

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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In the Matter of the Application for Rehearing  
of Resolution No. E-4373 Issued on  
November 22, 2010

Application 10-12-014  
(Filed December 22, 2010)

**RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) TO THE  
LEATHERBURY & LOWELL FAMILY TRUST'S APPLICATION  
FOR REHEARING OF COMMISSION RESOLUTION E-4373**

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**January 6, 2011**

#250760

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**I. INTRODUCTION AND BACKGROUND**

Pursuant to Rule 16.1 of the Commission's Rules of Practice and Procedure ("Rules"), San Diego Gas & Electric Company ("SDG&E") hereby responds to the *Application for Rehearing of Commission Resolution E-4373* ("Application for Rehearing") submitted by Chuck Leatherbury ("Leatherbury") on behalf of the Leatherbury & Lowell Family Trust ("L&LFT") on December 22, 2010. For the reasons discussed below, L&LFT's Application for Rehearing is without merit, and should be summarily denied as it essentially rehashes the same litigation arguments made earlier by Leatherbury in response to SDG&E's Advice Letter (AL) 2106-E asserting exemption under General Order (GO) 131-D for the Orange Grove transmission enhancement project and the Pala to Monserate Wood-to-Steel replacement project -- all of which L&LFT positions were previously considered and appropriately rejected by the Commission. Moreover, the bulk of the arguments raised on behalf of the L&LFT are materially flawed and unsupportable. As more fully discussed herein, L&LFT's arguments do not merit rehearing or reconsideration on both substantive and procedural grounds and thus L&LFT's request should be denied.

Fundamentally, L&LFT's Application for Rehearing of Resolution E-4373 ("Decision") is premised upon an erroneous predicate in asserting that no easement was obtained by SDG&E for the existing Pala to Monserate 69 kV electric transmission line.<sup>1</sup> In making its argument, L&LFT essentially contends that to the extent Commission Resolution E-4373 concludes that SDG&E has an existing utility easement to locate the proposed 69 kV power line facilities, the Decision of the Commission is unlawful or erroneous.<sup>2</sup> Of course the ipse-dixitism grounds for rehearing alleged by L&LFT appear only as a stubbornly unsupported repetition of a disputed claim.<sup>3</sup> Not once in these proceedings have L&LFT ever cited any authority for that assertion, and it is also not the case here that the decision of the Commission is unlawful or erroneous.

Furthermore, the Commission's Decision simply recognizes that SDG&E's existing 69 kV power line facilities currently occupy a 12 foot wide area of a public utility easement and appropriately concludes that under GO 131-D Section III.B.1.g the utility may continue to locate its proposed power line facilities in the currently occupied utility right-of-way.<sup>4</sup> In fact (and as notably acknowledged by Leatherbury in this Application for Rehearing), SDG&E has maintained its existing 69 kV electric transmission line with a similar footprint located on L&LFT's property for over thirty-five years.<sup>5</sup> The Pala to Monserate 69kV transmission line was completed on or about June 25, 1971.

Indeed, SDG&E holds and has submitted to the Commission two valid, duly recorded easements through L&LFT's property, which are both currently in use, and which explicitly

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<sup>1</sup> L&LFT Application for Rehearing, p. 1.

<sup>2</sup> *Id.* at p. 2.

<sup>3</sup> While SDG&E has undertaken to remain within the currently utilized 12 foot easement for this proposed project where it is feasible to do so, SDG&E specifically disputes any and all assertions that the existing easements may not exceed 12 feet in width.

<sup>4</sup> Resolution E-4373 at pp. 11-12, *see also* Finding 10.

<sup>5</sup> L&LFT Application for Rehearing, p. 1.

permit the type and rating of electrical facilities proposed by SDG&E.<sup>6</sup> Moreover, both easements expressly grant to SDG&E the

“right, easement and privilege of placing, erecting, constructing, repairing, replacing, maintaining and using, for the transmission and distribution of electricity and for all purposes connected therewith, a line of poles with wires suspended therefrom and all necessary and proper guys, anchorage, crossarms and braces and other fixtures for use in connection therewith...”<sup>7</sup>

The project replacement of wooden poles with tubular steel poles and the reconductoring of the existing electric power line as outlined in Advice Letter 2106-E clearly fits within SDG&E’s property rights to construct, replace, maintain and use its 69 kV electric transmission and 12 kV distribution facilities within its existing easements.<sup>8</sup> None of the applicable SDG&E right-of-way documents restrict the easement width, type or number of poles that may be placed in the easements (except that such poles must consist of a line), or the type, voltage or number of wires or other facilities that may be placed within the transmission and distribution easements. The easement granting clauses merely state such facilities must be used in connection with the transmission and distribution of electricity. Accordingly, SDG&E is legally entitled to use such width as is reasonably necessary for SDG&E to carry out the purposes of the easements. Accordingly, and with this factual background in mind, SDG&E responds to the remainder of L&LFT’s Application for Rehearing as follows.

