

Decision No. 81948

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
SAN DIEGO GAS & ELECTRIC COMPANY for)
a certificate that the present and)
future public convenience and)
necessity require or will require)
the construction and operation by)
applicant of the No. 1 230-kv)
transmission line from San Onofre)
Generating Station and interconnec-)
tion with Southern California)
Edison Company System to Escondido)
Substation to Mission Substation.)

Application No. 52735
(Filed July 8, 1971;
amended April 28, 1972)

Luce, Forward, Hamilton & Scripps, by Jack W. Crumley, Attorney at Law, for applicant.
Overton, Lyman & Prince, by Robert F. Lewis, Attorney at Law, and Frank B. Gray, for the Citizens to Save Fallbrook's Environment, protestants.

Charles F. Cooper and Robert J. Henry, Attorney at Law, for California State University and Colleges, and California State University, San Diego; John Witt, City Attorney, by Robert Logan, Deputy City Attorney, for the City of San Diego; J. Whitehead, for California Department of Parks and Recreation; and James H. Angell, Assistant County Counsel, for County of Riverside, interested parties.

John S. Fick, Walter H. Kessenick, Attorneys at Law, and Arthur C. Fegan, for the Commission staff.

FIRST SUPPLEMENTAL OPINION AND ORDER

By Decision No. 81069 dated February 21, 1973 on the above matter, San Diego Gas & Electric Company (SDG&E) was granted a certificate of public convenience and necessity to construct and operate a 230-kv transmission line from San Onofre Generating Station to Escondido Substation along the route set

forth in the application except through the Fallbrook area, where the Commission partially adopted an alternative route proposed by Citizens to Save Fallbrook's Environment (Citizens), protestants, with the provision that the line "...shall traverse points E and F as shown in Appendix B, modified to minimize the impact on the Santa Margarita Ecological Reserve."^{1/}

After the decision, the Commission staff met with representatives of the California State University, San Diego (University), and SDG&E. A tentative agreement shown as the "State College Route" on Exhibit 37, was reached subject to approval of the trustees of the California State University and Colleges, and of this Commission.

A prehearing conference was held on May 7, 1973 for the purpose, among others, of simplifying and defining the issues and encouraging and receiving offers of settlement. At this prehearing conference a representative of the California Department of Parks and Recreation (Parks) stated that it was negotiating with University to establish a state park to include the land presently managed by University as well as other federally and privately owned land as delineated on Exhibit 82. Parks' representative further stated that the park proposal was contingent upon no transmission line traversing the land managed by University other than along the San Diego - Riverside County line as originally proposed by SDG&E. Under these circumstances University felt it was unable to continue to support the "State College Route" and further hearings were scheduled to receive evidence of the feasibility of constructing the transmission line along the westerly line of federally owned land or along such other alternate routes as were acceptable to the parties to the proceeding.

^{1/} Descriptive rather than legal designation; see diagram in Appendix A.

Public hearings were held on the matter on June 19 and 20 and the matter was submitted on July 16, 1973 upon the receipt of concurrent briefs due two weeks after the receipt of the transcript.

Testimony and exhibits were presented on behalf of Parks by the chief of the Division of Resource Management and Protection, a commissioner (under subpoena), and the District 6 superintendent; on behalf of University by a member of the Board of Trustees (under subpoena), a vice president of administration, the director for the Center for Regional Environmental Studies, and an assistant professor of ecology; and on behalf of SDG&E by the manager of the Engineering Land Department and the manager of the Electrical Engineering Department. Citizens called as witnesses, under subpoena, a member of the California Parks and Recreation Commission and a member of the Board of Trustees of California State University and Colleges, and cross-examined other witnesses.

Proposed State Park

A land use and facilities study of the contemplated park unit was authorized by the Park Commission by a resolution adopted May 15, 1964. Exhibit 82 is a tentative plot plan of the proposed park which was prepared in October, 1965. Apparently the matter has remained essentially dormant from then until approximately December 18, 1972 when the president of University wrote the director of Parks, advising him that University felt it was in the public interest to establish cooperative management of a state park unit to include the land in question. The record indicates that early in May 1973, the director of Parks expressed interest in the establishment of such a state park system unit, but said that Parks would not accept any power line easement across lands presently managed by University except across the south boundary of the project as originally proposed by SDG&E.

