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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 06-08-010
(Filed August 4, 2006)

**ASSIGNED COMMISSIONER'S REVISED SCOPING MEMO
AND RULING REGARDING POSSIBLE RULE 1.1 AND
RULE 8.3 VIOLATIONS; ORDER TO SHOW CAUSE**

1. Introduction

By this Assigned Commissioner Scoping Memo and Ruling, San Diego Gas & Electric Company (SDG&E) is hereby ordered to appear and show cause why it should not have fines and other sanctions imposed for possible violations of the Commission's Rules of Practice and Procedure, Rules 1.1 and 8.3¹, at a time and place to be determined, in a third phase of this proceeding which will be categorized as adjudicatory². Pursuant to Rule 7.3, this Scoping Memo identifies the issues to be addressed and orders a Prehearing Conference to address a procedural schedule for the third phase of this proceeding.

¹ Unless otherwise stated, all references to Rules herein are to the Commission's Rules of Practice and Procedure.

² Pursuant to Public Utilities Code Section 1701.5, this third phase of the proceeding should be completed within 18 months of the effective date of this order.

Rule 1.1 provides that:

Any person who . . . transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and **never to mislead the Commission or its staff by an artifice or false statement of fact or law.** (Emphasis added.)

The purpose of Rule 1.1 is to preserve the integrity of the Commission's process and to provide us an enforcement tool to address situations when parties that practice before the Commission have not provided us with truthful, accurate, or complete information.

The Commission examines with a critical eye the possibility that any party may have misrepresented facts to Commission staff during communications in this proceeding. If the allegations set forth in this ruling are true, these actions violate Rules 1.1 and 8.3 and may lead to significant additional sanctions. Based on the following discussion and attached declarations, and having formed a reasonable basis to believe that these actions have occurred, SDG&E is directed to respond to the allegations and demonstrate why it should not be fined and sanctioned, pursuant to the procedural schedule set forth herein.

2. Factual Background

On January 3, 2008, Commission staff, in coordination with staff from the Bureau of Land Management (BLM), released the Draft Environmental Impact Report/Environmental Impact Statement (Draft EIR/EIS) in this proceeding. The proposed transmission line project in this proceeding goes through Anza-Borrego Desert State Park (Anza-Borrego). In addition to the impacts associated with potential paths through Anza-Borrego, the Draft EIR/EIS identified several alternative routes that avoid Anza-Borrego by going south around the park, including one referred to as the "Environmentally Superior

Southern Route.” One segment of that route proposed to cross tribal lands owned by the Campo and La Posta Indians.

After release of the Draft EIR/EIS, the Campos notified SDG&E on February 1 of their opposition to the “Environmentally Superior Southern Route.”³ SDG&E discussed this Campo opposition in its Phase II direct testimony served on March 12, 2008, and described alternative routes that would avoid tribal lands.⁴ The Campos provided more complete comments regarding their concerns to the Commission and BLM in a letter dated April 11, 2008.⁵

Concurrently, the United States Forest Service (Forest Service), in cooperation with BLM, provided comments on all of the southern alternative routes considered in the Draft EIR/EIS. The Forest Service enunciated several concerns about route placement, including impacts requiring plan amendments for southern routes circumventing tribal lands.⁶ To resolve these concerns, Commission staff scheduled a joint meeting among SDG&E, BLM, the Forest Service, and environmental consultant Aspen Environmental Group (Aspen).

The meeting occurred on May 20, 2008, and included the following representatives from SDG&E: Alan Colton, Mark Heidecke, Chris Terzich, Kevin

³ See Attachment 1, Letter from H. Cuero (Campo) to L. Trexel (SDG&E) (Feb. 1, 2008) (Ex. SD-35, Attachment 8-1 to SDG&E’s Phase 2 Direct Testimony).

⁴ SDG&E’s Phase II Direct Testimony is available at:
<http://www.sdge.com/sunrisepowerlink/CPUC.html>

⁵ See Attachment 2, Letter from S. Gollis (Campo) to B. Blanchard (CPUC) and L. Kastoll (BLM), April 11, 2008.

