

124 FERC ¶ 61,157
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeem G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Southern California Edison Company

Docket No. PT08-1-000

ORDER DISMISSING REQUEST FOR STAY
AND DENYING MOTION TO INTERVENE

(Issued August 14, 2008)

1. The Arizona Corporation Commission (ACC) has filed comments in the prefiling process regarding a potential application by Southern California Edison (SCE) for a construction permit to build an interstate electric transmission line from Arizona into California. The ACC asks the Commission to allow it to intervene in the prefiling docket, and to stay the prefiling process. As discussed below, we deny the motion to intervene, because the Commission does not entertain intervention during prefiling. We dismiss the motion for stay, because the ACC, as a non-party, lacks standing to file it, and also explain why a stay is not warranted in any event.

Background

2. In section 1221 of the Energy Policy Act of 2005,¹ Congress amended the Federal Power Act (FPA) by adding new section 216,² dealing with the siting of interstate electric facilities used for the transmission of electric energy in interstate commerce. Under section 216, the Secretary of the Department of Energy (DOE) is authorized to designate certain areas as national interest electric transmission corridors. The Secretary subsequently did so, including an area in the southwestern United States. In addition to the authority given to DOE, section 216 also gives the Commission authority, in limited

¹ Pub. L. No. 109-58, § 1221, 119 Stat. 594 (2005).

² 16 U.S.C. § 824p (2000).

circumstances, to issue construction permits for proposed electric transmission facilities within the corridors designated by DOE.

3. To implement new section 216, the Commission in 2006 issued Order No. 689, which established the process by which an applicant may seek a construction permit.³ Among other things, Order No. 689 established a mandatory prefiling process, during which an applicant would gather information necessary to prepare an application, and the Commission would begin its environmental review process.⁴

4. On May 16, 2008, SCE asked Commission staff to initiate the prefiling process for the proposed Devers-Palo Verde No. 2 transmission project, which would run from a point west of Phoenix, Arizona to a point near Palm Springs, California, in an area within the corridor designated by DOE.⁵ By letter dated May 30, 2008, Commission staff granted SCE's request.⁶

5. On July 10, 2008, the ACC filed comments in the prefiling process, asking the Commission to allow it to intervene and also to stay the process. The ACC filed a second set of comments on August 1, 2008.

Discussion

A. Motion to Intervene

6. As an initial matter, the ACC moves to intervene in the prefiling process, arguing that intervention is necessary to protect its ability to advocate its position.⁷ As the ACC recognizes, however, we have determined that we will not allow intervention during the prefiling process. In Order No. 689, we amended section 380.10 of our regulations to clarify that "Commission prefiling activities . . . are not considered proceedings under

³ *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, Order No. 689, FERC Stats. and Regs., Regulations Preambles 2006-2007 ¶ 31,234, 71 Fed. Reg. 69440 (December 1, 2006), *order denying reh'g*, 119 FERC ¶ 61,154 (2007), *appeal pending sub nom. Piedmont Environmental Council v. FERC, et al.* (4th Cir. No. 07-1651) (consolidated).

⁴ *See* 18 C.F.R. § 50.5 (2008).

⁵ *See* letter from Julie A. Miller (SCE) to Kimberly D. Bose (Commission Secretary).

⁶ *See* letter from J. Mark Robinson (Commission staff) to Julie A. Miller.

⁷ ACC comments at 4-5.

part 385 of this chapter and are not open to motions to intervene. . . . Once an application is filed . . . any person may file a motion to intervene”⁸ We explained that during prefiling “the Commission staff will work with the applicant to make sure that all interested stakeholders have been made aware of the proposed project and have had the opportunity for their views and recommendations to be considered.”⁹ Moreover, the potential applicant must file a participation plan that details the activities it proposes to undertake during prefiling, and must keep stakeholders apprised of any changes in the plan.¹⁰ The Commission itself will issue public notice regarding its scoping and environmental review process.¹¹ Once an application is filed, the Commission then will offer an opportunity to intervene.¹² No party sought rehearing of this aspect of the rule, which is therefore final and not subject to judicial review. Thus, the ACC has no right to intervene in the prefiling process, and we deny its motion.