The record also shows that since May, 1973, negotiations between Parks and University have progressed rapidly and it now appears that the recommended park plan will go forward subject to final approval by the trustees of the California State University and Colleges, the Director of finance, and the Superior Court of Riverside County.

Park's director of the Division of Resource Management and Protection testified that the primary purpose of the proposed park was the preservation, protection, and perpetuation of the public enjoyment of Temecula Gorge; that the area offers opportunities for scenic enjoyment, for riparian nature study, and photographic and other activities that people like to enjoy in this kind of environment; that the area is an excellent combination of resource features and lands which is hard to beat, particularly in this part of California; and that there is only one Temecula Canyon which, should it be despoiled by the construction of the proposed transmission line, would be irreplaceable. He further testified that "...any power line which would traverse those lands would so detract from their quality and from the quality of the visitor experience for people visiting the State Park System unit as to make it undesirable to perceive."

As discussed in Decision No. 81069, University is conducting an intensive program of resource inventory (biological, geological, land-use history, potential future land-use policies) in the Santa Margarita Ecological Reserve (SMER). In addition, SMER encompasses some very rare ecological types such as riparian and woodland-sagebrush dictating a minimal disturbance in the area to insure their aesthetic and ecological integrity. Also, several species of wildlife indigenous to the area of SMER deserve special considerations as they are fully protected by state law. University's director of the Center for Regional Environmental Studies testified that University was actively seeking a joint management state park unit because the university does not have the manpower

or the financial resources to adequately protect the area; that there is a great need for research into the impact of people on a semi-wilderness area that can better be effectuated through a joint management arrangement; and that such an arrangement would better permit research requiring instrumentation for measurement of plant and animal variables. The record shows that University will continue to use the land as it does now, even after the park is established.

Citizens and the Commission staff take the position that the establishment of the proposed park is so speculative as to preclude the necessity of the Commission considering the possible adverse effect of its selection of the transmission line route on the contemplated park. In support of this position they state that the park is contingent on Parks and University completing a joint management agreement and securing approval of such an agreement by the University's trustees, the Park's Commission, the Department of Finance, the Superior Court of Riverside, and the State Legislature; obtaining appropriation of sufficient funds for land acquisition, development and operation; acquiring the necessary federal and privately owned land; and resolving the problem of locating a north-to-south transmission line to interconnect with Southern California Edison Company.

While these enumerated contingencies are numerous and difficult, they do not appear to present insurmountable obstacles to the establishment of the contemplated state park unit. The fact that interest in the park has been rekindled after approximately eight years' dormancy, coupled with ever-increasing demands for recreational facilities and mounting impetus on the preservation of the environment, tends to greatly enhance the possibility of the formation of such a park. Under these

circumstances the alienation of Parks' staff to the proposed park by the selection of an imprudent transmission line route would certainly be adverse to public interest.

Modification of Decision No. 81069

In support of their position that the Commission at this time may consider only the route of the proposed transmission line beyond Point E, Citizens quote from a Commission decision denying Southern Pacific a rehearing on an application for a rate increase, as follows:

"It is a long-established rule that when the Commission, upon a given statement of facts, reaches a conclusion regarding a certain rate it will adhere to that conclusion in subsequent proceedings regarding the same rate, unless (a) some new facts are brought to its attention, (b) conditions have undergone a material change, or, (c) it proceeded on a misconception in misapprehension." Application of Southern Pacific Company (1969) 70 CPUC 150 at 152.

Citizens also quoted from the petition of Golconda Utilities Company:

"Where jurisdiction has been reserved a point may be reopened or considered at a later time. However, absent extrinsic fraud or other extraordinary circumstances, where jurisdiction has not been reserved and the Commission passes upon a past transaction and the adjudication has become final Section 1708 does not permit the Commission to readjudicate the same transaction differently with respect to the same parties." Petition of Golconda Utilities Company (1963) 68 CPUC 296 at 305.

Citizens further state that no extraordinary circumstance not previously considered in the exhaustive and extensive evidence from all parties have arisen since Decision No. 81069 was issued, and that to reopen proceedings on the route west of Point E would be unfair, expensive, and redundant.