⁶ See DEIR at D.17-9. See also Attachment 3, Letter from P. Hawkins (Forest Service) to B. Blanchard (CPUC) & L. Kastoll (BLM) (Mar. 16, 2007) (Ex. SD-35, Attachment 10-11 to SDG&E’s Phase 2 Direct Testimony).

O’Beirne, Bill Torre, Jonathan Woldermariam, Tom Carr, Art Holland, and by phone, Senior Counsel Jill Larson, Lynn Trexel, and Kenda Pollio.⁷ Among other things, the parties to the meeting discussed the Campo and La Posta objections to the “Environmentally Superior Southern Route” and Forest Service concerns about possible routes around tribal lands. To respond to these concerns, SDG&E representatives agreed to complete mapping revisions to avoid the tribal lands along the Environmentally Superior Southern Route, and to specifically consider and address the Forest Service concerns articulated at the meeting.⁸ SDG&E submitted these mapping changes to Commission Staff on June 6 and June 13, 2008.⁹ Staff informed SDG&E, during the May 20, 2008 meeting, that they would begin the process of revising their Environmentally Superior Southern Route to reflect the route changes that avoided tribal land and addressed Forest Service Concerns.¹⁰

Subsequently, SDG&E requested meetings with various energy advisors to the Commissioners to provide an update on the Sunrise proceeding.¹¹ On Tuesday, June 10, 2008, SDG&E Chief Operating Officer Mike Niggli, Vice President Dan Skopec, Manager for Regulatory Relations Billy Blattner, and Senior Counsel Jill Larson met with Robert Kinosian and Lindsay Brown,

⁷ Attachment 4, Decl. of B. Blanchard.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ See Attachment 5, Notice of *Ex Parte* Communication (Simon) at ¶ 2, Application (A.) 06-08-010 (Jun. 13, 2008).

advisors to Commissioner Bohn.¹² Later that day, the same SDG&E representatives met with Nancy Ryan and Andy Schwartz of President Peevey's office,¹³ and then met with Robert Mason, Chief of Staff to Commissioner Simon.¹⁴ The following day, Billy Blattner met with Andy Campbell, advisor to Commissioner Chong, and intern Matthew Worchesek.¹⁵

During all of these meetings, SDG&E discussed the benefits and challenges faced by the proposed project, focusing on the advantages of selecting a northern route. Promotional materials handed out at the meetings included maps illustrating a southern route passing through tribal land.¹⁶ Additionally, Ms. Larson, who attended the joint BLM and Forest Service meeting on May 20, 2008, identified a "number of major challenges" faced by a southern route "including crossing tribal land" and impacts to undisturbed National Forest land.¹⁷ SDG&E further asserted to at least four of the six advisors that it met with that any southern route would pass through three tribal lands – the Campo, La Posta, and Viejas Reservations – requiring tribal approval and resulting in significant

¹² See Attachment 6; Notice of *Ex Parte* Communication (Bohn) at ¶ 2, A.06-08-010 (Jun. 13, 2008).

¹³ See Attachment 7; Notice of *Ex Parte* Communication (Peevey) at ¶ 2, A.06-08-010 (Jun. 13, 2008).

¹⁴ See Attachment 5; Notice of *Ex Parte* Communication (Simon) at ¶ 2, A.06-08-010 (Jun. 13, 2008).

¹⁵ See Attachment 8; Notice of *Ex Parte* Communication (Chong) at ¶ 2, A.06-08-010 (Jun. 13, 2008).

¹⁶ See Attachment 6; Notice of *Ex Parte* Communication (Bohn) at Attachment 1 (entitled "What's the Best Route to a Clean Energy Future?"), A.06-08-010 (Jun. 13, 2008).