7. The ACC asserts that its “effective advocacy at this stage of the proceeding . . . can only be accomplished by permitting ACC intervention in this docket.”¹³ This is incorrect. As discussed above, the Commission gives stakeholders extensive opportunities to participate in the prefiling process, a key objective of which is to provide stakeholders information and elicit their comments. The Commission will thoroughly consider submittals made at the prefiling stage (and, indeed, throughout the course of any permit proceeding) by any entity, regardless of its party status. Although we here reject the ACC’s procedural objections regarding the prefiling process, we nonetheless will fully consider its comments concerning the merits of the proposed project.

8. The significance of becoming a party is that it gives an entity the right to seek rehearing and thereafter judicial review of Commission orders issued in a Commission

⁸ 18 C.F.R. § 380.10(a)(2)(iii) (2008).

⁹ FERC Stats. & Regs., Regulations Preambles 2006-2007 ¶ 31,234 at P 72 and, generally, at 72-99 (2006).

¹⁰ *Id.* at P 76. SCE filed its participation plan on June 6, 2008. Among other things, it provides for public notice; placing project information in repositories open to the public; holding open houses; meeting with key stakeholders, including elected and appointed officials; and responding to inquiries from the public and from federal, state, and tribal agencies.

¹¹ *Id.* at 80.

¹² *Id.* at 85.

¹³ ACC comments at 4.

proceeding. However, the prefiling process is not a formal proceeding, and the Commission issues no final orders in it that could be subject to rehearing or appeal. Should SCE file an application for a construction permit, the ACC, like all interested entities, will be given an opportunity to intervene. The absence of that opportunity at this preliminary stage in no way deprives the ACC of the opportunity to effectively advocate its position, and a grant of intervention would give the ACC no greater ability to press its position than it already has.

9. The ACC raises two specific issues with respect to which it feels it was improperly excluded, and which it contends give it grounds for intervention. First, the ACC objects to the Commission's selection of a third-party contractor to assist the Commission in preparation of an environmental impact statement without consulting the ACC.¹⁴ Selection of a contractor is a matter purely within the Commission's discretion, and, while the Commission does require a potential applicant to provide a list of suggested contractors, the Commission is not bound by that list, and the Commission, through its staff, alone chooses the contractor.¹⁵ The ACC also complains that SCE set dates and locations for public open houses, and that we scheduled environmental scoping meetings, without consulting with the ACC. We had no involvement in SCE's meeting schedule. Commission staff set our scoping meetings, based on project location, in an effort to ensure that members of the public who may be affected by the project, as well as other interested entities, be given a reasonable opportunity to be heard.¹⁶ Moreover, with respect to both of these issues, the ACC would have no greater rights had it been an intervenor, so these matters are irrelevant to the question of intervention.

B. Request for Stay

10. Given that we have determined that intervention does not lie in the prefiling process, and thus there are no "parties" in such a process, the ACC lacks standing to seek

¹⁴ *Id.* at 7-8.

¹⁵ Moreover, pursuant to the Council on Environmental Quality regulations implementing the National Environmental Policy Act, the Commission is responsible for the scope and content of the EIS, and must provide guidance and participate in the preparation of the EIS, as well as independently review the document. See 40 C.F.R. § 1506.4(c).

¹⁶ We note that the ACC does not allege any deficiencies in our scoping schedule, nor did it object to anything in the schedule when we issued public notice of it.

a stay here. Therefore, we reject its stay request.¹⁷ We nonetheless discuss below why a stay is not warranted in any event.

11. As the ACC recognizes, in acting on stay requests, the Commission applies the standard set forth in the Administrative Procedure Act;¹⁸ that is, we will issue a stay “if justice so requires.” Under this standard, the Commission considers such factors as whether the moving party will suffer irreparable injury without a stay, whether issuance of a stay will substantially harm other parties, and where the public interest lies.¹⁹

12. The ACC argues that the Commission should stay the prefiling process here because cases are pending in the courts of appeal challenging both DOE’s designation of the Southwest National Interest Electric Transmission Corridor and the Commission’s regulations implementing new FPA section 216.²⁰

13. While the ACC is correct that a decision overturning DOE’s corridor designation could deprive the Commission of jurisdiction to consider a siting application from SCE, it is nonetheless well within our jurisdiction to proceed with prefiling pending the outcome of those cases. As a general matter, we do not stop processing cases when relevant regulations are under review.²¹ To do otherwise would often bring the Commission’s business to a halt and could significantly delay the benefits that consumers may otherwise receive from additional energy infrastructure. Here, we conclude that it serves the public interest for us to permit SCE to gather, at its own financial risk, the information that would be needed to support an application for a construction permit.