The record clearly shows that active negotiations between Parks and University to establish joint management of the land

currently entrusted to University were commenced in May, 1973 some three months after the issuance of Decision No. 81069. Consequently, consideration could not have been given to the possible effect of a transmission line route selection on these negotiations for the jointly-managed state park unit. University's director of the Center for Regional Environmental Studies testified that in his opinion, the establishment of a jointly-managed state park unit would be a higher use of the land for the benefit of the general public. The possible deleterious effect on this proposed higher use of land that could result from the Commission's decision on this matter clearly reflects conditions that have undergone a material change since the issuance of Decision No. 81069 and mandates a thorough review of all viable alternative routes.

In addition, Parks' position in this matter could effect another changed condition by invalidating Finding 23 of Decision No. 81069 which states, "The route authorized by this decision will not produce an unreasonable burden on natural resources, aesthetics of the area which the route traverses, public health and safety, air and water quality in the vicinity, or parks, recreational and scenic areas, or historic sites and buildings or archaeological sites." (Emphasis added)

These materially changed conditions provide ample justification for the Commission to exercise its option granted by Section 1708 of the Public Utilities Code to "...rescind, alter, or amend any order or decision made by it."

Alternate Routes Under Consideration

SDG&E's manager of its Engineering Land Department presented Exhibit 87 delineating the four alternate routes which SDG&E believes to be under consideration at this time. These four routes are referred to as the State College Proposed Route, the Gavilan Mountain Route, the PUC Decision No. 81069 Route, and the SDG&E Route.

The State College Route follows the E to F route to its intersection with the westerly boundary of the proposed state park and then runs southeasterly to SDG&E's original route and then easterly to Point H. This route was tentatively agreed to at the staff level by the Commission staff, SDG&E, and University, subject to approval of this Commission and of the trustees of the California State University and Colleges. However, as a result of Parks' position that approval of any route across contemplated state park land other than SDG&E's original proposal would cause abandonment of the state park, University has reversed its position and no longer supports this route.

The Gavilan Mountain Route commences on a point on the E to F route northeasterly of Point E and runs southerly just west of the land presently owned by the United States. This route would cross the 1800 foot gradient line which would place the top of the towers at an approximate elevation of 1900 feet, the highest point in the vicinity. Consequently, towers placed along this route would be silhouetted against the skyline and clearly visible for many miles around, and would appear to incorporate all the objectionable features of the other proposed routes with none of the benefits.

The PUC Decision No. 81069 Route has been delineated as running from E to F to G to H. The E to F portion was to be "...modified to minimize the impact on the Santa Margarita Ecological Reserve." Through cross-examination of Park's chief of the Division of Resource Management and Protection, Citizens emphasized that the proposed line from points F to G to H would traverse the central portion of the proposed park unit and thereby cause its abandonment by Parks. Parks' witness testified that it was his understanding that an alternate route east of the delineated F to G to H line would be available which, because of the terrain involved, would be acceptable to Parks. This position is premised on the assumption that the F to G to H alternate line would be

for an interconnection with the Southern California Edison Company and will be constructed at some future date.

The fourth route delineated on Exhibit 87 is the route originally proposed by SDG&E along the San Diego - Riverside County line between points A and E. It is the only route crossing state proposed park land that is acceptable to Parks and is the only route supported by Riverside County.

Environmental Impact Report

University has taken a position that prior to any easement being granted across any portion of land managed by University, it will be necessary to comply with the 1973 amendments to the State Environmental Quality Act of 1970 by preparing an environmental impact report pursuant to Section 21,100, et seq. of the Public Resources Code.

The "Guidelines for Implementation of the California Environmental Quality Act of 1970" issued by the Resource Agency of California on February 5, 1973 (Guidelines) provide the means for determining when as well as how an EIR must be prepared.

Section 15030 of the Guidelines defines the lead agency as the public agency having the principal responsibility for approving a project which may have a significant effect on the environment. Sections 15064, 15065, and 15066 state that only one EIR is required to be prepared by the lead agency after consultations with all other public agencies which must approve the project. Consequently, this Commission would normally be the lead agency responsible for the preparation of an EIR on an electric transmission line. However, Section 15070(e) of the Guidelines, under the heading of "Ongoing Projects", provides as follows:

"Where a project involving the issuance of a lease, permit, license, certificate, or other entitlement to use has been granted a discretionary governmental approval for part of the project before April 5, 1973, and requires another or additional discretionary governmental approvals after April 5, 1973, the project shall require the preparation of an EIR only if the approval or approvals after April 5, 1973, involve a greater degree of responsibility and control over the project as a whole."
(Emphasis added.)