## **II. NONE OF THE ARGUMENTS PROFFERED IN L&LFT’S APPLICATION IDENTIFY ERRORS WHICH MERIT REHEARING**

According to its pleading, L&LFT seeks rehearing based on grounds that: (1) Findings number 8 and 9, conflict with finding number 10 in E-4373; and (2) Finding 10 did not exist in

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<sup>6</sup> The first easement, granted to SDG&E on April 21, 1951, is recorded in the San Diego County Recorder’s Office in Book 4482, Page 524. The second easement, granted to SDG&E on January 7, 1952, is recorded in the San Diego County Recorder’s Office in Book 4354, Page 503.

<sup>7</sup> See Right of Way, granted to SDG&E by Protestants’ predecessors-in-interest, Travis Flippen and Lorraine L. Flippen, on January 7, 1952, recorded in the San Diego County Recorder’s Office in Book 4354, Page 503, and Right of Way, granted to SDG&E by Protestants’ predecessors-in-interest, V.K. Wilt and Ruth H. Wilt, on April 21, 1951, recorded in the San Diego County Recorder’s Office in Book 4482, Page 524, attached hereto as Exhibit A.

<sup>8</sup> The Pala to Monserate 12kV distribution line was completed on or about March 18, 1955.

the two preceding CPUC staff Draft Resolutions versions.<sup>9</sup> However, all of these assertions are not only substantively flawed and unpersuasive but should also be rejected on procedural grounds. Contrary to L&LFT’s claim, the Commission is not required by law to summarize each party’s position on each topic, nor is it a violation of the Rules for a final Commission Decision to adopt Findings of Fact that were not included in a preceding draft or proposed resolution version circulated for comment. Section 1757(a)(3) of the Public Utilities Code provides that a decision of the Commission may be annulled by a reviewing court if: “the decision of the commission is not supported by the findings.” Caselaw interpreting this portion of Section 1757 provides that Commission decisions need only be supported by findings and conclusions stated with sufficient clarity that a reviewing court may understand the bases for the action the Commission has taken in the decision; *see Greyhound Lines, Inc. v. PUC*, 65 Cal.2d 811, (1967); *California Motor Transport Co. v. PUC*, 59 Cal.2d 270, (1963); *California Manufacturers Assn. v. PUC*, 24 Cal.3d 251, (1979).

In that regard, the rules governing rehearing of Commission decisions allow rehearing solely on the basis of a clear legal error. Thus, under Sections 1731 and 1732 of the California Public Utilities Code<sup>10</sup> and the Commission’s Rules of Practice and Procedure, the policy/equity and factual arguments raised by L&LFT are inapposite to a rehearing determination and should

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<sup>9</sup> L&LFT Application for Rehearing, pp. 3-4.

<sup>10</sup> After an order or decision has been issued by the Commission, any party to the proceeding may apply for rehearing with respect to any matters determined in the proceeding and specified in the application for rehearing (California Public Utilities Code (“Pub. Util. Code”) §1731(b)). At its discretion, the Commission may grant and hold a rehearing on such matters if, in its judgment, there is sufficient reason therefore (*id.*). No party can challenge in court an order or decision of the Commission unless that party has filed a timely application with the Commission for rehearing (*id.*). An application for rehearing must identify specifically the ground or grounds on which the applicant considers the decision or order to be unlawful (Pub. Util. Code §1732). A party may not challenge in court a Commission decision on any ground not addressed previously in an application for rehearing (*id.*).

be given little or no weight.<sup>11</sup> In order to successfully support such an application for rehearing under Rule 16.1 of the Commission's Rules of Practice and Procedure, L&LFT must:

“set forth specifically the grounds on which applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”

However, the purported grounds for rehearing alleged by L&LFT do not support rehearing as the L&LFT has failed to demonstrate that the Commission's Decision is unlawful or erroneous, and lacks any specific references to the record or law in support of the arguments against approval of Advice Letter 2106-E raised by L&LFT. Indeed, L&LFT's claims should be summarily rejected given that the Commission's final Decision clearly states that the adequacy of SDG&E's easement is outside the scope of General Order (“GO”) 131-D, and is not a matter specific to the Commission's jurisdiction.<sup>12</sup> Moreover, as discussed below, L&LFT's arguments in support of their request for rehearing/reconsideration of the final opinion simply rehash the same litigation positions previously considered, addressed and rejected by the Commission in this proceeding. Accordingly, no changes to the Commission's Decision are required.

