVEY
Commissioners