BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of San Diego Gas & Electric Company (U-902-E) for a Certificate of Public Convenience and Necessity for the Sunrise Powerlink Transmission Project	A.05-12-014

BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) IN RESPONSE TO ASSIGNED COMMISSIONER'S RULING

Pursuant to the "Assigned Commissioner's Ruling Seeking Briefs on Legal Issues" (February 10, 2006), San Diego Gas & Electric Company ("SDG&E") hereby responds to the questions posed in the ruling. Concurrently with its application, SDG&E filed a Motion to Set Procedures and to Defer Certain Filing Requirements ("motion'), seeking permission to postpone, pending completion of route selection for the Sunrise Powerlink ("Sunrise" or "project"), certain Certificate of Public Convenience and Necessity ("CPCN") requirements for the above application, specifically dependent on route selection, including the Proponent's Environmental Assessment ("PEA"). The ruling seeks answers to a few fundamental questions concerning the motion: can the Commission grant SDG&E's motion to defer, and, if so, what are the costs and benefits of granting the motion. Before turning to the specific questions in the ruling, SDG&E first addresses these fundamental questions, all of which are further illuminated in the detailed response to the individual questions propounded by the ruling.

The motion is permissible, fair, and consistent with Commission practice

SDG&E's motion is legal, fair, and consistent with Commission practice. As detailed below, granting the motion is completely within the Commission's authority

under Commission Rules and state law. It is fair, in that it deprives no party of the timely notice required by the Commission's Rules and CEQA, nor would it shorten any processing time or deprive the Commission and interested parties of any information needed for decision. Moreover, granting the motion would be consistent with Commission practice; the Commission invariably "bifurcates" CPCN applications, and, has, at times, established "need" prior to the filing of a CPCN.

Granting the motion would advance recent policy initiatives

Granting SDG&E's motion will:

- Help ensure that the project is in-service when it is needed;
- Implement policies articulated by the CPUC, Governor and other state agencies;
- Allow all parties to use resources efficiently and effectively;
- Permit extensive public outreach well beyond what is required.

SDG&E's application demonstrates good cause for the request: SDG&E's customers face a reliability deficit as early as 2010; the line is needed by 2010 to meet the state's mandated RPS goals; and the sooner the line is brought into service, the sooner customers statewide will be able to access additional supplies of economic energy sources.[1] Other parties will no doubt contest this need. But if the CPUC denies SDG&E's motion,

[1] SDG&E is not asking the Commission to timely process this application based solely on its own assertions. The need that drives SDG&E's motion has substantial independent corroboration, including by this Commission. D.04-12-048 (December 16, 2004) specifically endorsed moving forward on a 500 kV interconnection (p. 228):

> While we do not approve SDG&E's 500 kV transmission line here, we do acknowledge the lengthy process needed to plan, license and construct transmission, and thus encourage SDG&E to continue its planning efforts and move forward with evaluating these transmission alternatives for meeting a local resource deficiency by 2010.

This need is also supported by findings in the multi-stakeholder collaboratives, Southwest Transmission Expansion Plan ("STEP") and the Imperial Valley Study Group.

requiring SDG&E to refile its need showing with the PEA, these issues will not even be put to the test for another six months or more, delaying the entire project, including the in-service date. Considering that it takes three to four years to license, design and construct major facilities, such delay is unwise and unnecessary.

SDG&E's motion advances state policies articulated by the Commission, the Governor and other state agencies. Energy Action Plan II, adopted by the Commission and the CEC, focused on the need to expand the state's grid, calling for "streamlined" permitting processes to insure the timely planning and construction of this expansion.[2] The Commission has commenced its own initiatives in support of this policy.[3]

Consistent with these policies, SDG&E's motion allows all parties and the Commission to use resources efficiently without compromising notice or information flow. It makes perfect sense to focus on the fundamental question of need before expending funds and parties' time analyzing the route-specific implementation details of that project. SDG&E's proposal contemplates overlapping phases, with much of the substantial effort of preparing an EIR and soliciting input taking place after hearings on need have concluded.