¹⁷ *Ibid.*

project delays.¹⁸ SDG&E also stated to these same advisors that the Campos would refuse to allow any route through their land.¹⁹ Further, SDG&E asserted in several of these meetings that the Forest Service had rejected any southern alternative circumventing tribal lands.²⁰ Finally, SDG&E stated that any southern route proposed in the final EIR/EIS would be infeasible, and that the Commission should therefore approve the proposed northern route through Anza-Borrego.²¹

SDG&E's *Ex Parte* Notices filed after the June meetings reflect that SDG&E discussed a "number of major challenges" faced by a southern route "including crossing tribal land."²² However, it appears that those notices fail to include many of the critical details allegedly asserted during the meetings. Further, it also appears that those notices do not include all of the documents that were provided to staff during those meetings pursuant to Rule 8.3(a).²³

¹⁸ See Attachment 9, Decl. of L. Brown at 2; Attachment 10, Decl. of R. Kinosian at 2; Attachment 11, Decl. of N. Ryan at 2; Attachment 12, Decl. of A. Schwartz at 2.

¹⁹ *Ibid.*

²⁰ Attachment 12, Decl. of A. Schwartz at 2; Attachment 9, Decl. of L. Brown at 3.

²¹ Attachment 9, Decl. of L. Brown at 3; Attachment 11, Decl. of N. Ryan at 3.

²² Notice of *Ex Parte* Communication (Bohn) at ¶ 3, A.06-08-010 (Jun. 13, 2008).

²³ As reflected in the attached declarations, it appears that the *ex parte* notices filed by SDG&E on June 13, 2008 do not include all materials provided to Commission staff at these meetings and the notices identify materials that were not actually provided to staff. See, e.g., Decl. of A. Schwartz at 1 n.1, 2 and Decl. of R. Mason at 1 n.1, 2; and compare Decl. of A. Campbell with Notice of *Ex Parte* Communication (Chong) at ¶ 2, A.06-08-010 (Jun. 13, 2008). And see Cal. Pub. Util. Comm'n R. 8.3(a).

3. Discussion

Based on these preliminarily determined facts, which may be modified or corrected through further investigation, there is a reasonable basis to conclude that SDG&E, through its officers, agents, and/or attorneys, misrepresented material facts in its June 2008 *ex parte* meetings with Commission staff regarding the routing of the proposed Sunrise Powerlink Transmission Project, in violation of Rule 1.1. SDG&E appears to have misrepresented that the route went through tribal lands, when in fact an alternate route had previously been jointly developed and agreed to by SDG&E that did not go through tribal lands. There is also a reasonable basis to conclude that SDG&E violated Rule 8.3 by failing to properly report its *ex parte* communications.

If the Commission finds that SDG&E's statements have violated Rule 1.1, and/or that SDG&E has violated Rule 8.3, the Commission is authorized under Public Utilities Code Section 701 to do those things "necessary and convenient in the exercise of [its] power and jurisdiction."²⁴ The Commission may also impose sanctions pursuant to California Public Utilities Code Section 2113. As set forth in Decision (D.) 06-09-025, the Commission has recognized a number of options available to it to remedy Rule 1.1 violations pursuant to Section 2113:

Any violation or violations of Rule 1 may subject a party to sanctions, including but not limited, to prohibiting a party from participating in a Commission's proceeding, disallowing intervenor's compensation for unreasonable conduct, rejecting pleadings, holding a party in contempt under section 2113, and any other sanctions permitted under the law.

²⁴ Public Utilities Code Section 701; *See also* Cal. Const., Art. XII, Sec. 6.

Specifically, section 2113 provides: "Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the commission or any commissioner is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record."²⁵

Traditionally, the Commission pursues monetary fines for violation of its Rules and orders. If a violation is found, the Commission may levy fines upon SDG&E directly²⁶ in amounts ranging from \$500 to \$20,000 per incident. Decision 98-12-075 clarifies the factors considered by the Commission when levying fines. These include the severity of the offense, the conduct of the utility, the financial resources of the utility, the totality of the circumstances, and the role of precedent.²⁷ Additionally, the Commission may also consider the imposition of a ban on *ex parte* communications, either for the duration of the proceeding or for a specified period of time. Due to the importance of maintaining the integrity of the proceeding, the Commission will consider all available options, not limited to those described above.

