

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ENERGY DIVISION

RESOLUTION E-3471  
November 14, 1996

R E S O L U T I O N

RESOLUTION E-3471. EXECUTIVE DIRECTOR'S INTERIM ORDER DISMISSING PROTEST BY THE CITY OF SAN DIEGO TO SAN DIEGO GAS AND ELECTRIC COMPANY'S REQUEST FOR EXEMPTION FROM GENERAL ORDER 131-D PERMITTING REQUIREMENTS FOR THE SYCAMORE LANDFILL TRANSMISSION LINE RELOCATION PROJECT UNTIL RECEIPT OF NOTICE REGARDING PENDING JUDICIAL ACTION UNDER PUBLIC RESOURCES CODE SECTION 21167.3.

BY ADVICE LETTER NO. 992-E FILED ON AUGUST 13, 1996.

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SUMMARY

San Diego Gas and Electric Company (SDG&E) proposes to relocate three existing electric transmission lines which currently bisect the Sycamore Landfill, which is owned and operated by the County of San Diego ("County"). The County requested that SDG&E relocate the lines so that available Landfill capacity can be utilized.

The relocation of power lines is governed by General Order (GO) 131-D which requires either an application for a Permit to Construct or an informational advice letter if the project qualifies for exemption, as specified in GO 131-D, Section III.B. SDG&E filed Advice Letter No. 992-E to claim exemption from the requirement to file for a Permit to Construct, as prescribed by GO 131-D, Sections XI.B and C. SDG&E's claim of exemption is based on GO 131-D, Section III.B.1.f, which exempts power lines or substations to be relocated or constructed which have undergone environmental review pursuant to the California Environmental Quality Act (CEQA) as part of a larger project, and for which the final CEQA document finds no significant unavoidable environmental impacts caused by the proposed line or substation.

The City of San Diego timely protested this advice letter, contesting the validity of the County's environmental review cited by SDG&E as grounds for exemption, based upon the City's ongoing dispute with the County, as well as current litigation between the City of Santee and the County.

Our review of the current status of legal disputes among local jurisdictions about the adequacy of the County's CEQA review for

this project leads us to conclude that SDG&E's Advice Letter No. 992-E may be approved at this time provided that certain conditions are adopted so as to ensure compliance with Public Resources Code Section 21167.

### **BACKGROUND**

Electric utilities proposing to construct new power lines of 50kV to 200kV, or to upgrade or relocate existing power lines in that range, must comply with GO 131-D which, among other things, provides for filing an application for a Permit to Construct unless the project is exempt for certain reasons specified in Section III.B of the GO.

In Section XIII, GO 131-D provides that any person or entity may protest a claim of exemption for one of two reasons: (1) that the utility incorrectly applied a GO 131-D exemption, or (2) that one or more conditions exist which are specified in the GO to render the exemption inapplicable. If a timely protest is filed, construction shall not commence until the Executive Director has issued an Executive Resolution either requiring the utility to file an application for a Permit to Construct or dismissing the protest.

In Advice Letter No. 992-E, SDG&E proposes to relocate three existing electric transmission lines which currently bisect the Sycamore Landfill, which is owned and operated by the County of San Diego ("County"). The County requested that SDG&E relocate the lines so that available Landfill capacity can be utilized. As its grounds for exemption from a Permit to Construct, SDG&E cites Section III.B.1.f for the 69 kV and 138 kV lines which would be relocated (three lines, at 69 kV, 138 kV and 230 kV, have undergone environmental review pursuant to CEQA as part of a larger project). SDG&E claims that the 230 kV line to be relocated within the Landfill fits the description of "the minor relocation of existing power line facilities" which does not require a Certificate of Public Convenience and Necessity (CPCN), pursuant to G.O. 131-D, Section III.A.

### **NOTICE**

SDG&E distributed a Notice of Proposed Construction in accordance with Section XI of GO 131-D, including the filing and service of Advice Letter No. 992-E in accordance with Section III of GO 96-A.

### **PROTESTS**

The City of San Diego timely protested on September 9, 1996, contesting the validity of the Subsequent Environmental Impact Report (SEIR) cited by SDG&E as grounds for exemption, based upon that City's ongoing dispute with the County of San Diego, as well

as pending litigation between the City of Santee and the County. The City of San Diego describes a "tolling agreement" with the County which is in effect until November 30, 1996, under which the two parties have agreed to "stop the clock" on the statute of limitations for CEQA litigation. In addition, the City of San Diego invoked G.O. 131-D, Section III.B.2 which specifies three conditions under which the exemptions do not apply.

As prescribed by G.O. 131-D, Section XIII, SDG&E timely responded to the City of San Diego's protest on September 16, 1996, and argued that the City's protest failed to state a valid reason why the exemption should not stand. SDG&E also provided the Energy Division with a copy of the Final Subsequent EIR certified by the County of San Diego in May, 1996, under which SDG&E claims exemption from the requirement to obtain a Permit to Construct.