The Commission also benefits from this phased approach in that it will be in a position to hire the environmental consultant prior to the filing of the PEA, rather than initiating the time-consuming hiring process only after it receives the typically massive environmental document, a concept that has been publicly supported by many decision makers. This also allows SDG&E to solicit feedback before it files the PEA, resulting in

[2] Energy Action Plan II at 10-11 (October 2005).

[3] These include the investigations addressing transmission economics (I.05-06-041) and the transmission for renewables (I.05-09-005).

a more robust filing which minimizes deficiencies without compromising the independence of the Commission's environmental review. In fact, it expands the analysis to include route and environmental mitigation alternatives that may be raised in the need phase or during SDG&E's own voluntary outreach efforts.

Denying SDG&E's motion comes with costs

Design and construction of a major transmission facility takes two to three years. In addition to putting SDG&E and its customers at risk of not meeting the reliability, renewable energy and economic needs for the project, delay serves to increase costs. Not only does SDG&E's approach allow certain critical design work to begin a few months earlier, the costs of construction, land acquisition and materials continues to rise. Anything the Commission can do to streamline licensing helps control project costs.

The need determination will not occur in a vacuum. The preferred and alternate routes will be identified in March 2006 and the PEA will be filed in July 2006, well before the Commission determines need. If SDG&E's motion is not granted, the process gets flipped on its head with parties expending resources on route issues before the Commission has made any progress in determining the fundamental question of need.

Denying SDG&E's motion places SDG&E's customers at unnecessary risk.

SDG&E forecasts that this project is needed to supply a reliability deficit faced by its customers as early as 2010. Denying SDG&E's motion will delay the review process by a minimum of six months and will seriously jeopardize our ability to put these much-needed facilities in service in time to meet that reliability need.

Denying SDG&E's motion jeopardizes SDG&E's ability to meet its RPS goals.

If SDG&E cannot place these facilities into service by 2010, SDG&E may not be able to meet its RPS goals of obtaining 20% of its energy needs from renewable resources.[4]

What the motion does NOT do.

In sum, SDG&E's motion:

- DOES NOT limit analysis in any way (it adds to the time available for analysis);
- DOES NOT relegate the "no project" alternative to a subsequent phase (it is the foundation of the need case);
- DOES NOT supplant public involvement (it enhances it);
- DOES NOT request exemptions or waivers (only that certain route-specific information be filed this summer);
- DOES NOT shorten/compress any Commission processing time (only that consideration of need commence at the earliest possible date);
- DOES NOT shortcut a full environmental review ((it will formally commence upon submittal of the PEA);
- DOES NOT limit Commission options or put it at risk of appellate reversal.

QUESTIONS FOR SDG&E:

1. Is SDG&E seeking an interim or final decision on need in 2006?

Short Answer: SDG&E seeks an interim decision on need in 2006.

Explanation: The decision on need that SDG&E seeks would be "interim" in the sense that it would not be final for purposes of appeal pursuant to Pub. Util Code § 1756.

[4] In Res. E-3965 (December 15, 2005), the Commission approved an agreement with Stirling Energy Systems resulting from the 2004 RFO. The Stirling project will be located in the Imperial Valley area of California. This agreement contemplates the purchase by SDG&E of up to 900 MW of new solar generated energy from Stirling in three phases. The first phase of Stirling's project alone represents 3.8% of SDG&E's renewables portfolio in 2010, and SDG&E continues to negotiate with other renewable resource developers in the Imperial Valley that would use Sunrise.

But the decision would be "final" in the sense that it would fully dispose of due process requirements for determining whether SDG&E needs a 500 kV interconnection in 2010, assuming the cost of such interconnection falls within the estimates provided. Interested parties must come forward and present evidence and argument on need within the procedural schedule set by the Commission.

Need would not be subject to relitigation, except insofar as substantial new information comes to the Commission's attention bearing on need, and the party offering such information makes a compelling demonstration why such information was not available earlier. The final decision on the CPCN application would issue after the Commission has before it the final EIR, and, the Commission would base its final decision on the certified EIR and the interim decision.[5]

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[5] Contrary to Conservation Group's assertion, the issuance of the requested interim decision also is not subject to CEQA review, because it does not constitute an "approval" triggering CEQA review. The CEQA Guidelines define "approval" as "the decision by a public agency which *commits the agency to a definite course of action* in regard to a project intended to be carried out by a person." 14 Cal. Code Regs. § 15352(a) (emphasis added). As the California Court of Appeal has expressly found, agency decisions do not commit an agency to "a definite course of action [where] they are expressly made contingent on CEQA compliance." *Stand Tall On Principles v. Shasta Union High School Dist.*, 235 Cal. App. 3d 772, 781 (1991). Similarly, the Commission previously has held that, if "agency action merely establishes its ability to take a later action that will affect the environment, but does not commit the agency to a definite course of action, that action is not a 'project' subject to CEQA." *In re Pacific Gas and Electric Co.*, D.03-10-013, 1999 Cal. PUC LEXIS 959 at *17. Because the requested interim decision will not approve or disapprove the project, guarantee recovery of any expenditures, or dictate the outcome of the Commission's environmental review, it is not subject to CEQA. The Commission approved such an approach requested by applicant in D.05-02-052, at 1, 5 and Conclusion of Law 3.

2. What issues addressed in an initial need decision would also need to be reviewed and resolved in a subsequent order resolving environmental and CPCN issues in order to satisfy California Environmental Quality Act ("CEQA") and Commission laws and rules? What issues relating to the initial finding of need could or should not be addressed in the 2006 decision?

Short Answer: The answer to this question is the same with or without SDG&E's motion. Need and CEQA review both must consider project alternatives (including "no project"). In the EIR process, the Commission will consider whether feasible alternatives can avoid or reduce one or more significant environmental impacts from the project.

Explanation: There are two issues that overlap the Commission's separate need and EIR processes – alternatives and cost. A need decision will address alternatives to the proposed project, including the "no project" alternative, which is at the heart of the need case and of SDG&E's approved long-term resource plan. For example, in this case, the Commission might look at whether on-system generation or investment in rooftop solar panels can better address any reliability need identified. The Commission will evaluate the need in the context of the cost estimates provided by applicant (which are open to challenge by parties in that phase of the proceeding).

In the EIR process, the Commission will consider whether feasible alternatives (including the "no project" alternative) can avoid or reduce one or more significant environmental impacts from the project.[6] And, in the EIR process, the Commission will have before it the PEA, which will identify preferred and alternate routes and other alternatives to the project. The Commission will also have before it a route-specific cost-estimate for the project and alternatives.

[6] The purpose of analyzing a "no project" alternative under CEQA is to allow decision makers to compare the environmental impacts of approving the proposed project with the impacts of not approving the proposed project. CEQA Guidelines § 15126.6.

While the need proceeding will address what alternatives best achieve the need identified, the EIR process evaluates alternatives that might reduce significant environmental impacts of the proposed project, while still attaining most of the project's purposes. The development of the draft EIR often draws from any record available in the need proceeding, and, in comments on the draft EIR, commenters can and do provide reference to the need record, and indeed, to any Commission findings (if available) on need for the project under consideration. Not only is it self-evident that a need inquiry commencing prior to CEQA review should result in a more fully-informed EIR, but the Commission's actual practice suggests this is so, most recently in the context of the staged processing of Southern California Edison's Devers-Palo Verde 2 application.[7]

Indeed, the overlap just described is inherent in the Commission's CPCN process, and is not merely a peculiar result of SDG&E's motion to defer. DRA, UCAN, Conservation Groups and others characterize SDG&E's proposal as "bifurcation." This suggests something that is new, or somehow improper. But in practice, upon receiving a utility's application, the Commission's CPCN process immediately divides and proceeds on two separate tracks conducted by different divisions within the Commission. One track is the purpose and need analysis conducted by the ALJ, with all of the resource planning evidence and formal adjudication that entails. The second track, which, as

[7] See, A.05-06-041, Scoping Memo (August 26, 2005) at 10-12. That ruling staged the receipt of evidence for the CPCN application into two phases. Phase 1 is to address need issues and the economic methodology used to assess cost effectiveness, with workshops, testimony, and evidentiary hearings to be held as needed on a consolidated basis with I.05-06-041. Phase 2, in A.05-04-015 only, will address environmental, routing, and other issues related to DPV2, with evidentiary hearings to be held as needed after the Draft EIR/EIS is released. The scoping memo's procedural schedule provided that the need phase would precede the environmental phase.

noted, may rely on many of the same facts as the first, is the CEQA review, conducted by the Energy Division, which focuses on public participation in assessing and comparing the environmental impacts of the proposed project with site, route, system and other alternatives.

Each track proceeds separately, the first, often with multi-party evidentiary hearings and a published proposed decision for Commission consideration; the second, with a report prepared by agency staff, published after input from public meetings, agency communications and consultations and comments on a published draft. The two tracks come back together only in the Commission's final CPCN decision.[8]

Given the foregoing process, the only issues related to need *not* determined in the interim decision (characterized in the question as the "2006 decision") are those issues related to environmental impacts of the project compared to feasible alternatives,[9] and whether it is in the public interest for a CPCN to issue for the project.[10]

3. When will SDG&E be ready to file a Proponents' Environmental Assessment ("PEA") for this project?

Short Answer: SDG&E expects to file a PEA by the end of July 2006.

4. SDG&E's motion appears to assume that the Commission's need analysis requires the longest lead time in this case. However, the Commission's CEQA review, not its need analysis, will require a longer lead time, due to

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[8] That such "bifurcation" is inherent in Commission practice and can yield efficiencies is reinforced by the August 26, 2005 Scoping Memo (at 10-12) in A.05-06-041 (re SCE's Devers-Palo Verde 2 CPCN). *See* footnote 7, *supra.*

[9] Of course, a party may argue in the need phase that an alternative is infeasible because of economic, environmental, legal, social or technological factors. *Cf.,* CEQA Guidelines § 15364.

[10] As lead agency, the CPUC has the authority to disapprove of the project if necessary in order to avoid one or more significant effects on the environment that would occur if the project were approved as proposed. CEQA Guidelines § 15042.

preparation of a draft and final Environmental Impact Report ("EIR"). In addition, the Independent System Operator has not yet issued a finding that the Sunrise project is needed, which may be critical in the Commission's review of whether the project is needed. Thus, SDG&E's motion appears to rely on incorrect facts or assumptions. Please explain.

Short Answer: SDG&E's application and motion do not presume that the Commission's need analysis requires more time to process than its CEQA analysis, only that it is logical for the Commission to begin the analysis of need first and that to do so will result in a more efficient, but still fair, licensing process. While the California Independent System Operator's finding may be important to the Commission's decision in this case, it is not unusual for the formal determination of the ISO Board to follow the ISO's prepared testimony in support of a CPCN and after the CPUC has begun to consider the need for the project. Furthermore, the ruling overlooks the fact that in the case of the Sunrise Powerlink, the proposed project was assessed in an open, collaborative stakeholder process (STEP), conducted under the auspices of the ISO and with ISO staff participation. In sum, SDG&E's assumption is that the sooner the Commission begins adjudication, the more likely it is that SDG&E will be able to bring Sunrise on-line to meet its 2010 reliability need.

Explanation: Lead times for need determinations are not necessarily shorter than the time required to prepare and certify an EIR. This is implicit in the statutory requirements for processing CPCN applications. P.U. Code § 1701.5 provides that the Commission must resolve "ratesetting" matters within ***18 months*** of issuing a scoping memo. The Commission typically classifies CPCN applications as ratesetting. But Commission Rule 17.1(f)(3) provides that "Final EIRs shall be completed and certified within ***one year*** of the date on which the project application is accepted as complete." See, P.U. Code § 1701; Pub. Resources Code § 21165.[11]

True, as the question suggests, the Commission must prepare a draft EIR and then consider comments on the draft before issuing and certifying the final EIR. But need adjudication requires discovery, preparation and filing of rounds of prepared testimony,

[11] Both Public Utilities Code § 1701.5 and Rule 17.1 provide that the Commission may extend the respective time limits in certain circumstances.

evidentiary hearings, rounds of briefing, and preparation of a proposed decision that will also address the EIR. This is particularly true in the case of a major, complex transmission project with many active parties. Recent examples suggest that the need finding may require more time than EIR processing in some circumstances. For example, Southern California Edison's Devers-Palo Verde No. 2 application (A.05-06-041) has been phased, with the need determination preceding the issuance of the EIR.[12]

As for the ISO, the Commission has not yet determined that it should rely on ISO determinations of need.[13] While SDG&E believes that ISO input is valuable, the Commission adjudicates the case based on the facts presented to it. Nonetheless, it is not uncommon for the ISO Board to approve projects long after the adjudication of need commences. In recent cases, the ISO has submitted testimony before its board approved the project.[14] Furthermore, while the ISO has not yet formally endorsed the Sunrise Powerlink, the project is the result of analysis presented and vetted in the Southwest

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[12] *See* the August 26, 2005 Scoping Memo (at 10-12) in A.05-06-041. And, the Commission issued an Interim Opinion determining the need for SDG&E's Miguel Mission # 2 line issued February 27, 2003, *nineteen months* after a prehearing conference determined that evidentiary hearings were required to evaluate the net economic benefits to ratepayers of relieving certain transmission constraints on SDG&E's system west of Miguel and at Imperial Valley. See D.03-02-069 at 4-5. The EIR for the project issued within a slightly shorter time-frame (the PEA was deemed complete on January 27, 2003, with the final EIR issued in June 2004. Miguel-Mission # 2 is also instructive in that need was determined in an Interim Opinion issued substantially in advance of the final CPCN decision. *See* D.04-07-026 (July 16, 2004).

[13] The extent to which the Commission should rely on such ISO determinations is under consideration in I.05-06-041 and I.05-09-005.

[14] For example, in SDG&E applied for its Otay Mesa transmission CPCN in March 2004, the ISO submitted testimony in support of the project in November 2004, and the ISO Board approved the project on May 6, 2005. *See* D.05-06-061 at pp. 5, 55. Even more pertinent is the fact that need was found in an earlier proceeding prior to the ISO's testimony. *See, id*, at 62-63; *see generally* D.04-06-011.

Transmission Expansion Plan ("STEP"), a robust multi-party collaborative planning process, conducted under the auspices of the ISO, and with the participation of ISO staff and consultants.

QUESTIONS FOR ALL PARTIES:

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

   Short Answer: As a preliminary matter, SDG&E is concerned that the ruling gives the unfortunate impression that SDG&E has requested that the Commission waive certain filing requirements. SDG&E has not requested that the Commission waive any filing requirements. SDG&E requests that the Commission allow SDG&E to file the PEA and certain other route-specific information after SDG&E completes its voluntary, comprehensive public participation process and the route and alternatives have been identified. It is within the Commission's discretion to allow SDG&E to postpone certain filing requirements of the P.U. Code and the Commission's rules, so long as the Commission's act bears a reasonable relation to statutory purposes and language.

   Explanation: First, to be clear about what SDG&E has requested, in its "Motion … to Defer Certain Filing Requirements" filed concurrently with the application (at 1), SDG&E asked for "permission … to postpone, pending completion of route selection for the Sunrise Powerlink, certain … CPCN requirements for the above application, specifically dependent on route selection, including the … PEA." Strictly speaking then, SDG&E has not asked the Commission to "waive" any rules. Indeed, the words "waive" or "waiver" do not appear in SDG&E's motion or in the supporting authority cited in the motion.

   SDG&E's request is based on Commission Rule 87, which provides (emphasis added): "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…."

SDG&E is not asking to waive the rules, only that it be allowed to complete its public outreach process and file the PEA and other information thereafter. SDG&E simply intended to voluntarily conduct more public outreach to obtain input on project siting during the time the Commission would commence the need proceeding. Some parties suggest that the Commission cannot consider the Sunrise application without violating Pub.Util. Code §1003. This section requires that a CPCN application contain information relating to engineering and design, implementation plans, cost estimates, cost analysis, and construction plans. SDG&E will submit this information concurrently with its later filing of a PEA. SDG&E's motion requests deferral of the route-specific elements of this provision. DRA and Conservation Groups argue that it would be reversible error for the Commission to initiate a need adjudication prior to completion of all of section 1003's requirements.

While there are no appellate decisions directly addressing section 1003, the case law establishes that the Commission has the power to effectuate the intent of provisions of the Public Utilities Code through flexible application of the rules. In general, the courts defer to the Commission's interpretations of the Public Utilities Code. *See, Greyhound Lines, Inc. v. Public Utilities Comm'n*, 68 Cal.2d 406, 410-41 (1968) (finding that the Commission's "interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language ....").

Indeed, it is reversible error for the Commission, based on an overly restrictive interpretation of its own authority, to refuse to consider the merits of a proposal that falls within the Commission's discretion. In *City of Los Angeles v. Public Utilities Comm'n*, 15 Cal. 3d 680 (1975), the California Supreme Court examined the Commission's

rejection of telephone tariffs with annual adjustments for federal tax expenses. In the decision under review, the Commission had rejected the notion of annual adjustments on grounds that such adjustments were beyond its power under Public Utilities Code §728:[15]

> Any order which would have the effect of automatically reducing the rates of any utility without hearing and without the opportunity for hearing would be inconsistent with the Public Utilities Code …. Our rejection of the automatic reduction method stems … *from a due regard for statutory limitations*." *Id*. at 693, *quoting* D.83540 (1974) (emphasis added).

This is similar to arguments raised against SDG&E's motion; that the Commission lacks authority to grant the motion to defer because it has no flexibility to commence adjudication on "need" before full completion of § 1003's requirements. But, in *City of Los Angeles*, the court rejected the Commission's "extremely restrictive" interpretation of the terms of § 728. *Id.,* at 695. The court examined the underlying purposes of the P.U. Code requirements, and found that annual adjustments would meet that legislative intent: "The legislative purpose behind section 728 is better served by a plenary consideration of the advantages and disadvantages of an annual adjustment clause than by a yearly charade attendant to its application." *Id*. at 697. This means that, as long as the substance of the code is met, it is error to allow the form to constrain the Commission's consideration of annual adjustments. In this case, the Sunrise application will satisfy all the requirements of §1003, accomplishing the legislative purpose, and the deferral of a portion of the CPCN requirements is only a change in form.

The court also found that the Commission had used similar adjustment mechanisms "for a number of years". *Id*. at 695. The court found "[c]onsistent administrative construction of a statute over many years… is entitled to great weight and

[15] Section 728 requires that a Commission order setting rates be based on a hearing.

will not be overturned unless clearly erroneous." *Id*., *quoting Federal Trade Comm'n v. Mandel Brothers,* 359 U.S. 385 (1959). Similarly, the Commission has followed a 'bifurcated' CPCN process in most recent cases.[16] Indeed, in several cases, "need" adjudication commenced prior to the filing of a CPCN.[17] In other words, section 1003 had not been satisfied at the time of the need determination. The only distinction in the Sunrise case is trivial – SDG&E is submitting a CPCN application and asking for deferral of route-specific requirements up front – and, under *City of Los Angeles,* this trivial difference cannot support holding that section 1003 bars SDG&E's motion. The effect would be no different if the Commission made a determination of need in a different docket or in a separate application, as was the case in for SDG&E's Miguel-Mission and Otay transmission projects. Clearly the Commission's own precedent demonstrates that need and route can be determined separately and sequentially as long as both the need and environmental components are presented to the Commission before it decides to either approve the project or an alternative thereto or deny the CPCN, and all notice requirements are satisfied.

Lastly, *City of Los Angeles* examined whether the adjustment clause violated the Constitution's due process clause. The court's reasoning is instructive relating to the common–sense supporting SDG&E's motion (emphasis added):

> Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, *to make the pragmatic*

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[16] S*ee*, e.g., A.02-07-022, A.04-03-008, A.04-12-007 and A.05-06-041.

[17] Two recent CPCN applications, *In re Miguel Mission #2,* A.02-07-022, and *In re Otay Mesa Power Purchase Agreement Transmission Project,* A.04-03-008, reflect situations where the Commission found a need for the project before the PEA was filed. These projects were approved by D.05-06-061 (Otay), and D.04-07-026 (Miguel-Mission).

> *adjustments which may be called for by particular circumstances*. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped.

Id. at 698, *quoting, Federal Power Comm'n v. Pipeline Co*., 315 U.S. 575, 586 (1942).

The California Supreme Court found that the Commission has the flexibility to *waive a hearing* with respect to annual rate adjustments, even though the Public Utilities Code specifically requires that rates be set after hearing. The deferral SDG&E seeks is trivial compared to the omission allowed by the court: permitting the Commission to forgo a hearing implicates substantive rights and process in a way the SDG&E's motion does not. Indeed, unlike the action before the court, SDG&E's motion neither forecloses nor dilutes any substantive right of any party – it does not even propose to shorten any notice or processing times under the Public Utilities Code or the Commission's Rules. In sum, based on the direction of the California Supreme Court in *City of Los Angeles*, SDG&E's motion is not only within the Commission's power to grant, but it would be reversible error for the Commission to refuse to consider the merits of SDG&E's motion on grounds that it lacks the authority to do so.

2. Has SDG&E met that legal standard?

Answer: Yes. Because SDG&E's request does not seek waiver of any filing requirements, is consistent with past Commission practice, increases the scope of notice to the public, and does not compress any Commission processing time, SDG&E's request "bears a reasonable relation to statutory purpose and language."

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

Answer: Yes. SDG&E's proposal contemplates full compliance with §1003. SDG&E will complete the § 1003 requirements at the time it files its PEA.

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?

The Commission's proper concern is whether any "delay" prejudices any party or interest with respect to notice or time to provide input to the Commission. But first, note that the "delay" assertion by project opponents and implied by the question is a red herring. Granting SDG&E's motion will not delay any notice required under CEQA, the Public Utilities Code, or the Commission's rules; nor will it compress or shorten any time for public comment. SDG&E's motion contemplates that it will provide full and timely notice to all persons, organizations and communities that will be affected by the preferred and alternate routes for Sunrise. In fact, SDG&E's approach fully supports the Commission's preference for full public notice.[18]

Indeed, by filing an application prior to route selection, and by starting a public outreach process with comprehensive notice *prior to route selection and PEA filing*, when the PEA is filed, SDG&E will have provided earlier and far more robust notice than contemplated by CEQA and Commission requirements. SDG&E previously highlighted its extensive public participation efforts to the Commission in its Prehearing Conference Statement. And, SDG&E does *not* propose any shortening or compression of the time allocated to the Commission for preparing an EIR and for taking public input in that process. There is manifestly no delay in public notice inherent in SDG&E's motion.

[18] Obviously, under SDG&E's motion, requirements such as that of G.O. 131-D (XI) (notice required within 10 days of the CPCN application) would be postponed until SDG&E submits the PEA for the project. But the required notice would be submitted within 10 days of the PEA, and there would be no shortening of the time for EIR processing or of any other time or notice requirement once the PEA is filed.

In such circumstances, where there is no prejudice to public notice or input, it would be bad policy to deny SDG&E's motion. This would send a clear signal to the utilities that the Commission will penalize early and transparent public outreach in the siting process. It would also disregard policy forcefully enunciated by the EAP, and by this Commission, encouraging a more flexible and efficient transmission siting process.[19] Moreover, a rigid interpretation of the Commission's notice requirements would chill utility projects, and, perversely, give an undue advantage to transmission providers not regulated by this Commission. Finally, under the *City of Los Angeles* decision discussed at pp. 14-16 above, it would be reversible error for the Commission's to torture its notice requirements into a rigid rule that forbids proposals such as SDG&E's, where the timing and scope of public notice are not compromised at all, but, in fact, are enhanced.

Had SDG&E proposed that the need determination take place in a separate application or different docket such as the AB 970 proceeding or the Resource Planning proceeding,[20] notice would be confined strictly to parties on the service list for that docket. From a policy perspective, to grant SDG&E's motion would support State goals as articulated in the Energy Action Plan II, where the section laying out state transmission policies and key actions states:

> An expanded, robust electric transmission system is required to access cleaner and more competitively priced energy, mitigate grid congestion, increase grid reliability, permit the retirement of aging plants, and bring new renewable and conventional power plants on line. *Streamlined, open*

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[19] *See,* Energy Action Plan II at 10-11 (October 2005); Commission investigations addressing transmission economics (I.05-06-041) and transmission for renewables (I.05-09-005).