Based on the foregoing, SDG&E is hereby required, within 15 days of the effective date of this ruling, to file a response to this Scoping Memo and Ruling explaining why SDG&E should not be found to have violated Commission Rules 1.1 and 8.3. SDG&E should submit its response under oath, with a declaration by

²⁵ D.06-09-025.

²⁶ Pac. Bell Wireless, LLC v. Cal. Pub. Util. Com., 140 Cal. App. 4th 718, 735-38 (Ct. App. 2006) (holding that the Commission is authorized to levy fines directly upon utilities by Cal. Pub. Util. Code Section 2107 and 2104).

²⁷ D.98-12-075.

a corporate officer attesting to the truth of the matters contained in SDG&E's response. The third phase of this proceeding is limited to these issues and will not address the underlying merits addressed in the first two phases of this proceeding. Because the enforcement of the Commission's rules is uniquely a matter for the Commission staff to address and the witnesses of the potential violation of the rules are Commissioner advisors and staff, this third phase will be limited to participation between SDG&E and Commission staff. Moreover, the declarants, who are the Commissioner advisors and staff and are percipient witnesses in this adjudicatory phase of the proceeding, may not advise the Commissioners on the potential violations of Rules 1.1 or 8.3, but they are not limited in continuing to advise their Commissioners on Phases 1, and 2, the ratesetting phases of this proceeding.

IT IS RULED that:

1. At a time and place to be determined by an Administrative Law Judge (ALJ), respondent San Diego Gas & Electric Company (SDG&E) will appear and show cause why it should not have fines and other sanctions imposed for violations of the Commission's Rule 1.1 for misrepresenting key facts in this proceeding to Commission Staff, and for failing to follow the requirements of Rule 8.3 by not filing proper *ex parte* notices.
2. Respondent SDG&E shall file and serve its response to the allegations in this Scoping Memo and Ruling within 15 days of the effective date of this ruling addressing the following:
 - a. Why, based on the discussion in this ruling and the attached declarations and evidence, the Commission should not find San Diego Gas & Electric Company in violation of Rules 1.1 and 8.3;

- b. Why the Commission should not impose monetary sanctions pursuant to Public Utilities Code Sections 2107 and 2108 if it determines that violations have occurred;
 - c. Why the Commission should not impose any additional sanctions pursuant to Public Utilities Code Sections 701 and 2113.
 3. Pursuant to section 2107 and 2108, the Commission may impose penalties in the amount of \$500 to \$20,000 per day per offense for violations of the Public Utilities Code. Each instance of a misrepresentation may be considered a separate offense.
 4. The issues of this matter are framed in the above ruling. A Prehearing Conference pursuant to Rule 7.2 will be convened, and the ALJ will calendar a date, time, and location for a hearing on the order to show cause, as appropriate. The ALJ may set forth a schedule for the issuance of additional prepared testimony and any additional discovery matters. Commission Staff will have the opportunity to respond to SDG&E's written testimony.
 5. All briefings and other written communications regarding this incident shall be verified pursuant to Rule 1.11 by the highest ranking officer of the respondent.
 6. By this ruling, a ban on all *ex parte* communications relating to the issues set forth in this Scoping Memo and Ruling for the third phase of this proceeding is imposed from the effective date of this ruling. Pursuant to Public Utilities Code Section 1701.5, this third phase of the proceeding should be completed within 18 months of the effective date of this order.

7. Pursuant to Rule 7.5, the preliminary determination on categorization of Phase 3 shall be adjudicatory. This determination will be placed on the Commission's consent agenda for approval at the next available meeting.

Dated August 1, 2008, at San Francisco, California.

/s/ DIAN M. GRUENEICH

Dian M. Grueneich
Assigned Commissioner

INFORMATION REGARDING SERVICE

I have provided notification of filing to the electronic mail addresses on the attached service list.

Upon confirmation of this document's acceptance for filing, I will cause a Notice of Availability of the filed document to be served upon the service list to this proceeding by U.S. mail. The service list I will use to serve the Notice of Availability of the filed document is current as of today's date.

Dated August 1, 2008, at San Francisco, California.

/s/ MICHAEL J. OLIVEROS
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