

Case No. E030783

COURT OF APPEAL – STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

RALPH E. and SALLY MORTON, et al.

Petitioners,

vs.

THE SUPERIOR COURT FOR THE COUNTY OF RIVERSIDE

Respondent.

SAN DIEGO GAS & ELECTRIC COMPANY,
Real Party in Interest.

From Riverside County Superior Court Case No. RIC364308
The Honorable Robert G. Spitzer, Judge

AMICUS CURIAE BRIEF OF THE CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION IN SUPPORT OF REAL PARTY IN INTEREST
SAN DIEGO GAS & ELECTRIC COMPANY

CALIFORNIA INDEPENDENT SYSTEM
OPERATOR

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I. INTRODUCTION

The California Independent System Operator Corporation ("ISO") is charged under California law with ensuring the "efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council". Public Utilities Code Section 345.

Although the ISO has responsibility to ensure efficient use and reliable operation of the transmission grid, the review and approval of several entities are required before a transmission facility determined to be needed by the ISO can be permitted and constructed. Nonetheless, without necessary facilities, the ISO cannot meet its statutory responsibilities. Thus, the ISO has a strong interest in an efficient and effective process for the permitting and construction of transmission facilities it determines to be needed.

The Superior Court's order at issue in this appeal allows San Diego Gas & Electric Company ("SDG&E") access to the Petitioner landlords' properties to undertake pre-condemnation activities. This order is consistent with Public Utilities Code Section 625, which permits pre-condemnation activities by a public utility such as SDG&E that is otherwise complying with the requirements of the law. Further, the order is in the public interest as it will expedite the full and thorough review before the California Public Utilities Commission ("CPUC") of diverse aspects of the Valley Rainbow Interconnect Project, including the applicability of Public Utilities Code Section 625. In contrast, the interpretation

given by Petitioner landlords to the substantive and procedural requirements of Public Utilities Code Section 625 are unsupported by the language of the statute and would delay or render impossible the permitting and construction of needed transmission facilities. Accordingly, the Superior Court's order should be upheld.

II. STATEMENT OF THE INTEREST OF *AMICUS*

The ISO is a nonprofit public benefit corporation responsible under California Law for the efficient use and reliable operation of the transmission systems of the California Investor Owned Utilities, including that of SDG&E, and such other transmission systems as are placed under ISO operational control. In particular, Public Utilities Code Section 345 provides:

The Independent System Operator shall ensure efficient use and reliable operation of the transmission grid consistent with achievement of planning and operating reserve criteria no less stringent than those established by the Western Systems Coordinating Council and the North American Electric Reliability Council.

In order to assure the efficient use and reliable operation of the transmission grid, and the achievement of planning and operating reserve criteria, the ISO oversees an annual grid planning process in which both reliability and economic upgrades to the transmission system are identified and approved. This planning process is undertaken in accordance with the ISO tariff, which has been approved by the Federal Energy Regulatory Commission. See e.g. 81 FERC ¶ 61,122, pp 61,459 (October 30, 1997); 80 FERC ¶ 61,128, pp 61,430-35 (July 30, 1997). Through this planning process, the ISO works with public utilities, and other stakeholders to identify the transmission upgrades necessary to achieve efficient use and reliable operation of the transmission grid.

The ISO has a strong interest in an efficient process for the permitting and construction of transmission projects that it has identified as necessary through the transmission planning process. Without such a process, the ISO will be unable to meet its statutory responsibility to provide for the efficient use and reliable operation of the transmission grid.

III. THE SUPERIOR COURT'S ORDER ALLOWING SAN DIEGO GAS AND ELECTRIC COMPANY ACCESS TO THE LANDOWNERS' PROPERTIES IS CONSISTENT WITH CALIFORNIA PUBLIC UTILITIES CODE SECTION 625 AND PUBLIC POLICY.

Distilled to its essence, this case involves whether the Superior Court could, consistent with Public Utilities Code Section 625, allow SDG&E access to the Petitioner landowners' properties for purposes of "conducting land and environmental survey work and other studies to identify with specificity the route for the Valley-Rainbow Interconnect Project that will be most compatible with the greatest public good and least private injury." The simple answer to this question is yes. Moreover, this outcome is consistent with public policy. Accordingly, the Superior Court's order should be upheld.

A. The Superior Court's Order Allowing San Diego Gas and Electric Company Access to the Landowners' Properties is Consistent with California Public Utilities Code Section 625 and Should be Upheld .

The briefs of the landowners, SDG&E and Pacific Gas and Electric Company ("PG&E") discuss at length whether the Valley-Rainbow Interconnect Project is intended to provide competitive services and hence subject to the requirements of Public Utilities Code Section 625. The ISO does not believe it is necessary to address this issue in order to conclude that the Superior Court's order

allowing SDG&E access to the property of the landowners is consistent with Public Utilities Code Section 625. Public Utilities Code Section 625 allows public utilities to undertake pre-condemnation activities under Title 7 of Part 3 of the Code of Civil Procedure, provided that they otherwise comply with the requirements of Public Utilities Code Section 625.

