

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for a Certificate of Public Convenience and Necessity Concerning the Tehachapi Renewable Transmission Project (Segments 4 through 11)

Application 07-06-031
(Filed June 29, 2007)

CITY OF ONTARIO'S APPLICATION FOR REHEARING

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I. Introduction

Pursuant to Rules of Practice and Procedure (RPP) 16.1, the City of Ontario (City) respectfully requests that the Commission rehear, reconsider and reverse its denial of the City's Amended Petition for Modification Order Undergrounding of Segment 8 (Petition) and related procedural Amended Petition for Modification to Stay Construction of Segment 8 (Stay Petition) in Decision D.15-05-004 (Decision). The Decision should be reversed because it contains numerous unlawful and erroneous conclusions. Specifically, the Decision contains six important errors: (1) it erroneously attributes actual knowledge of the effect of the City towers to City staff and other affected parties; (2) it squarely conflicts with the Commission's liberal interpretation of Rule 16.4 in D.13-07-018; (3) it erroneously applies laches; (4) it subjects City ratepayers to disparate treatment without any reasonable or rational basis for doing so; (5) the Decision erroneously speculates about the potential effects of the Petition on the TRTP without any basis for doing so; and (6) the Decision relies on evidence not submitted in the record or provided to the City during the consideration of its Petition and Stay Petition.

II. Standard of Review & City's Ability to Request Rehearing

Under RPP Rule 16.2(a), any party to the underlying proceeding may file an application for rehearing. The application must be filed within thirty days of the issuance of the underlying decision. In addition, the application for rehearing must set forth specifically the grounds on which the applicant considers the resolution to be unlawful or erroneous. (See RPP Rule 16.1(c).)

Here, the City became a party to this proceeding upon the filing of its Petition and Stay Petition. (RPP Rule 1.4(a)(1).) Moreover, the decision was issued on May 15, 2015, and this Application for Rehearing is timely.

III. The Decision Is Unlawful and/or Erroneous

As noted above, the Decision makes six important errors.

A. The Decision Erroneously Attributes Actual Knowledge of the Effect of the Towers Prior to Their Construction to the City

Rule 16.4 requires the City to articulate why it did not participate in the proceeding prior to filing the Petition and Stay Petition. In determining that the City failed to meet this burden, the Decision discusses the City's argument that it did not understand the true impact of the towers within the City until the most recent construction began in 2014. Specifically, the City noted that any delay was justified as it only discovered that undergrounding was necessary after the new, especially taller towers were installed in the City. Those towers, that are part of Segment 8A/8C, were installed beginning in April 2014 and created significant visual and similar impacts. In one area of the City, residents are entirely surrounded by these extremely tall towers carrying significant loads. This has a significant impact on the daily lives of the City's residents. Specifically, these towers depress property values, affect quality of life, and generally stand as community-wide visual impairments.

Rejecting this argument, the Decision notes:

While it is true that construction resulting in the new, taller poles that support Segment 8A (and Segment 8C) began in April 2014, Ontario's argument is unpersuasive. The argument presumes that Ontario was unaware that the FEIR, certified in 2009, includes plans for 198 foot towers in the City; that in 2011 Ontario had no knowledge such towers actually were standing in Chino Hills, on Ontario's border; and that between 2011 and 2013 Ontario did not know about Chino Hills' multi-faceted effort to obtain undergrounding in its ROW. (Decision, pp. 18-19.)

The Decision further notes that the City received five letters prior to construction of the towers within the City and that the City failed to request undergrounding in any letter. (Decision, pp. 19-22.) The Decision uses this discussion to conclude that "Ontario implausibly

argues that the City, its residents and the developers of its planned residential/commercial New Model Colony had no meaningful knowledge of the impact of tower height until April 2014.”

This conclusion is clearly erroneous as it directly conflicts with the Commission’s determination in D.13-07-018 that the true impact of TRTP towers is not known until they are actually constructed. In D.13-07-018, the Commission determined new facts justified undergrounding TRTP towers within the Chino Hills. That new fact was the construction of the towers within the City:

Chino Hills suggests that the towers have a far greater impact when viewed in person and we must agree, as each of the five Commissioners now sitting has visited the site (though the ALJ has not). Chino Hills describes the lines in the narrow ROW as an “eyesore” and “jarring”; we must agree. (D.13-07-018, p. 18.)

Here, D.15-05-004 directly conflicts with D.13-07-018, determining that it is “implausible” to believe that the City would not have actual knowledge of the impact of the towers until their construction. It is simply impossible to reconcile these decisions, and D.15-05-004 is clearly erroneous.

B. The Decision Takes an Incorrectly Narrow View of Rule 16.4

The Decision applies Rule 16.4 in an incorrectly narrow way. The Decision correctly outlines the standard for issuing a petition for modification in Rule 16.4. It then notes that this is an “... extraordinary remedy. It must be exercised with care and in keeping with fundamental principles of res judicata since ‘Section 1708 represents a departure from the standard that settled expectations should be allowed to stand undisturbed.’” (See Decision, p. 6 [internal citations omitted].)

This takes an unduly narrow view of Rule 16.4. Precedent establishes that the Commission has not applied the justification and timing requirements of Rule 16.4 and its predecessor, Rule 47, in a mechanical way if that would thwart justice; thus, even where the Commission has determined that a petition was not the appropriate procedural remedy, on occasion and for public policy reasons, it has considered the substantive merits and after that review, has either granted or denied the petition.¹

¹ D.13-07-018, Conclusion of Law #1, p. 65-66; see generally 71 CPUC 2d 144, 153 [D.97-02-051]; 74 CPUC 2d 582, 585 [D.97-08-065].

The Decision fails to cite or even discuss this broad authority under Rule 16.4 and why it is inapplicable in this case. Moreover, on the merits, the Commission clearly must exercise its equitable powers under Rule 16.4 in this case. Once the impacts of the towers became apparent within the City, the City immediately filed for relief utilizing the same procedures used by Chino Hills to obtain undergrounding. The City filed two petitions for modification: (1) requesting undergrounding; and (2) requesting a related construction stay.² It supported the first petition with pictures of the towers within the City and a short declaration of its City Manager in substantially similar form to that used by Chino Hills. Similar to the discussion regarding the effect of the towers within each jurisdiction, it is simply not possible to reconcile the Commission's interpretation of Rule 16.4 in D.13-07-018 with its interpretation in this case.

C. Laches Does Not Apply

In addition to concluding that the City did not meet its burden under Rule 16.4, the Decision determines that laches bars the City's Petition. As noted in the Decision, "[I]aches is unreasonable delay in asserting a right which renders the granting of relief inequitable. (*County Sanitation District No. 2 of Los Angeles County v. Southern California Edison Company*, D.02-09-025 at 8, *citing Adams v. Young* (1967) 255 Cal.App.2d 145, 160; see also *Butler v. Holman* (1956) 146 Cal.App.2d 22, 28.) Omitted from the Decision are two factors that the Commission has previously considered when applying laches: "First, laches applies only where there has been unreasonable delay by the party seeking relief....Second, laches requires that the party seeking relief have actual knowledge of facts or fail to acquire such knowledge after receiving notice." (D.02-09-025 at p. 9.)

Here, the Decision incorrectly applies laches because neither of these factors is present. First, the City has not unreasonably delayed in seeking relief. As explained above, the City immediately filed its Petition once the towers were constructed and their true impact was apparent. Moreover, the City justifiably relied on the Commission's determination in D.13-07-018 that the towers within Chino Hills were truly unique. Once it was clear that this was not true, the City filed the Petition. Second, the City had no actual knowledge regarding the true impact of the towers prior to their construction. As acknowledged in D.13-07-018, the true impact of TRTP towers is only apparent once they are actually constructed within a jurisdiction.

² City of Chino Hills' Petition to modify Decision 09-12-044 to reopen the record with regard to Segment 8 of the proposed route; City of Chino Hills' Petition to modify Decision 09-12-044 to stay construction of transmission facilities in Segment 8A.

Here, once the City became aware of the true impact of the towers, it filed the Petition. It is, therefore, improper to apply laches here.

D. The Decision Unfairly and Unlawfully Treats City Residents Differently From Chino Hills Residents

Under basic constitutional due process and equal protection requirements, the Commission must treat all similarly situated communities the same. The Decision violates this fundamental legal requirement by permitting undergrounding in Chino Hills at ratepayer expense while denying undergrounding to City residents. As explained above, there is no rational way to distinguish the Commission's decision in D.13-07-018 from the Decision. The procedural avenue chosen by each jurisdiction is the same, the evidentiary support supplied in each jurisdiction's petition for modification is the same and the basis for relief (i.e., the effect of the towers once they were constructed) is the same.

This disparate treatment is compounded by the racial and economic disparities between the communities. As outlined in the City's prior filings, based on the 2010 Census, the City's population is 163,924.³ The median income in the City is \$54,994, with 16.4% of the population living below the federal poverty line. By contrast, Chino Hills' population is 74,799.⁴ The median income is \$97,065, with 6.3% of the population living below the federal poverty line.

Moreover, the decision not to underground the lines in the City has a discriminatory impact⁵ on the Hispanic and African American populations in the City of Ontario. The census tracts affected⁶ by the TRTP in the City have a significantly greater proportion of Hispanic and African American residents than do the affected census tracts in Chino Hills. In Chino Hills, where the TRTP will be undergrounded, the affected population is 22.8% Hispanic and 4.6% African American. In contrast, in Ontario, where the TRTP's 200 foot towers will be visible

³ See <http://quickfacts.census.gov/qfd/states/06/0653896.html>. The Decision notes that the City has not requested official notice of these statistics. As federal government census information, these facts cannot be reasonably disputed. (RPP Rule 13.9; Evid. Code, § 452(h).)

⁴ See <http://quickfacts.census.gov/qfd/states/06/0613214.html>.

⁵ As noted in its Petition, the City does not imply or suggest any direct discriminatory intent by the Commission's or its staff.

⁶ The Decision expresses confusion regarding census tracts and what this information provided. "Census tracts are small, relatively permanent statistical subdivisions of a county or equivalent entity that are updated by local participants prior to each decennial census as part of the Census Bureau's Participant Statistical Areas Program." (https://www.census.gov/geo/reference/gtc/gtc_ct.html.) Accordingly, affected census tracts are those areas of the cities near the TRTP lines.

from the resident's backyards, the affected population is 49.5% Hispanic and 14.1% African American.

The Decision acknowledges the City's concerns regarding transmission siting considerations but fails to articulate any justification for treating the communities differently. The Decision then simply notes the timing issues rebutted above to deny the Petition. The different treatment of these communities has a discriminatory impact and is otherwise unlawful and erroneous.

E. The Decision Erroneously Speculates About the Effect of Granting the Petition on the TRTP

As justification for denying the Petition, the Decision speculates that "...were we to entertain review of Ontario's request at this late date and ultimately, to order undergrounding of Segment 8, completion of the TRTP most certainly would be postponed to the end of this decade, if not longer." (Decision, p. 16.) This is reflected in Finding of Fact #17: "Ontario's undergrounding request, if granted at this late date, would delay the timeline for completion of the TRTP by at least 5 years and would have significant costs for all ratepayers, attributable not only to actual construction costs but also stemming from the delayed completion of the TRTP."

This determination is entirely speculative without any support in the record. At this point, it is entirely unclear how long California Environmental Quality Act (CEQA) and related Commission review and hearings would take if the Petition is granted. The Commission determined that it take "at least 5 years" without any evidentiary support. (See *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945 [findings of fact must have some admissible evidentiary support].)

F. Decision Relies on Evidence Not Submitted by Any Party

Lastly, the Decision should be reversed because it relies on evidence that no one, except presumably Commission staff, has seen or heard: the testimony/declaration/indication/verbal statement of the Commission's "CEQA Manager." As evidentiary support for its determination that Segments A and C are almost completed within the City, the Decision notes that the CPUC's "CEQA Manager" has confirmed this. (Decision, p. 8.) Specifically, the Decision notes that "[for Segment 8C]...our CEQA Project Manager reports that the only work remaining now is some additional electric testing, final clean up, recontouring and reseeding." (Decision, pp. 8-9.) For Segment 8A, the Decision notes, "...our CEQA Manager reports that the line is now 95%

complete, with the remaining tower and wire construction expected in early April 2015.” (Decision, p. 9.) No declaration from the CEQA Manager was submitted by CPUC staff in this proceeding, and the City has not seen this statement (if it was written), identified the actual speaker beyond his or her position or determined whether it was made under penalty of perjury.

Under RPP Rule 13.6(a), “[a]lthough technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.” Despite this, all findings of fact must be supported by some admissible evidence. (See *The Utility Reform Network v. Public Utilities Com.*, *supra*, 223 Cal.App.4th at pp. 960-961.) Here, the Commission has based its conclusions in the Decision on no evidence (either admissible or inadmissible). It simply notes in narrative form what the CPUC Project Manager told/wrote someone (presumably) at the CPUC. This is clearly unlawful.

V. Conclusion

Based on the foregoing, the City requests that the Commission grant its request for rehearing, reverse the Decision and grant the Petition.

DATED: June 15, 2015

Respectfully submitted,

/s/

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