This Commission by Decision No. 79969 dated April 18, 1972 and Decision No. 81069 dated February 21, 1973 (Effective March 13, 1973), certificated the 93-mile transmission line leaving only a small segment to be "...modified to minimize the impact on the Santa Margarita Ecological Reserve." Since Decision No. 81069 granted discretionary approval prior to April 5, 1973 and since the further approval under consideration at this time clearly does not involve a greater degree of responsibility or control over the project as a whole, Section 15070(e) of the Guidelines applies and an EIR is not required. Consequently, the Commission need make only that evaluation of the environmental impact of the project which is required by General Order No. 131.^{2/}

Government Code Section 14666 permits the trustees, with the approval of the Department of General Services, to grant easements across portions of land owned or administered by the

^{2/} General Order No. 131 requires a finding that:

"...the construction of the proposed facility:

* * *

- B. Will not produce an unreasonable burden on natural resources, aesthetics of the area in which the proposed facilities are to be located, public health and safety, air and water quality in the vicinity, or parks, recreational and scenic areas, or historic sites and buildings or archeological sites."

California State University and Colleges. Section 21174 of the EQA reads, in part, as follows:

"No provision of this division is a limitation or restriction on the power or authority of any public agency in the enforcement or administration of any provision of law which it is specifically permitted or required to enforce or administer..."

This provision would permit University to condition a grant of easement across land under its control upon the preparation of a suitable EIR by University. Such an action would be subsequent to the issuance of this decision and requires no Commission action at this time.

Award of Expert Witnesses' and Attorneys' Fees

Citizens moved to have the Commission order SDG&E to pay Citizens all past and future expert witnesses' and attorneys' fees incurred by Citizens in the prosecution of the matter. In support of this motion Citizens state that a primary obstacle to the effectuation of a strong public policy toward environmental protection is the inability and unwillingness of individual citizens to pay the costs of such litigation. They further state that the courts have become aware of the inequity of requiring individual citizens to bear the costs of litigation which benefits the entire public and have expressed a willingness to re-evaluate the traditional prohibition on recovery of attorneys' fees. It is further asserted that the same principles apply to the recovery of expert witnesses' fees.

Citizens further state in Exhibit 86:

"A strong line of recent federal cases has established the proposition that where an individual, acting in effect as 'private attorney general' has successfully prosecuted an action which has (1) resulted in the effectuation of strong public policies; (2) benefitted a large class, and (3) where, further, the necessity and financial burden of private enforcement are such as to make the award appropriate, considerations of equity and public policy justify the awarding of attorneys' fees to the successful plaintiff, notwithstanding the absence of express statutory authority

for such award. Newman v Piggie Park Enterprises (1968) 390 US 400, 88 S Ct 964, 19 L ed 2d 1253; Mills v Electric Auto-Lite (1970) 396 US 375, 90 S Ct 616, 24 L ed 2d 593; Lee v Southern Home Sites Corp (5th Cir 1971) 444 F 2d 143; Cooper v Allen (5th Cir 1972) 467 F 2d 836; La Raza Unida v Volpe (N D Cal 1973) 57 FRD 93; Sims v Amos (MD Ala 1972) 340 F Supp 691."

In the instant proceeding the Citizens are proposing an alternate transmission line route designed primarily to shift the ecological burden from themselves to present and future residents of Riverside County and beneficiaries of present and future state lands in the area. Inasmuch as any benefits to be derived from the rerouting of the proposed transmission line will redound only to the benefit of the citizens of Fallbrook and vicinity and not the general public as a whole, the cited cases are inappropriate. Furthermore, the award or denial of a certificate of public convenience is an administrative rather than judicial act, Ernest Tyhurst (1948) 47 CPUC 667, and a private attorney general has no place in such a proceeding. The Commission has the benefit of active participation of a professional staff to represent the general public interest.