14. The ACC asserts that “there will be needless public expense if either challenge is successful”²² and that absent a stay “there is no meaningful retroactive cure for the unwarranted processing of any filings in this matter.”²³ On the contrary, if court rulings

¹⁷ See, e.g., *FPL Energy Maine Hydro, LLC*, 124 FERC ¶ 61,037, at P 13 (2008).

¹⁸ 5 U.S.C. § 705 (2000).

¹⁹ See *Public Utility District No. 1 of Pend Oreille County, Washington*, 117 FERC ¶ 61,205, at P 22 (2006).

²⁰ ACC comments at 2-4.

²¹ For example, we processed numerous compliance filings while our major gas and electric restructuring regulations were under review.

²² ACC comments at 3.

²³ *Id.* at 10.

dictate that the Commission stop considering SCE's proposal, whether at the prefiling stage or in any subsequent phase, we will promptly do so, thus providing complete relief. To the extent that the ACC suggests that it or any other entity will bear costs during prefiling, our process imposes no requirements on third parties during prefiling that would necessitate their incurring significant expenditures. Thus, such entities are not at any financial risk. Instead, the significant burdens in the prefiling process are borne by the potential applicant and by the Commission.²⁴ Moreover, the Supreme Court has held that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury."²⁵

15. The ACC cites as a "defect" leading to irreparable harm the fact that the prefiling process "does not provide for equal participation by affected entities such as the ACC."²⁶ However, while we do not permit interventions during prefiling activity, the ACC has the same ability as any other entity to review and provide information, and file any comments it chooses. Thus, the ACC's argument on this point does not demonstrate irreparable harm. Moreover, the ACC's complaint about the prefiling process does not point to any infirmity in this particular prefiling, but rather is an improper collateral attack on our regulations.²⁷

16. On the other hand, we believe that it would be contrary to the public interest to halt a prefiling process that could ultimately lead to the construction of necessary interstate electric transmission facilities that meet the criteria set forth by Congress in section 216. Thus, justice does not require issuance of a stay here.²⁸

²⁴ To the extent that the ACC seeks to raise issues during prefiling that are properly raised at later stages, we do not consider that a burden warranting a stay.

²⁵ *Renegotiation Board v. Bannerkraft Clothing Co.*, 415 U.S. 1, 24 (1974). The costs of appearing in an administrative proceeding are essentially litigation costs. See also *Public Utility District No. 1 of Pend Oreille County, Washington*, 117 FERC ¶ 61,205 at P 26 (stating that pecuniary loss, without more, is not irreparable harm).

²⁶ ACC comments at 9.

²⁷ The ACC, unlike a number of other state regulators, chose not to participate in the rulemaking that led to Order No. 689.

²⁸ ACC also asserts that allowing prefiling to move forward is at odds with efforts at the state level to resolve ACC's and SCE's differences. ACC comments at 3. We strongly support settlements as an alternative to litigation, but do not see how the federal prefiling process will in any way hinder the settlement of disputes regarding matters of state law.

17. Finally, Arizona argues that, during prefiling, SCE has filed project alternatives that were not filed before the ACC and that “FERC appears poised to consider them.” The ACC contends that the Commission may not consider such alternatives.²⁹ It would be premature for us to determine during prefiling what alternatives may properly be filed with us. The prefiling period is a time for a potential applicant to begin the process of gathering the information needed to support an application; it is not a time for us to make determinations to rule out certain alternatives. We will consider such issues if and when SCE files an application for a construction permit.

The Commission orders:

(A) The motion to intervene filed by the Arizona Corporation Commission on July 9, 2008 is denied, without prejudice.

(B) The request for stay filed by the Arizona Corporation Commission on July 9, 2008 is dismissed.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁹ ACC comments at 11.