

**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

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

**MOTION OF THE SAN DIEGO CHAPTER OF THE SIERRA CLUB AND THE  
CENTER FOR BIOLOGICAL DIVERSITY FOR DETERMINATION OF  
APPLICABILITY OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AND  
TO REQUEST A HEARING AND/OR TO RESCHEDULE THE PREHEARING  
CONFERENCE**

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Dated: January 20, 2006

## **INTRODUCTION**

On December 14, 2005, San Diego Gas & Electric Company (“SDG&E”) submitted a Motion to Set Procedures and to Defer Certain Filing Requirements (“Motion to Defer”) requesting that among other things, it be permitted to defer filing its Proponent’s Environmental Assessment (“PEA”) until after selection of a preferred route. Further, in its Application for Certificate of Public Convenience and Necessity (“Application”) for the Sunrise Powerlink Transmission Project (“Project”), SDG&E included a Proposed Schedule, which indicates that SDG&E will provide its PEA in July 2006 and that the Commission will make a Final Decision on a Certificate of Public Convenience and Need (“CPCN”) regarding “purpose and need” three months later in October 2006. The effect of this deferral and schedule, if allowed, would be to permit SDG&E to bifurcate its Application between “purpose and need” and “route” and have the Commission prepare separate final binding decisions, one on “purpose and need” and one on “route.”

SDG&E does not discuss the effect of its proposed course of action on the Commission’s California Environmental Quality Act, Public Resources Code §§ 21000 *et seq.*, (“CEQA”) obligations, except to state the Commission can start work on an Environmental Impact Report (“EIR”) “while the need determination is pending;” and “begin the months-long process of retaining an environmental consultant while route selection is pending.”

Due to the unusual nature of SDG&E’s Motion to Defer it is not clear when or how the Commission will meet its CEQA obligations in this matter. Nonetheless, it is evident that SDG&E does not anticipate, and that it would be impossible for the Commission to complete, a final EIR before a final decision on “purpose and need,” given SDG&E’s proposed time for a

final decision on “purpose and need.” Instead, it seems likely that SDG&E anticipates that a final EIR will not be completed until before a final decision on route sometime in 2007.

SDG&E’s proposed deferment and schedule create great uncertainty in the CEQA process as well as the potential for Commission action in violation of CEQA. The San Diego Chapter of the Sierra Club and the Center for Biological Diversity (“Conservation Groups”) submit this motion in an effort to clarify the Commission’s obligations under CEQA in this unusual situation and thereby avoid unnecessary confusion and delay.

In accordance with Rules 2.1, 17.2 and 45 of the Commission’s Rules of Practice and Procedure, the Conservation Groups request a clarification of the Commission’s intent with regard to meeting its CEQA obligations related to the Application, and specifically, a determination of whether a decision on “purpose and need” as requested by SDG&E requires the prior completion of an EIR.

**I. CEQA Applies to the Sunrise Powerlink Project**

The Commission’s own regulations specifically provide that it “adopts and *shall* adhere to the principles, objectives, definitions, criteria and procedures of CEQA, the EIR Guidelines, and the additional provisions of this rule.” Commission Proc. Rule 17.1 (emphasis added). Rule 17.1 then goes on to state that “this rule shall apply to CEQA projects for which Commission approval is required by law,....” In this instance, because the Sunrise Project must be approved by the Commission, it is clear that CEQA applies to the Project.

**II. CEQA Analysis Should Be Completed Before a Decision on “Purpose and Need”**

The real question is *when* CEQA analysis must occur. Such a determination is extremely important because it dictates the context of the entire CEQA process. For the following reasons,

it is not only legally necessary, but also logical and practical to complete the CEQA process for the Sunrise Project before a decision on purpose and need.<sup>1</sup>

**A. The Commission’s Own Regulations Mandate That CEQA Be Completed Before a Final Decision on “Purpose and Need”**

SDG&E appears to assume there are no environmental impacts or considerations related to a decision on purpose and need. Further, SDG&E assumes that it need only consider alternative routes to comply with CEQA requirements and need not consider alternatives to the entire Project. As described more fully below, a Commission final decision on the purpose and need for the Project would have significant environmental implications separate from those directly related to route, and such a decision would normally include evaluation of a number of project alternatives that would have differing environmental merits. The Commission’s own rules make clear that it must fully evaluate these impacts and alternatives in a final EIR prior to making any final decision on purpose and need.

According to Commission Procedural Rule 17.1(b)(2), the objective of including a CEQA analysis in the Commission’s application process is:

To ensure that environmental issues are thoroughly, expertly, and objectively considered within a reasonable period of time, so that environmental costs and benefits will assume their proper and *co-equal* place beside the economic, social, and technological issues before the Commission, and so that there will not be undue delays in the Commission’s decisionmaking process.

(emphasis added). Allowing CEQA to proceed after a decision on purpose and need would do just the opposite by allowing economic and social goals to effectively trump

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<sup>1</sup> SDG&E cites *In re Miguel Mission # 2*, A.02-07-022 and *In re Otay Mesa Power Purchase Agreement Transmission Project*, A.04-03-008 as support for its request to bifurcate “purpose and need” and CEQA analysis. However, Miguel Mission is inapposite because route selection was not an issue. The Miguel Mission project only involved the upgrade of existing rights of way and was not a decision to create a *new* powerline. Moreover, in Miguel Mission, SDG&E did indeed file its PEA concurrently with its Application.

In the *Otay Mesa* proceedings, SDG&E likewise filed its PEA in conjunction with its application for a CPCN.

environmental concerns related to the need for the Project. Since Rule 17.1(b)(2) is explicit in its mandate that environmental concerns be provided a “co-equal” respect in the application process, it is legally required that a CEQA analysis be completed before a purpose and need decision. Doing so ensures that all environmental issues will be placed on the table alongside the reasons why the Project is needed. Only then can the Commission productively determine whether the Project really is what it proclaims to be and determine whether it is truly needed in light of economic, social, technological, *and* environmental issues.

A further objective of Rule 17.1(b) is:

To assess in detail, *as early as possible*, the potential environmental impact of a project in order that adverse effects are avoided, *alternatives are investigated*, and environmental quality is restored or enhanced, to the fullest extent possible.

Rule 17.1(b)(3) (emphasis added). Again, allowing a purpose and need decision to precede CEQA analysis contradicts such an objective by permitting CEQA analysis to be delayed (*i.e.* not be performed “as early as possible”). Moreover, delaying the consideration of alternatives allows the Project’s non-environmental concerns to monopolize the playing field in direct opposition of Rule 17.1’s mandate that CEQA analysis be provided a “co-equal” place on the playing field.

Rule 17.1 also explicitly states that “the proponent of any project subject to this rule shall include with the application for such project an environmental assessment which shall be referred to as the Proponent’s Environmental Assessment (PEA).” Rule 17.1(d). Including an environmental assessment at the very beginning of the Application process makes logical and practical sense, especially in light of the objectives already stated that environmental analysis be provided a co-equal space and be done as early as possible. Requiring an application to include

an environmental analysis allows the Commission to “quickly focus on any impacts of the process.” Rule 17.1(d). If, instead, such analysis is delayed until after a purpose and need decision, impacts may not be understood until it is too late to adequately address them. *See Laurel Heights Improvement Ass'n v. Regents of University of California*, (1988) 47 Cal. 3d 376, 394 (“A fundamental purpose of an EIR is to provide decision makers with information they can use in deciding whether to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If post-approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken.”)

**B. CEQA and Its Guidelines Mandate That CEQA Analysis Be Completed Before a Final Decision on “Purpose and Need”**

CEQA is one of California’s preeminent laws for environmental protection. As the California Supreme Court has explicitly stated, “the Legislature intended [CEQA] to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.” *Friends of Mammoth v. Board of Supervisors*, (1972) 8 Cal.3d 247, 259. CEQA has procedural, informational, and substantive mandates. The procedural and informational mandates ensure that the public and decision-makers are fully informed as to the environmental consequences of actions that may affect the environment. It is crucial to follow the procedural and informational mandates of CEQA for a number of reasons, including the fact that they are the mechanisms by which CEQA’s substantive mandates for environmental protection are accomplished.

With a limited number of exceptions, “an Environmental Impact Report (“EIR”) shall be considered by every public agency *prior* to its approval or disapproval of a project.” Cal. Pub. Res. Code § 21061 (emphasis added). “[An] EIR is the primary means of achieving the

Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.'" *Sierra Club v. State Bd. of Forestry*, (1994) 7 Cal. 4th 1215, 1229; Cal. Pub. Res. Code § 21001(a). In the words of the California Supreme Court, the EIR is "the heart of CEQA." *Laurel Heights Improvement Assn.*, 47 Cal. 3d at 392.

1. The Commission Must Evaluate the Impacts of the Project That Are Inherent to the Project Before Making a Final Decision On "Purpose and Need"

SDG&E seems to assume that all Project impacts are related to route issues and that merely selecting the Project would not have any environmental impacts separate from those related to route. This is incorrect. For example, irrespective of route, the Project impacts the development of in-basin energy sources and conservation in San Diego, including the economic viability of local fossil-fuel fired plants, distributed solar, demand management, and other means to address energy demand.

Should the Commission approve the "purpose and need" of the Project before considering these and other impacts unrelated to route, it would make later consideration meaningless because the Project as a whole would no longer be subject to review, modification or denial. Since CEQA requires a meaningful consideration of these types of impacts, a failure to do so would violate CEQA.

2. Analysis of Alternatives to the Project Must Occur as Part of an EIR

As described in *Citizens of Goleta Valley v. Board of Supervisors*, (1990) 52 Cal. 3d 553, 564, the "core of an EIR is the mitigation and alternatives section." To comply with CEQA's Guidelines, an EIR must "[d]escribe a range of reasonable alternatives to the project, or to the location of the project, which could feasibly attain the basic objectives of the project, and

evaluate the comparative merits of the alternatives.” 14 Cal Code Regs, § 15126.6(a) (“Guidelines”); *see also Laurel Heights Improvement Association*, 47 Cal. 3d at 400. The EIR should also explain how the project alternatives were selected for analysis and identify alternatives rejected as infeasible and explain why they were rejected. Guidelines § 15126.6(c). The discussion of alternatives must include enough information concerning each alternative to allow adequate evaluation and comparison with the proposed project. Guidelines § 15126.6(d); *see also Laurel Heights Improvement Association*, 47 Cal. 3d at 403. The alternatives discussed should focus on ways to avoid or substantially lessen the project’s significant environmental effects. Cal Pub. Res. Code § 21002; Guidelines § 15126.6(a),(b). Further, CEQA requires that the Commission consider alternatives “to the project,” not just alternatives “to the location,” Guidelines § 15126.6(a), including, what is referred to as the “no-project” alternative whose purpose is to allow a comparison of the environmental effects of approving versus not approving the project. Guidelines § 15126.6(e)(1); *see Mira Mar Mobile Community v. City of Oceanside* (2004) 119 CA 4<sup>th</sup> 477 (no-project alternative allows decision makers to compare impacts of project with impacts of no project). The no project alternative must be evaluated whether or not it is feasible. *Planning & Conserv. League v. Department of Water Resources*, (2000) 83 CA 4<sup>th</sup> 892.

SDG&E has presented a number of alternatives to the Project and other parties to this proceeding will present the Commission with additional alternatives to the Project. Any Commission decision on purpose and need would predetermine a project from among these alternatives prior to completion of a CEQA alternatives analysis and would prevent a comparison of the environmental merits of the Project with those of the available alternatives. Should the Commission consider only the economic and technical merits of these alternatives and not their



environmental merits, the Commission would frustrate CEQA's intent to compare the Project to alternatives with regard to environmental concerns and to give environmental concerns "co-equal" weight with other concerns. See p. 3, *infra*.

3. Public Oversight is Foreclosed by a Premature "Purpose and Need" Decision

One of CEQA's basic purposes is to "inform governmental decision-makers and the public about the potential, significant environmental effects of proposed activities," and to "disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose." Guidelines § 15002. By prohibiting public exposure to all Project alternatives and their respective environmental merits, failure to complete an EIR before a purpose and need decision completely undermines public oversight of the decision. Because part of CEQA's mission is to enhance public participation, not derail it, the purpose and need decision must occur after a full EIR.

4. An Early Final Decision on "Purpose and Need" Precludes Adequate Agency Response

Section 15002(h) of the CEQA Guidelines states that:

CEQA requires more than merely preparing environmental documents. The EIR by itself does not control the way in which a project can be built or carried out. Rather, when an EIR shows that a project would cause substantial adverse changes in the environment, the governmental agency must respond to the information by one or more of the following methods:

- (1) Changing a proposed project
- (2) Imposing conditions on the approval of the project;
- (3) Adopting plans or ordinances to control a broader class of projects to avoid the adverse changes;
- (4) Choosing an alternative way of meeting the same need;
- (5) Disapproving the project;
- (6) Finding that changing or altering the Project is not feasible
- (7) Finding that the unavoidable significant environmental damage is acceptable as provided in Section 15093

If the Commission issues a decision on purpose and need before completing an EIR, it would foreclose its ability to use the EIR to choose an alternative way of meeting the same need, its ability to consider a rulemaking to plan for orderly transmission line development in southern California, as well as its ability to disapprove the Project because it will already have committed itself to the Project.

Since this is a regulated industry, it is for the State to decide which of a variety of possible power supply and transmission options best serve the public interest. Therefore, part of that process must be consideration of alternatives to the entire Project, including those proposed by other entities. It may be that other power supply and demand management options are environmentally superior to the Project, irrespective of its route. Indeed, the whole point of a purpose and need decision is to decide how to best supply power, *not* merely to evaluate the merits of a proposed project in isolation. And the Commission must retain the ability to respond to the Application by “choosing an alternative way of meeting the same need,” including consideration of alternatives proposed by other entities. To do otherwise violates CEQA.

5. A Final Decision on “Purpose and Need” Constitutes Approval

CEQA requires that an EIR be completed *before* a project is approved. The CEQA Guidelines define “approval” as follows:

- (a) "Approval" means 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 any person. The exact date of approval of any project is a matter determined by each public agency according to its rules, regulations, and ordinances. Legislative action in regard to a project often constitutes approval.
- (b) With private projects, approval occurs upon *the earliest commitment* to issue or the issuance by the public agency of a discretionary contract, grant, subsidy, loan, or other form of financial assistance, lease, permit, license, certificate, or other entitlement for use of the project.

Guidelines § 15352 (emphasis added). The CEQA Guidelines are afforded “great weight” by the courts, which interpret the Guidelines so as to consider the practical effect of agency decisions when determining whether a decision is an approval subject to CEQA. *See Laurel Heights Improvement Association*, 47 Cal. 3d at 391, fn. 2, (“‘approval’ means the decision by a public agency which commits the agency to a definite course of action in regard to a project...”); *see also Citizens for Responsible Government v. City of Albany*, (1997) 56 Cal. App. 4th 1199, 1218 (“As stated in Guidelines section 15352, subdivision (a), the pertinent question is whether the public agency ‘commits [itself] to a definite course of action . . . .’”)

Although not expressly stated in SDG&E’s Application, the contents of the Application and Motion to Defer show that SDG&E intends the Commission’s decision on purpose and need to be final and binding. In particular, SDG&E categorizes the proposed decision as a “final decision,” and its Proposed Schedule includes all the formal procedures prerequisite to final binding Commission decisions. Further, it states that subsequent to a decision on purpose and need, the Commission would consider which route would be chosen, but there is no suggestion that the Commission could reconsider the Project as a whole.

In practical terms it is also difficult to imagine that SDG&E or the Commission would go through such an extensive and formal evaluation of purpose and need without having the Commission’s decision represent a binding commitment to proceed with the Project. However, should the Commission believe that its decision on purpose and need would not commit it to the Project, it should state this clearly and define precisely and unambiguously what this decision means and does not mean. A failure to be clear about its intentions would seriously compromise the Commission’s credibility with the public and it would be unfair to SDG&E. The Commission and SDG&E cannot have their cake and eat it, too.

*Stand Tall on Principles v. Shasta Union High Sch. Dist.*, (1991) 235 Cal. App. 3d 772 is a case on point. In order to assess “a range of reasonable alternatives to the project,” and to “ensure that environmental considerations play a significant role in governmental decision-making,” the *Stand Tall* court required an EIR to be completed “prior to the ultimate selection of a particular site.” *Id.* at 780-81. In *Stand Tall*, the plaintiffs complained that a vote to merely *authorize* the purchase of a site to build a high school represented an approval under CEQA. The court ruled that this authorization did not represent an approval because the school district did not commit itself to actually purchasing the site – it could have decided to not act on its authorization. *Id.* at 782-83. However, the courts stated that actual acquisition of the site would constitute an approval. *Id.* In other words, the court made clear that the school district had to complete its EIR before actually buying the site because purchase of the site represented a commitment by the school board to the project. It is important to note that the purchase did not represent the final approval to actually build the school (the property could have been sold rather than built upon). *See id.* The court recognized that the mere purchase of the site represented a partial commitment, but a commitment nonetheless, that sent the school district down a particular course of action.

Like final acquisition of the school site, a purpose and need decision commits the Commission to the Project because, if it is meaningful and binding, it is a promise to go forward with the Project (the only decision left to be made being what *route* to use). Since the Application and Motion to Defer would not permit the completion of a final EIR before the issuance of a final decision on “purpose and need,” this approval would come before issuance of a final EIR and therefore be in violation of CEQA.

6. EIRs Must Be Completed as Early as Possible

Even if SDG&E claims it will discuss project alternatives in its delayed EIR, the CEQA Guidelines and court interpretation expressly prohibit such a delay. The CEQA Guidelines explicitly state that “EIRs ...should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.” Guidelines § 15004(b). Moreover, “[the public agency] shall encourage the project proponent to incorporate environmental considerations into project conceptualization, design, and planning at the earliest feasible time.” Guidelines § 15004(b)(3); *see also Citizens for Responsible Government*, 56 Cal. App. 4th at 1220-1221.

SDG&E has provided no evidence to show that it is infeasible to conduct an environmental review of all alternatives before a decision by the Commission on purpose and need. Moreover, it makes most sense in both legal and practical terms to conduct the final decision on purpose and need only after CEQA review. As pointed out in *Citizens for Responsible Government*, “any later environmental review might call for a burdensome reconsideration of decisions already made and would risk becoming the sort of ‘post hoc rationalization[] to support action already taken,’ which our high court disapproved in *Laurel Heights Improvement Assn. v. Regents of University of California*.” *Id.* at 1221. It would make no sense to bifurcate the environmental and non-environmental review of alternatives to the Project and doing so violates CEQA.

7. Public Relations Campaigns by Project Applicants Cannot Replace the Commission’s CEQA Obligations

SDG&E has described in some detail its efforts to communicate with the public on “route selection.” Legitimate questions on the quality, effectiveness and intent of this public relations

campaign aside, this effort cannot substitute for compliance by the Commission with its CEQA obligations. SDG&E's efforts to identify the least objectionable route might be helpful, but the fact that such efforts relate only to route indicates that SDG&E is not engaging the public in discussions of the environmental merits of all available alternatives to the Project and is unlikely to do so given its agenda to build the Project. However, the public certainly expects the Commission to consider the environmental merits of alternatives to the entire Project. This motion anticipates the submission by a number of people of complaints about SDG&E's "public involvement" efforts on route selection and the limitations of SDG&E's process.

8. Ad Hoc Experimentation with a Bifurcated Process is Inappropriate in a Proceeding of this Size, Complexity and Importance

The Commission has invested considerable time and effort in its rulemakings related to application procedures and CEQA compliance. Although somewhat complex and sometimes cumbersome, the existing rules and procedures are logical and proven. Further, the courts and the Commission's staff and constituents are familiar with these rules and procedures, which helps reduce the risk of delay.

Although the Commission is free to flex its rules within the limits of law (which this proceeding does not) and experiment with possible improvements in its procedures, doing so in a contested, complex, important and high-visibility proceeding presents a significant risk of delay, confusion and dissatisfaction with the Commission and its procedures, particularly given the great skepticism with which the public views the electric power industry and its regulators. Should the Commission, SDG&E, its parent company, Sempra Energy Inc. and/or other entities wish to provide for a standardized bifurcation procedure, they should initiate a separate rulemaking.

### **III. Request for Hearings and/or to Reschedule Prehearing Conference**

The Conservation Groups respectfully request that the Commission hold a hearing to clarify SDG&E and the Commission's CEQA obligations in light of SDG&E's "Motion To Defer" and Application, a formal hearing is necessary due to the fact that SDG&E has submitted materials that raise serious legal and factual issues and call into question SDG&E and the Commission's intent to comply with both CEQA obligations and significant procedural rules.

Currently, a prehearing conference to address SDG&E's "Motion To Defer" and Application is scheduled for January 31, 2006. Due to the fact that many important legal and factual issues need to be fully briefed and reviewed before such a prehearing conference takes place, the Conservation Groups request that the prehearing conference be rescheduled to reasonably ensure that all concerns are at least raised and that protests, motions, and responses are all filed prior to attempting to establish a schedule for hearings and other matters pertaining to SDG&E's Application. In the alternative, the Conservation Groups request that if the January 31<sup>st</sup> prehearing conference does go forward, there be no substantive consideration of SDG&E's motion or any subsequent Commission decision on this matter until the close of briefing and a hearing.

### **CONCLUSION**

For the foregoing reasons, the Conservation Groups respectfully request the Commission to order that CEQA analysis for the Sunrise Powerlink Project must be completed prior to any final binding decision on "purpose and need."

Because we anticipate that SDG&E will respond to this motion, we respectfully request, in accordance with Commission Rule 45(g), an opportunity to reply to SDG&E's response.

Dated: January 20, 2006

Respectfully submitted,

The San Diego Chapter of the Sierra Club  
and the Center for Biological Diversity

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**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to the California Public Utilities Commission’s Rules of Practice and Procedure, I have served a true copy of 1.) cover letter to the Honorable ALJ Kim Malcolm and 2.) “Motion for Determination of Applicability of the California Environmental Quality Act and Request for Hearing and/or to Reschedule the Prehearing Conference” to the following parties:

All parties of record in R.04-04-003 and I.05-09-005 and A. 05-12-014 and

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Service was completed by email where available or by placing true copies, enclosed in a sealed envelope with first-class postage prepaid, to be deposited in the United States mail.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 20<sup>th</sup> day of January, 2006, at San Francisco, California.

/s/ Justin Augustine

Justin Augustine