Findings of Fact

1. Findings 1-12, 15-17, and 23-25 of Decision No. 81069 dated February 21, 1973 are still effective.
2. This Commission by Decision No. 81069 granted SDG&E a certificate of public convenience and necessity to construct and operate a 230-kv transmission line from San Onofre Generating Station to Escondido Substation except for a small segment that was left to be "...modified to minimize the impact on the Santa Margarita Ecological Reserve."
3. Materially changed conditions, principally the commencement of negotiations between Parks and University to establish a jointly managed state park unit resulting in higher use of the land coupled with the Parks' position that no transmission line

be permitted to cross state land except along the route originally proposed by SDG&E, provide ample justification for the Commission to exercise its authority granted by Section 1708 of the Public Utilities Code to "...rescind, alter, or amend any order or decision made by it."

4. The establishment of a jointly managed state park unit would be a higher use of the land. The alienation of Park's staff to the proposed park unit by the selection of an imprudent transmission line route would be adverse to public interest.

5. Should such a park unit be established, a transmission line through the state park would have a much greater adverse visual impact on visitors to the park than the originally proposed line would have on the Fallbrook area residents.

6. The possible adverse effect of preventing the formation of a jointly managed state park unit in the Temecula Gorge area coupled with the probable adverse effect of any transmission line route from points A to B to E to H on future nearby residents of Riverside County outweigh the adverse effects of transmission line originally proposed by SDG&E on the Fallbrook area residents.

7. An environmental impact report is not required in this case because discretionary approval of the project was given prior to April 5, 1973.

8. University can condition a grant of easement to cross land managed by it to require the preparation of a suitable environmental impact report by University. Such action would occur subsequent to the issuance of a Commission decision.

9. The awarding of attorneys' fees and expert witnesses' fees to Citizens by SDG&E is not justifiable.

Conclusions of Law

1. Negotiations between Parks and University regarding the establishment of a jointly managed state park unit commenced since Decision No. 81069 was issued and its possible effect on

public benefit and the environment constitute a material change in conditions permitting the Commission to rescind, alter, or amend Decision No. 81069. ✓

2. Citizens' participation in this proceeding is for the benefit of Citizens only rather than for the general public, a certificate proceeding is an administrative rather than judicial act and a private attorney general has no place in the proceeding, and the Commission lacks authority to order reimbursement of attorneys' and expert witnesses' fees.

3. An environmental impact report is not required in this matter because discretionary approval was granted for the project prior to April 5, 1973.

4. Conclusion 2 of Decision No. 81069 still is effective. ✓

5. Decision No. 81069 should be modified to the extent set forth in the following order.

The action taken herein is for the issuance of a certificate of public convenience and necessity only and is not to be considered as indicative of amounts to be included in proceedings for the purpose of determining just and reasonable rates.

The certificate of public convenience and necessity issued herein is subject to the following provisions of law:

1. The Commission shall have no power to authorize the capitalization of the franchise involved herein or this certificate of public convenience and necessity, or the right to own, operate, or enjoy such franchise or certificate of public convenience and necessity in excess of the amount (exclusive of any tax or annual charge) actually paid to the State or to a political subdivision thereof as the consideration for the issuance of such franchise, certificate of public convenience and necessity, or right.
2. The franchise involved herein shall never be given any value before any court or other public authority in any proceeding of any character in excess of the cost to the grantee of the necessary publication and any other sum paid by it to the municipality therefor at the time of the acquisition thereof.

IT IS ORDERED that:

1. The certificate of public convenience and necessity granted to San Diego Gas & Electric Company by Decision No. 81069 dated February 21, 1973 authorizing it to construct a transmission line is modified through the Fallbrook area so that the route shall traverse the original route proposed by San Diego Gas & Electric Company from point A to H. Decision No. 81069 is modified accordingly. ✓

2. In all other respects Decision No. 81069 shall remain in effect.

3. The motion of the Citizens to Save Fallbrook's Environment to award attorneys' fees and expert witnesses' fees to the Citizens to Save Fallbrook's Environment is denied. ✓