[20] As discussed at p. 15 above, in two recent applications, *In re Miguel Mission #2,* A.02-07-022, and *In re Otay Mesa Power Purchase Agreement Transmission Project,* A.04-03-008, the Commission found a need for the project before the PEA was filed. These projects were approved by D.05-06-061 (Otay), and D.04-07-026 (Miguel-Mission).

> *and fair transmission planning and permitting processes must move projects through planning and into construction in a timely manner*. The state agencies must work closely with the CAISO to achieve these objectives and to benefit from its expertise in grid operation and planning.
>
> Key Actions:
>
> 10. The CEC supports legislation to consolidate the permitting process for all new bulk transmission lines within the CEC, while the CPUC believes existing permitting authority should remain in place. Irrespective of the status of legislative efforts, *the two Commissions agree to continue to work together to improve the transmission planning and permitting processes under existing authorities.*
>
> 11. Improve the State's transmission line planning and permitting processes by integrating the CAISO's transmission planning and modeling capabilities, the CEC's power plant licensing, environmental and planning expertise, and the CPUC's ratemaking function and by *ensuring that the processes are adaptable, flexible and representative of broad stakeholder input.*[21]

SDG&E's application demonstrates good cause for the request: SDG&E's customers will face a reliability deficiency as early as 2010; the line is needed by 2010 to meet CPUC-mandated RPS goals and SDG&E's own commitment to procure additional renewables above and beyond the state's goals; and the sooner the line is brought into service, the sooner customers statewide will be able to access additional supplies of

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[21] Energy Action Plan II at 10-11 (October 2005) (emphasis added). This policy is reinforced by Governor Schwarzenegger's 2005 State of the State address, which stressed the urgency of strengthening the electric grid:

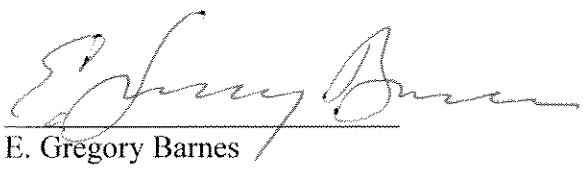
> Closely related to the environment is energy. California has long been the national leader in energy conservation. We must continue that leadership, but we cannot conserve our way out of our long-term energy crunch.
>
> Yes, we need conservation. Yes, we need renewable energy. But California also needs power plants and transmission lines. We need more of them and we need them as soon as possible. We're already increasing our reserves and encouraging long-term contracts.
>
> And I am pleased to report that we're beginning to see investments that will put steel in the ground and power on the lines. This is a modern society and a modern society must have abundant and affordable power.

economic energy sources. Other parties will likely contest the three-part need for the Sunrise Powerlink. But unless the CPUC grants SDG&E's motion, these issues will not even be put to the test for another six months or more, delaying the project's in-service date. Considering the length of time required to license, design and construct major facilities, such delay is unwise, unnecessary and inconsistent with state policy.

CONCLUSION

For the foregoing reasons, and those set forth in SDG&E's motion to defer, and in its Reply to Protests (filed January 30, 2006), SDG&E asks the Commission to grant its motion and issue a scoping memo setting further procedures.

Respectfully submitted,



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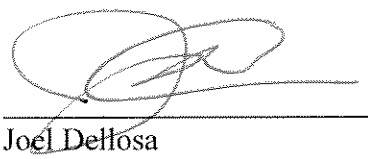
February 24, 2006

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **BRIEF OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) IN RESPONSE TO ASSIGNED COMMISSIONER'S RULING** on all parties of record in **A.05-12-014** by electronic mail and by U.S. Mail to those parties who have not provided an electronic address to the Commission. I have also sent hard copies by overnight mail to the assigned Commissioner, Dian M. Grueneich and the assigned Administrative Law Judge, Kim Malcolm.

Dated at San Diego, California, this 24th day of February, 2006.



Joel Dellosa