

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of
San Diego Gas & Electric Company
(U-902) for a Certificate of Public
Convenience and Necessity for the
Sunrise Powerlink Transmission Project.

Application No. 05-12-014
(Filed December 14, 2005)

**RESPONSE OF THE CITY OF SAN DIEGO
TO ASSIGNED COMMISSIONER RULING
DATED FEBRUARY 10, 2006**

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The City of San Diego (“CSD”) herein responds to questions set forth in Ruling of Assigned Commissioner Diane Grueneich dated February 10, 2006 (the “ACR”). CSD filed an appearance at the prehearing conference held in Ramona on January 31, 2006 and has an interest in this proceeding because it is the nation’s seventh largest city¹ and one of SDG&E’s largest customers. The electric loads of homes and businesses within the City represent a substantial measure of SDG&E’s total service requirement. Loads within the City are a major factor in SDG&E’s forecasts and planning.

CSD has not protested San Diego Gas & Electric Company’s (SDG&E) application out of its concern that reliable, cost-effective, and environmentally sound sources of electricity should be available in a timely manner to support the economy of the City and the region. CSD comes to this proceeding with open understanding that the transmission line sought by SDG&E might be shown to be publicly convenient and necessary.

By the same token, CSD has not endorsed SDG&E’s application or its bifurcated approach. As background, CSD actively participated in SDG&E’s 2004 Resource Plan proceeding, R.04-04-003. CSD sponsored testimony that was circumspect of the element of

¹ SDG&E Application for Certificate of Public Convenience and Necessity (CPCN) to Construct the Sunrise Powerlink dated December 14, 2005 (“Application”) at p. 2

SDG&E's resource plan which called for construction of a 500kV transmission line by 2010, to the apparent exclusion of other considerations.² CSD's criticism was not based on an opposition to the idea of SDG&E constructing a new 500kV line by 2010 to secure area reliability; rather it was based on CSD's view that SDG&E's resource plan had not adequately analyzed alternative resource scenarios which might meet forecasted demand through integration of generation options in SDG&E's service area.³ D.04-12-048 did not approve the feature of SDG&E's resource plan calling for the 500 kV line by 2010.⁴ The decision acknowledged the lengthy process needed to plan, license, and construct transmission and encouraged SDG&E to continue planning and evaluating transmission alternatives.⁵ SDG&E assured the Commission that the application process for a CPCN to construct a 500 kV line would be the venue where necessity would be established, including project definition and analysis of alternatives.⁶ SDG&E stated "[i]t is in this (CPCN) forum that SDG&E would be seeking specific approval for a firm commitment regarding *detailed design, location and timing* of the new transmission line. This (CPCN) is the appropriate forum to determine whether a different alternative should be approved."⁷ Timing, design, and location were thus said to be critical to the weighing of alternatives.

Timing to the year 2010 is a driving force in SDG&E's application approach. SDG&E has moved to "defer certain filing requirements" contained in Commission Rules and General Orders, acknowledging that its application is not complete, but assuring that it will be made so later. On this background The ACR poses the following questions:

² Testimony of William Monsen (CSD), Exhibit 57 to resource plan hearing in R.04-04-003 at pp. 13-14.

³ Id.

⁴ D.04-12-048 at p.45

⁵ Id.

⁶ Rebuttal Testimony of Linda Brown (SDG&E) Ex. 7 in R.04-04-003 at pp. 2-3 (emphasis added).

⁷ Id. at p. 3

Questions for all parties:

1. What is the legal standard for waiving the Commission's rules and General Orders requested by SDG&E?

Response: The Commission's Rules can be modified by the Commission with due process of law, but they remain subject to statute. The Commission could afford a due process procedure to grant a deviation from its rules in this case, but likely to no effective end, since SDG&E's Motion to Defer concerns Commission rules which have their basis in statute. SDG&E's request for the Commission to deviate from its rules, however well intentioned,⁸ amounts to a request for an exception from statute, which the Commission cannot grant.

The California Constitution provides that “[s]ubject to statute and due process, the Commission may establish its own procedures.”⁹ It is on this footing that the Commission's Rules have been adopted. The Rules by definition have been created with due process in rulemaking proceedings, and have been crafted, as the constitution requires, to comply and not conflict with statutes. Where the Commission's Rules have been adopted with lawful due process and where they do not give rise to conflict with any statute, they are law. The General Orders of the Commission have the same significance as the Commission's Rules, since they stem from the same constitutional authority of the Commission. The Commission may modify or allow deviations from its General Orders, subject to the same constitutional limitations regarding due process and statutory compliance.

⁸ CSD notes SDG&E's explanation that the motion to defer is based on its attempt to maximize community and stakeholder input into the route selection. CSD commends SDG&E for this objective.

⁹ California Constitution Article XII §2 (emphasis added)

Assuming the Rules and General Orders at issue in this motion¹⁰ were lawfully adopted and are compliant with statutes, by what mechanism can they be modified or deviated from by the Commission? In this case, SDG&E cites Rule 87, the Commission's Rule for allowing exceptions to its own Rules.¹¹ Rule 87 provides:

Rule 87 Construction and Amendment

These Rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. Rules may be amended at any time by the Commission.

Rule 87 is the Commission's own recognition that occasionally there may be grounds to deviate from the Rules in "special cases" upon a showing of "good cause." This Rule is surely within the Commission's constitutional authority to enact and to act upon,¹² but Rule 87 itself remains subject to the broader limitations on the Commission's rulemaking authority contained in the constitution. In permitting any deviation from a rule (as provided for in a Rule allowing deviation from and amendment to rules), the Commission must still (a) provide for due process, and (b) comply with statutes and not permit the proposed deviation to be inconsistent with statutes.

Rule 87 is a rule for efficiency, providing for liberal and not strict construction of the other rules to ensure "just, speedy, and inexpensive" determinations. CSD embraces this objective but notes that the results implied in the terms "just", "speedy", and "inexpensive" will not always be in harmony. Speedy and inexpensive determinations may not necessarily be just. Thus, notwithstanding Rule 87's objective of efficiency, the Commission is fundamentally bound by constitutional principles of due process in applying Rule 87.

¹⁰ Rules 17.1-17.3, Rule 18, General Order 131 D. SDG&E Motion to Set Procedures and to Defer Certain Filing Requirements ("Motion to Defer") dated December 14, 2005 at p. 2.

¹¹ SDG&E Motion to Defer at pp. 1-2

¹² The Commission is a constitutional body with broad legislative powers. *Southern California Edison Co. v. Public Utilities Commission*, 85 Cal. App. 4th 1086 (2004)

SDG&E's Motion to Defer puts the requested deviation on course to satisfy constitutional requirements. The ACR reflects a further step toward accord of due process. Parties have been given notice and at least preliminary opportunity to be heard on SDG&E's request for deviation. A more complete and defensible due process would be a procedure where the Parties are permitted an opportunity to present evidence as to the material elements for a deviation under Rule 87, i.e., evidence either for or against this application (in its present form) being a "special case", and if so, whether SDG&E has shown "good cause" for the requested deviation.¹³ Further, since the Commission's Rules were adopted by a vote of a Commission quorum (including Rule 87 allowing for deviations by "the Commission"), due process dictates that any decision allowing deviation must be the product of a vote of "the Commission."¹⁴

But aside from the due process issues is the other constitutional limitation that the Commission's actions remain subject to statutes and must not be inconsistent with statutes. In this case, a deviation from the Commission's rules cited in SDG&E's motion¹⁵ would be inconsistent with Pub. Util. Code § 1003 and the requirements of CEQA.¹⁶ The operative provisions of the Rules in question here – Rules 17.1-17.3, Rule 18, and G.O. 131-D – are not wholly based within the prerogative of the Commission, nor do they originate from the Commission. The requirements of these Rules stem from the legislature in Pub. Util. Code

¹³ ACR Question No. 2 to all parties does invite such evidence.

¹⁴ CSD notes that in I.05-09-005, the *Order Instituting Investigation to Facilitate Proactive Development of Transmission Infrastructure to Access Renewable Energy In California*, Assigned Commissioner Grueneich stated that "[t]o the extent changes in Commission General Order 131-D are recommended or needed, the Commission will need to open a separate proceeding to address those recommendations, since the transmission siting process applies to all CPCN/PTC applications..." Scoping Memo, December 21, 2005 at p.8. This language recognizes that the full Commission must approve deviations from G.O. 131-D.

¹⁵ SDG&E Motion to Defer at pp. 5-8

¹⁶ California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 et seq.

§ 1003 and CEQA. Even if deviations to G.O. 131-D might be allowed by the Commission under Rule 87, at the root of this inquiry is the reality that the statutes require SDG&E to identify the route, cost, engineering, right of way, Proponent’s Environmental Assessment (PEA), and other specified details with its application. The Commission may not exempt SDG&E from statutes lawfully enacted, and G.O. 131-D simply reflects the Commission’s rules for discharging its responsibilities under state law.¹⁷

2. Has SDG&E met that legal standard?

Response: No. As stated above, the Commission could accept evidence from parties as to whether the application in its present state amounts to a “special case” under Rule 87, and whether “good cause” has been shown to permit the deviation. But underneath the rules from which a deviation is sought lay Pub. Util. Code § 1003 and CEQA. The standard is statutory, and as explained in the response to the next question, the statutes have unambiguous requirements.

3. Has SDG&E complied with the requirements of § 1003 of the Pub. Util. Code?

Response: No. It seeks a deferral of compliance, which is not compliance. SDG&E’s proposal to bifurcate the requirements as to “need” and “route” are inconsistent with the purpose and intent of the required environmental review including alternatives analysis. CSD understands SDG&E’s concern about investing in the detailed studies without some assurance toward need, but the detailed studies are relevant to the determination of necessity. Pub. Util. Code § 1003 contains specific ingredients that must be included in an application for a CPCN. CSD will not recite the statute text here except in emphasized

¹⁷ Rule 131- D states that it was adopted “pursuant to” Pub. Util Code §§ 451, 701, 702, 761, 762, 768, 770 and 1001. § 1001 requires an electrical corporation to file for CPCN to construct transmission lines; the requisite contents of a CPCN application are prescribed in § 1003. Rule 131-D also states in Section II that its purpose is to be “responsive to the requirements of CEQA.”

pertinent part, which provides that the applicant “*shall include all of the following information in the application in addition to any other required information: (subsections (a)-(e) follow with specific requirements)*”.

CSD could find no reported cases on §1003, but the language is clear. The legislative intent of § 1003 contains a historical and statutory note under § 1091 (a contemporaneous act relating to electric and gas plants) which states that the purpose of the statute is:

- (a) To provide the Public Utilities Commission with *independent and credible reviews and information* regarding electric and gas public utility construction projects.
- (b) To provide the Commission with *sufficient reliable information to enable it to fulfill its functions* to issue justifiable decisions regarding the certification of electric and gas plants.
- (c) To provide the Commission with *sufficient reliable information to enable it to fulfill its functions* to establish fair and equitable rates to cover prudent and reasonable costs incurred by electric and gas public utilities in the construction of electric and gas plants.¹⁸

The requirements of § 1003 were intended by the legislature to ensure that the Commission in all cases has “sufficient reliable information” and “independent and credible reviews” regarding utility construction projects at the time it takes CPCN applications under consideration. For plain statutory construction the word “shall” does not suggest that the Commission, in the discharge of its functions, may allow the applicant to defer or stage the presentation of the required information to the Commission. Were the Commission to begin the decisional process of public convenience and necessity on a piecemeal basis without full information required by the statute would be contrary to its clear wording and legislative intent.

¹⁸ Section 1 of Stats. 1982, c. 1253, p. 4595 (emphasis added)

4. Please discuss legal and policy issues regarding delay in providing the legal notice required by the Commission's rules. Given the Commission's preference to ensure full public notice, what factors argue in favor of deferring compliance with the requirement?

Response: Timing is the impetus behind SDG&E's motion. In R.04-04-003 CSD sought more definition from SDG&E on resource planning alternatives to the utility's plans to build a 500 kV line by 2010. CSD was concerned that SDG&E was heading down a path of commitment to build the transmission line by 2010 without having done an adequate alternatives analysis as to the timing of the line or its relationship to and integration with local generation options. Even at the time of testimony in September 2004, CSD believed that SDG&E could be cutting reliability close with its apparently singular focus on building the 500 kV transmission line by 2010.¹⁹ CSD's witness was asked in that proceeding whether that fact would be reason for SDG&E to start the transmission facility process as soon as possible in order to make as much progress as possible in order to meet the 2010 date.²⁰ CSD's witness answered:

"I don't think I would characterize it exactly that way. I think if the timing of the transmission line, when weighing and balancing transmission relative to in-area generation, if that – *after that sort of tradeoff analysis*, if that (tradeoff analysis) were to say then 2010 is the right time, then, yeah, they (SDG&E) should get going very quickly. However, I think the point of my testimony is *it's not clear that that assessment has been done to say 2010 is the right time*. It might be delayed some...."²¹

The question presented now in SDG&E's Motion to Defer is: What is the exigency of the 2010 date for the transmission line? SDG&E states that it is threefold: (1) ensure reliability; (2) obtain renewable portfolio standard per Energy Action Plan; and (3) cost savings.

¹⁹ Testimony of William Monsen (CSD), R.04-04-003 Resource Plan Hearing, Reporter's Transcript Vol. 8 at p. 1191. September 9, 2004

²⁰ Id.

²¹ Id. (emphasis added)

From a policy perspective, in CSD's view, only item (1), reliability, rates as a possibly compelling reason to grant SDG&E's motion. As for item (2), access to renewables, CSD supports the Energy Action Plan (EAP) and the Commission's goal of having 20% renewable generation in SDG&E's portfolio by 2010. However, not at the expense of a thorough and fair public process. CSD recognizes that the EAP is Commission policy, not statutory law, and SB 1078 allows until 2017 to attain the 20% level.²² The rationale that the transmission line will allow SDG&E to attain the 20% renewable level by 2010 is thus not a legally compelling factor to stage the application process with separate decisions on "need" and "route." Further, CSD notes that the Commission recently adopted a California Solar Initiative in D.06-01-024. CSD regards this as a local generation option that has not been fully integrated with the utility resource plan, including SDG&E's (not approved) plan to build the transmission line by 2010. CSD notes that at present SDG&E will get no credit toward its renewable goals for customer owned solar generation in San Diego because that generation is not procured by the utility.

To the extent that meeting the EAP 20% renewable target of 2010 is a driving factor behind SDG&E's motion, CSD submits that it would be more worthy public policy to first find a way to have SDG&E acquire credit for the environmental attributes of local solar generation for purposes of meeting its renewable targets. As for item (3), cost, this also is not a legally compelling reason to grant the motion where all the support for the cost savings are contained in SDG&E's unprobed testimony and where that testimony is lacking of the specific estimated costs of the transmission line.

²² Pub. Util. Code § 399.15 (b)(1)

In conclusion, reliability would be the only possible reason to grant SDG&E's motion, but even this basis is constrained by statute. The application makes a case that the line is needed for reliability in 2010, a contention which CSD does not prejudge one way or the other here, except to observe that the Independent System Operator has not issued a finding on the issue. As stated at the start of these comments, CSD is certainly concerned about the reliability of service in the region and will not oppose transmission development that is shown to be necessary and convenient through a legally sufficient CPCN process. This caveat involves completing the PEA and all the other elements of Pub. Util. Code § 1003, Rules 17.1-17.3, Rule 18, and G.O. 131-D, including a legally sufficient analysis of local generation alternatives to, or combinations with, a defined project.

Respectfully submitted,

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DATED: February 24, 2006

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CERTIFICATE OF SERVICE

I, Michelle Barrett, am over the age of 18 years and employed in the City of San Diego. My business address is 1200 Third Avenue, Suite 1100, San Diego, California 92101-4100.

On February 24, 2006, I sent by U.S. mail the within document **RESPONSE OF CITY OF SAN DIEGO TO ASSIGNED COMMISSIONER RULING DATED FEBRUARY 10, 2006** to Commissioner Dian Grueneich and Administrative Law Judge Kim Malcolm, and by electronic service on all parties on the service list used for A.05-12-014, at San Diego, California.

Executed on February 24, 2006, at San Diego, California

Michelle Barrett