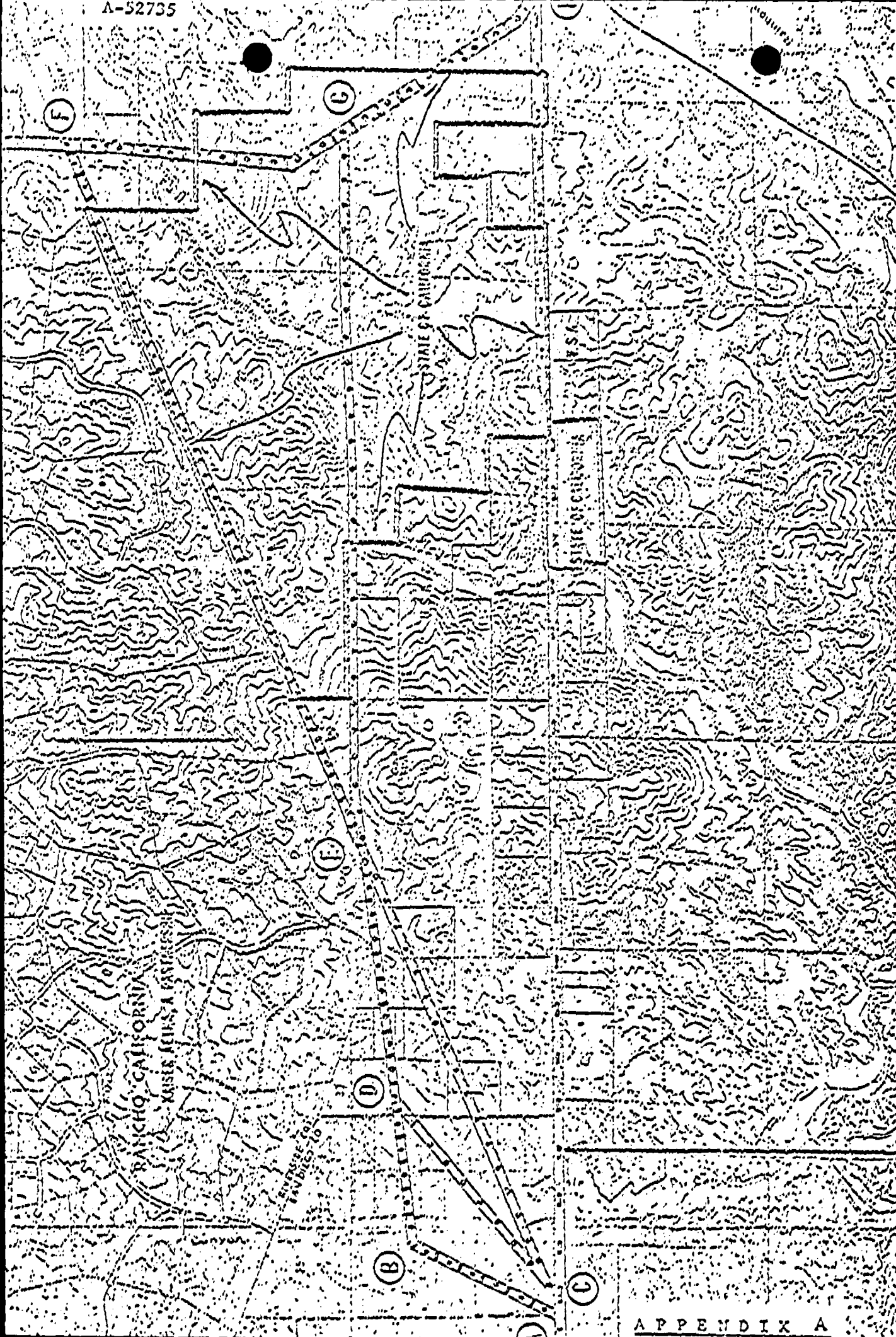
The effective date of this order shall be twenty days after the date hereof.

Dated at San Francisco, California, this 2nd day
of OCTOBER, 1973.

William J. Sturgeon President
[Signature]
[Signature] Commissioners

Commissioner Vernon L. Sturgeon, being necessarily absent, did not participate in the disposition of this proceeding.

Commissioner J. P. Vukasin, Jr., being necessarily absent, did not participate in the disposition of this proceeding.



NOTE:
MAP IS A PORTION
OF EXHIBIT NO. 79
WITH MODIFICATIONS

SCALE: ONE INCH EQUALS 3,000 FEET

R/W ROUTES
 S.D.G. & E. R/W ROUTE
 FIRST CHOICE

APPROX. 3 MILES
TO NORTH EDGE OF
FALLBROOK BUSINESS
AREA