### DISCUSSION

Our inquiries discerned that the City of Santee's pending CEQA litigation in the San Diego Superior Court against the County includes a request for injunctive relief. We are also informed that the tolling agreement executed between the City of San Diego and the County of San Diego (which expires on November 30, 1996) permits that City to file an action identical to the City of Santee's if it has not reached a settlement of its dispute with the County. Public Resources Code Section 21167.3 (CEQA statutes) prescribes the action that responsible agencies must take in the event of litigation: (paraphrased)

- (a) if litigation is commenced **and** an injunction or stay is issued pending final determination of the issue of CEQA compliance, then "responsible agencies shall assume that the (EIR) or Negative Declaration (NegDec) does comply with (CEQA) and shall issue a conditional approval or disapproval ... (which) shall constitute permission to proceed with a project when and only when (the litigation) results in a final determination that the (EIR or NegDec) does comply with (CEQA)."
- (b) when there's litigation, but no injunction or stay issued, "responsible agencies shall assume that the (EIR or NegDec) does comply with (CEQA) and shall approve or disapprove the project ... approval shall constitute permission to proceed with the project at the **applicant's risk.**" (emphasis added)

SDG&E cited this CEQA section in its response as relevant, although it only quoted the first clause directing agencies to assume compliance with CEQA. In a full, and plain, reading of this section, we can only assume such compliance **if** action has been taken by the courts on a request for a stay or injunctive relief. No such action has been taken by the court, but it has been requested to issue an injunction by the City of Santee.

Even if (b) were read to be applicable to the pendency of action on a request for injunctive relief, the phrase "applicant's risk" has greater meaning for a monopoly electric utility, given that ratepayers will bear this risk for what appears to be the benefit of the operators and users of the Sycamore Landfill. Undertaking such risk without the demonstration of needed benefit(s) to SDG&E ratepayers would not be prudent.

On the other hand but for the litigation challenging the supplemental EIR, the City of San Diego's protest would lack merit, since the project has been reviewed in the supplemental EIR and thereby qualifies for exemption. Therefore, in light of the direction given in Public Resources Code Section 21167.3, the City of San Diego's protest to SDG&E's Advice Letter No. 992-E can be tentatively dismissed subject to conditions that SDG&E follows in order to assure recognition and compliance with the Public Resources Code and protection of ratepayer interests until the pending requests for CEQA injunctive relief have been acted upon by the courts. These conditions are set forth in the order.

#### **FINDINGS**

1. At the County of San Diego's request, SDG&E proposes to relocate three existing electric transmission lines which currently bisect the Sycamore Landfill, owned and operated by the County, so that available Landfill capacity can be utilized.
2. As its grounds for exemption from a Permit to Construct, SDG&E cites Section III.B.1.f for the 69 kV and 138 kV lines which would be relocated (a Subsequent EIR for the Sycamore Landfill Transmission Line Relocation project was certified by the County in May, 1996).
3. SDG&E distributed a Notice of Proposed Construction in accordance with Section XI of GO 131-D, including the filing and service of Advice Letter No. 992-E in accordance with Section III of GO 96-A.
4. The City of San Diego timely protested on September 9, 1996, contesting the validity of the Subsequent EIR cited by SDG&E as grounds for exemption, based upon that City's ongoing dispute with the County of San Diego, as well as pending litigation between the City of Santee and the County.
5. SDG&E timely responded to the City of San Diego's protest on September 16, 1996, and argued that the City's protest failed to state a valid reason why the exemption should not stand.
6. The City of Santee's pending CEQA litigation in the San Diego Superior Court against the County includes a request for injunctive relief. (Case No. 702110 filed in San Diego County Superior Court, page 22-23).

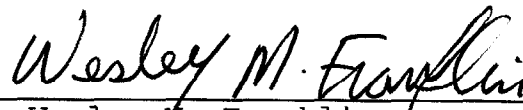
7. Public Resources Code Section 21167.3 prescribes the action that responsible agencies must take in the event of pending litigation. But for the possibility that an injunction may be issued, the project qualifies for the exemption requested. As of this date no injunction has been issued and no court filing has been made by the City of San Diego.

8. In light of the direction given in Public Resources Code Section 21167.3 and GO-131D it is reasonable to approve SDG&E's Advice Letter No. 992-E on an interim basis and subject to the conditions set forth in the order below.

**THEREFORE, IT IS ORDERED that:**

1. The City of San Diego's protest to San Diego Gas & Electric Company's Advice Letter No. 992-E is dismissed subject to the conditions set forth in the following ordering paragraphs.
2. This interim dismissal of the protest to the Advice Letter does not constitute in any manner whatsoever approval or disapproval by the Commission staff or the Public Utilities Commission of the supplemental EIR on the landfill project which is the subject of judicial review in the action commenced by the City of Santee.
3. Since dismissal of the City of San Diego's protest is not final, SDG&E shall not take any action to commence construction of the powerline relocation project. All expenditures by SDG&E Co., if any, on the landfill powerline relocation project are at shareholder risk, and this Interim Resolution does not in any manner constitute approval of the project or authorization to SDG&E Co. to proceed with it.
4. When appropriate SDG&E may file by letter notice to the Commission that pending actions for CEQA injunctive relief by the City of San Diego and the City of Santee have been concluded with the result that the Executive Director may act in accordance with Public Resources Code Section 21167.3 and GO 131-D and issue a final resolution dismissing the City of San Diego's protest. The notice shall be mailed by SDG&E to the Cities of San Diego and Santee. The cities shall have ten days from the mailing date to file a response.

PUBLIC UTILITIES COMMISSION  
STATE OF CALIFORNIA



Wesley M. Franklin  
Executive Director