Public Utilities Code Section 625 provides in relevant part that

a public utility that offers competitive services may not condemn any property for the purpose of competing with another entity in the offering of those competitive services, unless the commission finds that such an action would serve the public interest, pursuant to a petition or complaint filed by the public utility, personal notice of which has been served on the owners of the property to be condemned, and an adjudication hearing in accordance with Chapter 9 (commencing with Section 1701), including an opportunity for the public to participate.

Thus, even where applicable,¹ Section 625 prohibits only condemnation without the necessary procedures and finding by the CPUC, it does not prohibit pre-condemnation activities.

Only one provision of Public Utilities Code Section 625 could be said to apply in any manner to pre-condemnation activities, subsection (e). It states "A public utility that does not comply with this section may not exercise the power of

¹ The ISO does not address in this brief whether Public Utilities Code Section 625 is applicable in the case of the Valley-Rainbow Interconnect Project because, as discussed herein, it is unnecessary to reach this determination in order to conclude that the Superior Court's order is lawful and because the August 13, 2001 Assigned Commissioner's Ruling Establishing the Category and Providing Scoping Memo in the proceeding for a Certificate of Public Convenience and Necessity ("CPCN") before the CPUC states clearly that the CPUC will consider this question in the CPCN proceeding.

eminent domain, including but not limited to, any authority provided by Title 7 (commencing with Section 1230.010) of Part 3 of the Code of Civil Procedure."

In this case, compliance with Public Utilities Code Section 625 has been assured. The CPUC has explicitly stated that it will consider the applicability of Public Utilities Code Section 625 in the proceeding on SDG&E's application for a Certificate of Public Convenience and Necessity ("CPCN"). Further, the CPUC has established a schedule for such consideration. Thus, SDG&E is complying with Public Utilities Code Section 625 and may engage in activities authorized under Title 7 of Part 3 of the Code of Civil Procedure. Of course, consistent with Public Utilities Code Section 625, SDG&E may not actually condemn any property until either (1) there has been a determination that Public Utilities Code Section 625 does not apply, or (2) the CPUC has, through the process set forth in Section 625, made the requisite finding.

In sum, because the CPUC will determine the applicability of Public Utilities Code Section 625 to the Valley-Rainbow Interconnect Project, and undertake further proceedings in accordance with the requirements of that section, SDG&E is in compliance with Public Utilities Code Section 625 and may proceed with pre-condemnation activities. Accordingly, the order of the Superior Court should be upheld.

B. The Superior Court's Order Allowing San Diego Gas and Electric Company Access to the Landowners' Properties is Consistent with Public Policy .

As explained above, the CPUC has stated unequivocally that it will consider the applicability of Public Utilities Code Section 625 in the context of SDG&E's CPCN application for the Valley Rainbow Interconnect Project. Thus, the landowners will have a full and fair opportunity to address to the CPUC all arguments relating to applicability of the section, and if it is found to be applicable, to whether or not condemnation would serve the public interest. In order to assess this and other issues, however, the CPUC requires information that can only be obtained by allowing SDG&E limited access (as delineated in the Superior Court's order) to the Petitioner landowners' properties.

By seeking to interpret Public Utilities Code Section 625 far more restrictively than it is written, landowners would establish a circular process whereby the permitting and construction of needed transmission projects can be endlessly delayed because the information needed to make key determinations could only be accessed after the determinations are made. Such a result is clearly contrary to the public interest as it would significantly delay, if not altogether preclude, the permitting and construction of needed transmission facilities.

The review and approval of numerous entities is required for the construction of needed transmission facilities. Public utilities must themselves determine (or be persuaded) that construction of the project is appropriate. The ISO must assess the reliability and economic need and/or impacts of the project. For large facilities, the CPUC must issue a CPCN, and if applicable, make

necessary determinations pursuant to Public Utilities Code Section 625. The Federal Energy Regulatory Commission must determine whether cost recovery is appropriate and the manner in which cost recovery is achieved. Courts must address access for pre-condemnation activities, and where appropriate, actions to condemn property required for the project. Given the diversity of entities involved, it is important that entities cooperate to ensure that they all meet their responsibilities under the law in an efficient and effective manner that minimizes the likelihood of duplication of efforts and inconsistent results. The alternative is an ongoing drain of public resources, and unnecessary delays in the construction of necessary projects.

The Superior Court order allowing SDG&E limited access to the landowners' property for purposes of obtaining the information needed by the CPUC to make requisite finding under Public Utilities Code Sections, 1001, et. seq., and Public Utilities Code Section 625, if it is found to apply, will expedite full and thorough review of the Valley-Rainbow Interconnect Project. This review will address the need for the project, the environmental, social, aesthetic issues associated with the project, and the effects on competition. In contrast, the interpretation given by Petitioner landlords to the substantive and procedural requirements of Public Utilities Code Section 625 are unsupported by the language of the statute and would delay or render impossible the permitting and construction of needed transmission facilities. Accordingly, the Superior Court's order is in the public interest and should be upheld.

IV. CONCLUSION

The ISO respectfully requests that this Court uphold the Superior Court's order allowing SDG&E limited access to the Petitioner landowners' properties for purposes of "conducting land and environmental survey work and other studies to identify with specificity the route for the Valley-Rainbow Interconnect Project that will be most compatible with the greatest public good and least private injury." The Superior Court's order is consistent with Public Utilities Code Section 625 and in the public interest.

Dated: January 30, 2002

Respectfully submitted,

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