### **III. THE DECISION CONTAINS NO LEGAL ERRORS REGARDING THE EASEMENT**

L&LFT goes on to claim that the Commission's Decision is unlawful or erroneous.<sup>13</sup> L&LFT is incorrect. Prior to Resolution E-4373, this Commission has previously held that the Commission lacks jurisdiction to interpret easements under a deed, to determine the rights and obligations of the parties under any contractual or quasi contractual theory, or to adjudicate property rights, except where incidental to or in connection with some established power or duty

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<sup>11</sup> Indeed, the vague factual issues raised by L&LFT are also flawed and lack merit and should be rejected on a substantive basis as well.

<sup>12</sup> Resolution E-4373 at pp. 4-6.

<sup>13</sup> L&LFT Application for Rehearing, p. 1.

of the Commission; see *e.g.*, *A. & E. Ry. V. Northern Elec. Ry.* (1914) 4 CRRC 1155; *see also* Decision 08-11-040, November 21, 2008, and Decision 09-04-038 denying rehearing of Decision 08-11-040, April 16, 2009.

Under *Camp Meeker Water Systems, Inc. v. Public Utilities Commission* (1990), the Commission further acknowledged that it does not have jurisdiction to adjudicate incidents of title. In this case, the object of L&LFT's Application for Rehearing is unquestionably to secure from the Commission an interpretation of an existing easement and/or the adjudication of a property right. Clearly, a determination to resist expanding jurisdiction to simply examine the excess width boundaries of SDG&E's existing transmission right-of-way is reasonable when set on the basis of the limited purpose of ascertaining facts relevant to an advice letter exemption under GO 131-D.

Likewise, regardless of whether L&LFT has sufficiently stated its grounds pursuant to Rule 16.1, the Commission need not determine the merits of L&LFT's property rights claims to determine if the utility has correctly applied an exemption as defined in GO 131-D, Section III. As such, the Commission correctly notes in the Decision that as a general matter the Commission lacks jurisdiction to adjudicate property rights, except where incidental to or in connection with some established power or duty of the Commission.

In addition, the Decision lawfully finds that the adequacy of SDG&E's easement is outside the scope of the GO 131-D Advice Letter proceeding.<sup>14</sup> Thus, because the ancillary property rights dispute between the parties cannot legitimately be assessed by the Commission under GO 131-D, the complaint must be dismissed. Moreover, the Commission already considered L&LFT's claim that the easements are not broad enough to cover such work<sup>15</sup> and

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<sup>14</sup> *Id.* at p. 7; *see also* Finding 8.

<sup>15</sup> Resolution E-4373 at pp. 5-6.

determined that the proposed project involves no increase in capacity and no change to the function of the existing transmission line.<sup>16</sup> It would also appear that the Application for Rehearing has attempted to over-state the submitted issues in dispute, as Leatherbury and L&LFT have previously informed the Commission that SDG&E has an existing utility easement that is at least 12 feet wide along the disputed project area.<sup>17</sup> L&LFT's argument is not compelling and should be rejected.

Moreover, L&LFT have failed to substantiate its claim that a genuine legal error exists regarding the easement on the basis of the entire record or is otherwise un-resolvable pursuant to relevant legal precedent. Here, L&LFT merely attempts to relitigate a previously considered issue because it disagrees with the Decision's recommendation. Raising essentially the same arguments in its rehearing request does not establish that the Commission's Decision committed legal error on the issue. In considering the entire record in addition to the jurisdictional and subject matter limitations, the Commission appropriately recognized that to the extent L&LFT has a valid cause of action in a legal claim against SDG&E, which SDG&E adamantly denies, it must seek its remedy in a forum other than the CPUC.

#### **IV. CONCLUSION**

While L&LFT may differ with the Commission regarding the conclusions to be drawn after weighing all the record evidence, such disagreement merely represents a difference of opinion and does not constitute legal error compelling rehearing of the Commission's Decision. Indeed, there is nothing unprecedented, unlawful or erroneous in drawing different conclusions

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<sup>16</sup> *Id.* at p. 7.

<sup>17</sup> See Chuck and Ann Leatherbury Comments on draft Resolution Number E-4304, dated April 14, 2010; and letter from Leatherbury & Lowell Family Trust to Brian Shoemaker, CPUC, dated December 10, 2009; see also email from Tom Perez, consultant for Leatherbury, to Nicholas Sher, CPUC Energy Division Attorney, dated Friday, February 12, 2010, at 8:25 AM, which concluded "[i]f SDG&E can do what they need to do and keep everything within the 12' wide easement they are within their right to do so."



**CERTIFICATE OF SERVICE**

I hereby certify that a copy of **RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) TO THE LEATHERBURY & LOWELL FAMILY TRUST'S APPLICATION FOR REHEARING OF COMMISSION RESOLUTION E-4373** has been electronically mailed to each party of record of the service list in A.10-12-014.

Copies were sent via electronic mail and Federal Express to:

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Executed this 6th day of January, 2011 at San Diego, California.

          /s/ Jenny Norin            
Jenny Norin



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